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Contents

Federal Register

Vol. 89, No. 243

Wednesday, December 18, 2024

Administrative Conference of the United States

NOTICES

Hearings, Meetings, Proceedings, etc.:
Consultation with State, Local, and Tribal Governments
in Regulatory Policymaking, 102852–102853

Agency for Healthcare Research and Quality

NOTICES

Hearings, Meetings, Proceedings, etc., 102909

Alcohol and Tobacco Tax and Trade Bureau

RULES

Addition of American Single Malt Whisky to the Standards
of Identity for Distilled Spirits, 102726–102735

Bureau of the Fiscal Service

RULES

Disclosure of Records, 102735–102742

Census Bureau

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals:
2025 National Household Food Acquisition and Purchase
Survey Pilot Test, 102855–102856
Business Trends and Outlook Survey, 102854–102855

Centers for Disease Control and Prevention

NOTICES

Hearings, Meetings, Proceedings, etc., 102910

Civil Rights Commission

NOTICES

Hearings, Meetings, Proceedings, etc.:
New Mexico Advisory Committee, 102853–102854

Commerce Department

See Census Bureau

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

See Patent and Trademark Office

RULES

Implementation of Havana Act of 2021, 102701–102703
Promoting the Rule of Law Through Improved Agency
Guidance Documents Rescission, 102703–102704

Defense Acquisition Regulations System

RULES

Defense Federal Acquisition Regulation Supplement:
Small Business Innovation Research Program Data Rights,
103338–103366
Task Order and Delivery Order Contracting for
Architectural and Engineering Services, 103366–
103368
Technical Amendments, 103368

Defense Department

See Defense Acquisition Regulations System

See Engineers Corps

NOTICES

Removal of Designated Chinese Military Companies,
102868–102869

Drug Enforcement Administration

NOTICES

Importer, Manufacturer or Bulk Manufacturer of Controlled
Substances; Application, Registration, etc.:
Leading Pharma LLC, 102954

Education Department

PROPOSED RULES

Priority Requirements, Definitions, and Selection Criteria:
Innovative Rehabilitation Training Program, 102841–
102847

Energy Department

See Energy Information Administration

See Federal Energy Regulatory Commission

NOTICES

Environmental Impact Statements; Availability, etc.:

Appalachian Hydrogen Hub, 102872–102874

California Hydrogen Hub, 102881–102884

Pacific Northwest Hydrogen Hub, 102878–102881

Hearings, Meetings, Proceedings, etc.:

Environmental Management Site-Specific Advisory

Board, Nevada, 102877–102878

Environmental Management Site-Specific Advisory

Board, Paducah, 102871–102872

Privacy Act; Systems of Records, 102874–102877

Energy Information Administration

NOTICES

Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 102884–102885

Engineers Corps

NOTICES

Environmental Impact Statements; Availability, etc.:

Columbia River System Operations, 102869–102871

Environmental Protection Agency

RULES

Air Quality State Implementation Plans; Approvals and
Promulgations:

Arizona; Regional Haze State Implementation Plan for the
Second Implementation Period and Prong 4 for the
2015 Ozone and 2012 Particulate Matter Standards,
102744–102773

Clean Water Act Section 404 Tribal and State Assumption
Program, 103454–103509

Regulation under the Toxic Substances Control Act:

Carbon Tetrachloride, 103512–103558

Toxic Substances Control Act:

Perchloroethylene, 103560–103616

Updates to New Chemicals Regulations under the Toxic
Substances Control Act, 102773–102800

PROPOSED RULES

State Plans for Designated Facilities and Pollutants;
Approvals and Promulgations:

Oklahoma; Control of Emissions From Existing Municipal
Solid Waste Landfills, 102847–102851

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 National Emission Standards for Hazardous Air Pollutants for Carbon Black Production, 102886–102887
 National Volatile Organic Compound Emission Standards for Architectural Coatings, 102887–102888
 New Source Performance Standards for Small Industrial-Commercial-Institutional Steam Generating Units, 102891–102892
 Certain New Chemicals:
 Status Information for November 2024, 102895–102900
 High-Priority Substance Designations and Risk Evaluation on High-Priority Substances, 102900–102903
 Initiation of Prioritization under the Toxic Substances Control Act, 102903–102908
 Integrated Risk Information System Toxicological Review: Chloroform (Inhalation), 102892–102893
 Pesticide Product Registration:
 Requests to Voluntarily Cancel Certain Pesticide Registrations and/or Amend Registrations to Terminate Certain Uses, 102888–102891
 Preliminary Effluent Guidelines Program Plan 16, 102893–102894
 Requests to Voluntarily Cancel Certain Pesticide Registrations, 102894–102895

Federal Aviation Administration**RULES**

Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States, 103416–103451

Federal Election Commission**NOTICES**

Meetings; Sunshine Act, 102908

Federal Emergency Management Agency**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Preparedness Grants: Transit Security Grant Program and Intercity Bus Security Grant Program, 102932–102933
 Flood Hazard Determinations, 102928–102935

Federal Energy Regulatory Commission**NOTICES**

Combined Filings, 102885–102886

Federal Reserve System**NOTICES**

Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 102908–102909

Federal Retirement Thrift Investment Board**PROPOSED RULES**

Breakage on Late Contributions, Makeup Contributions, and Loan Payments, 102840

Food and Drug Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Advanced Manufacturing Technologies Designation Program, 102911–102912
 Reclassification Petitions for Medical Devices, 102910–102911

Hearings, Meetings, Proceedings, etc.:

Fiscal Year 2025 Generic Drug Science and Research Initiatives Workshop, 102914–102916

Patent Extension Regulatory Review Period:

Bylvay, 102916–102917
 Sohonos, 102912–102914

Foreign Assets Control Office**RULES**

Russian Harmful Foreign Activities Sanctions Regulations
 Web General Licenses 53A, 55C, 113, and 114, 102742–102744

Foreign-Trade Zones Board**NOTICES**

Application for Subzone:
 Premium Guard, Inc., Foreign-Trade Zone 240, Weirton, WV, 102856
 Proposed Foreign Trade Zone under Alternative Site Framework:
 Iberia Parish, LA, 102856

Health and Human Services Department

See Agency for Healthcare Research and Quality
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

Homeland Security Department

See Federal Emergency Management Agency

RULES

Application:
 Certain Mandatory Bars in Fear Screenings, 103370–103414
 Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 103054–103200
 Modernizing H–2 Program Requirements, Oversight, and Worker Protections, 103202–103335

Housing and Urban Development Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 Public Housing—Contracting with Resident-Owned Businesses, 102935–102937

Interior Department

See Land Management Bureau
See National Park Service
See Reclamation Bureau

Internal Revenue Service**RULES**

Definition of the Term Coverage Month for Computing the Premium Tax Credit, 102721–102726

PROPOSED RULES

Administrative Requirements for an Election To Exclude Applicable Unincorporated Organizations From the Application of Subchapter K; Correction, 102841

International Trade Administration**NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
 Administrative Reviews, 102856–102864

Oil Country Tubular Goods from the People's Republic of China, 102864–102866

International Trade Commission

NOTICES

Investigations; Determinations, Modifications, and Rulings, etc.:

- Certain Components for Injection Molding Machines, and Products Containing the Same, 102953–102954
- Certain Women's Flats with Colored Outsoles Thereof, 102951–102953
- Sol Gel Alumina-Based Ceramic Abrasive Grains from China, 102953

Justice Department

See Drug Enforcement Administration

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 - Leadership Engagement Survey, 102954–102955
- Proposed Consent Decree:
 - Toxic Substances Control Act, 102955–102956

Labor Department

See Workers Compensation Programs Office

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 - Roof Control Plans for Underground Coal Mines, 102956
- Underground Retorts, 102956–102957

Land Management Bureau

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 - Application for Land for Recreation or Public Purposes, 102939–102940
 - Desert Land Entry Application, 102938
 - Resource Advisory Council Application, 102937
- Hearings, Meetings, Proceedings, etc.:
 - Colorado Resource Advisory Council, 102938–102939

National Highway Traffic Safety Administration

RULES

Event Data Recorders, 102810–102834

National Institutes of Health

NOTICES

- Hearings, Meetings, Proceedings, etc.:
 - National Institute of Allergy and Infectious Diseases, 102927
 - National Institute of Environmental Health Sciences, 102917–102918
 - National Institute on Deafness and Other Communication Disorders, 102918
 - National Institute on Drug Abuse, 102918–102919
- Public Access Policy, 102919–102927

National Oceanic and Atmospheric Administration

RULES

- Fisheries of the Northeastern United States:
 - Framework Adjustment 15 to the Monkfish Fishery Management Plan; Framework Adjustment 6 to the Spiny Dogfish Fishery Management Plan, 102834–102839

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 - Applications and Reports for Scientific Research and Enhancement Permits under the Endangered Species Act, 102867–102868
- Request for Information:
 - Data for Marine Spatial Studies Related to Transmission Planning in Texas, Louisiana, Mississippi, and Alabama, 102866–102867

National Park Service

NOTICES

- Inventory Completion:
 - Fowler Museum at the University of California Los Angeles, Los Angeles, CA, 102950–102951
 - Harvard University Archives, Pusey Library, Cambridge, MA, 102949–102950
 - Los Angeles County Museum of Natural History, Los Angeles, CA, 102940–102941
 - Louisiana State University, Museum of Natural Science, Baton Rouge, LA, 102945
 - Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, 102943–102944, 102946–102948
 - U.S. Department of the Interior, Bureau of Reclamation, Boise, ID, 102945–102946
 - University of California, Davis, Davis, CA, 102942–102943
 - Vanderbilt University, Nashville, TN, 102948–102949
 - Western Washington University, Department of Anthropology, Bellingham, WA, 102941–102942
- Privacy Act; Systems of Records, 102948
- Repatriation of Cultural Items:
 - History Colorado (Formerly the Colorado Historical Society), Denver, CO, 102946
 - Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, 102944
 - The Children's Museum of Indianapolis, Indianapolis, IN, 102950

Patent and Trademark Office

NOTICES

- Agency Information Collection Activities; Proposals, Submissions, and Approvals:
 - Matters Related to First Inventor to File, 102868

Personnel Management Office

RULES

- Combined Federal Campaign:
 - Authorization of Short-Term Regulatory Variation, 102696–102697
- Suitability and Fitness, 102675–102696

Postal Regulatory Commission

NOTICES

New Postal Products, 102958–102960

Postal Service

NOTICES

- International Product Change:
 - Priority Mail Express International, Priority Mail International, and First-Class Package International Service Agreement, 102973
- Product Change:
 - Priority Mail and USPS Ground Advantage Negotiated Service Agreement, 102961, 102965, 102967–102969, 102972–102975

Priority Mail Express, Priority Mail, and USPS Ground Advantage Negotiated Service Agreement, 102960–102978

Presidential Documents

PROCLAMATIONS

Special Observances:

Bill of Rights Day (Proc. 10872), 102673–102674

Reclamation Bureau

NOTICES

Environmental Impact Statements; Availability, etc.:

Columbia River System Operations, 102869–102871

Securities and Exchange Commission

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 103012–103013, 103032–103033

Joint Industry Plan:

National Market System Plan Governing the Consolidated Audit Trail Designed to Implement Cost Savings Measures, 103033–103051

Self-Regulatory Organizations; Proposed Rule Changes:

Miami International Securities Exchange, LLC, 102989–102994

MIAX Emerald, LLC, 102978–102982

MIAX PEARL, LLC, 102982–102985, 103013–103017

MIAX Sapphire, LLC, 103025–103030

Nasdaq MRX, LLC, 103017–103025

Nasdaq PHLX LLC, 103002–103012

New York Stock Exchange, LLC, 103030–103032

The Depository Trust Company, 102985–102989

The Nasdaq Stock Market, LLC, 102994–103002

Small Business Administration

RULES

Accredited Lenders Program Express Pilot to Permanent Status, 102697–102701

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 103051

Social Security Administration

RULES

Availability of Information and Records to the Public, 102704–102721

State Department

NOTICES

Culturally Significant Object Being Imported for Exhibition:

Christine Sun Kim: All Day All Night, 103051

Substance Abuse and Mental Health Services Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 102927–102928

Surface Transportation Board

NOTICES

Exemption:

Operation; Puerto Verde Industrial Railroad, LLC, Line in Maverick County, TX, 103051–103052

Transportation Department

See Federal Aviation Administration

See National Highway Traffic Safety Administration

RULES

Transportation for Individuals with Disabilities:

Adoption of Accessibility Standards for Pedestrian

Facilities in the Public Right-of-Way, 102800–102809

Treasury Department

See Alcohol and Tobacco Tax and Trade Bureau

See Bureau of the Fiscal Service

See Foreign Assets Control Office

See Internal Revenue Service

Workers Compensation Programs Office

NOTICES

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

Attorney Acknowledgement/Instructions Relating to Representative Fee Applications, 102957–102958

Separate Parts In This Issue

Part II

Homeland Security Department, 103054–103200

Part III

Homeland Security Department, 103202–103335

Part IV

Defense Department, Defense Acquisition Regulations System, 103338–103368

Part V

Homeland Security Department, 103370–103414

Part VI

Transportation Department, Federal Aviation Administration, 103416–103451

Part VII

Environmental Protection Agency, 103454–103509

Part VIII

Environmental Protection Agency, 103512–103558

Part IX

Environmental Protection Agency, 103560–103616

Reader Aids

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to <https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new>, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR**Proclamations:**

10872.....102673

5 CFR

302.....102675

731.....102675

950.....102696

Proposed Rules:

1605.....102840

8 CFR

208.....103370

214 (2 documents) 103054,

103202

274a.....103202

13 CFR

120.....102697

14 CFR

120.....103416

15 CFR

3.....102701

29.....102703

20 CFR

402.....102704

26 CFR

1.....102721

Proposed Rules:

1.....102841

27 CFR

5.....102726

31 CFR

323.....102735

587.....102742

34 CFR**Proposed Rules:**

Ch. III.....102841

40 CFR

52.....102744

68.....102773

123.....103454

124.....103454

232.....103454

233.....103454

372.....102773

703.....102773

720.....102773

721.....102773

723.....102773

725.....102773

751 (2 documents) 103512,

103560

761.....102773

Proposed Rules:

62.....102847

48 CFR

212.....103338

216.....103366

225.....103338

227.....103338

252.....103338

49 CFR

37.....102800

563.....102810

50 CFR

648.....102834

Presidential Documents

Title 3—

Proclamation 10872 of December 13, 2024

The President

Bill of Rights Day, 2024

By the President of the United States of America

A Proclamation

America is the only country in the world founded on an idea: that we are all created equal and deserve to be treated equally throughout our lives. Two hundred and thirty-three years ago today, that idea was at the heart of our Nation's Bill of Rights, launching the greatest self-government experiment in the history of the world and endowing all of us with fundamental rights and liberties. Today, we recommit to safeguarding those first 10 freedoms guaranteed by the Bill of Rights and all the progress we have made to protect Americans since.

The freedoms guaranteed to us in the Bill of Rights help define the soul of our Nation. The first 10 Amendments to the United States Constitution include the freedoms of religion, speech, press, assembly, and privacy, which form our Nation's north star. And the 17 additional Amendments that came later helped our Nation realize its promise of liberty and justice for all—from abolishing our Nation's original sin of slavery to giving women the right to vote.

But freedom is never guaranteed—every generation has had to defend and fight for it. In recent years, long-established civil rights principles and protections have been undermined and challenged. The Supreme Court gutted the Voting Rights Act in 2013, opening the floodgates to a new wave of restrictive voting laws that States across the country have passed. Anti-LGBTQI+ rights bills have emboldened discrimination against Americans for who they are and whom they love. And in 2022, the Court overruled *Roe v. Wade* and took away the constitutional right to choose, which had been the law of the land for nearly 50 years.

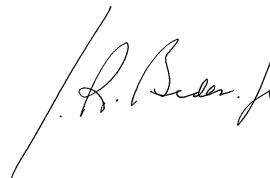
As President, I made it my mission to protect our democracy and the freedoms it guarantees. When the Supreme Court overturned *Roe v. Wade*, I took executive action to protect women's access to reproductive health care. To protect the will of the people, right to vote, and have that vote counted—which is the threshold of democracy and liberty—I signed the Electoral Count Reform Act to ensure the peaceful transfer of power. And to protect the civil rights and liberties of LGBTQI+ Americans, I signed the landmark Respect for Marriage Act, upholding the rights of same-sex and interracial couples. But there is still more to do to ensure that our Nation respects the civil rights and liberties of all Americans. I continue to call on the Congress to restore the protections of *Roe v. Wade* in Federal law and pass the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act.

On Bill of Rights Day, we recommit to protecting and expanding Americans' civil rights and liberties. We must continue fighting for progress and following our Nation's north star, securing dignity and respect for all Americans. And we must continue to strengthen the guardrails of our democracy, ensuring that our Nation and all the freedoms it guarantees will be enjoyed for generations to come. I know we can do it—because together, nothing is beyond our capacity.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution

and the laws of the United States, do hereby proclaim December 15, 2024, as Bill of Rights Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of December, in the year of our Lord two thousand twenty-four, and of the Independence of the United States of America the two hundred and forty-ninth.

A handwritten signature in black ink, appearing to read "Joe Biden", is written over a horizontal line.

Rules and Regulations

Federal Register

Vol. 89, No. 243

Wednesday, December 18, 2024

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 302 and 731

RIN 3206–AO17

Suitability and Fitness

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule revising regulations governing the Federal Government personnel vetting investigative and adjudicative processes for determining suitability and fitness. This final rule establishes requirements and standards for agencies to properly vet individuals to assess risk to the integrity and efficiency of the service. The regulations establish the requirements for when investigations must be conducted for appointments to the civil service, to work as a contractor employee, or to work in a Department of Defense Non appropriated Fund position. This final rule establishes the requirement for enrolling these populations, including low, moderate, and high risk, into continuous vetting. Furthermore, this rule provides adjudicative criteria for assessing suitability and fitness for much of the civil service. Nothing in this rule shall be read in derogation of any individual's rights under Title VII of the U.S. Code.

DATES: Effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Christine Bilunka at (202) 599–0090 or by email at SuitEA@opm.gov.

SUPPLEMENTARY INFORMATION:

Background

Under 5 U.S.C. 3301 and 7301, Congress authorizes the President to prescribe regulations to govern the admission into the civil service in the executive branch. The regulations must “best promote the efficiency” of the executive branch civil service,

“ascertain the fitness of applicants with respect to character, and prescribe rules for the conduct of executive branch employees. In addition to the President's authority to prescribe standards for suitability and fitness for civil service appointments based on character and conduct, 5 U.S.C. 3301 recognizes the President's authority to prescribe qualification standards based on applicants' education and experience and to assess their relative knowledge, skill, and ability.

OPM, as delegated by the President, has the authority to prescribe qualification standards and to conduct examinations of applicants' qualifications. OPM also has the authority to prescribe suitability standards and to conduct investigations of suitability for appointment and continuing employment. (See 5 U.S.C. 1104(a)(1).) Amendments to the Civil Service Rules made by Executive Order (E.O.) 13764 of January 17, 2017, *Amending the Civil Service Rules, Executive Order 13488, and Executive Order 13467 to Modernize the Executive Branch-Wide Governance Structure and Processes for Security Clearances, Suitability and Fitness for Employment, and Credentialing and Related Matters*, directed OPM to establish minimum standards of fitness based on character and conduct for appointment to positions in the excepted service of the executive branch. (82 FR 8115.) E.O. 13764 required the OPM Director to establish mutually consistent standards and procedures to determine the reliability, trustworthiness, and good character and conduct of those working for the Government in the executive branch regardless of appointment type. Additionally, E.O. 13764 expanded OPM's responsibilities by making OPM responsible for establishing investigative standards, risk designation procedures, and reciprocity rules for positions in the excepted service beyond those that could be noncompetitively converted to the competitive service.

As amended by E.O. 13764, E.O. 13488 of January 16, 2009, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust*, establishes that contractor employee fitness or nonappropriated fund employee fitness is subject to the same position

designation requirements and investigative standards, policies, and procedures as fitness determinations for civil service employees as prescribed by OPM under the Civil Service Rules. (74 FR 41111.) As amended by E.O. 13764, E.O. 13467 of June 30, 2008, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Classified National Security Information*, establishes a requirement for continuous vetting for persons who perform, or who seek to perform, work for the executive branch in competitive service, excepted service, career Senior Executive Service, contractor employee, and nonappropriated fund positions that are included in covered positions as defined in the E.O. 73 FR 38103. Furthermore, E.O. 13467 (section 2.1(c)), as amended by E.O. 13764, requires that, to the extent practicable, the investigative and adjudicative standards for fitness be consistent with the suitability standards.

In May 2018, the OPM Director and the Director of National Intelligence, in their respective roles as Suitability and Credentialing Executive Agent and Security Executive Agent, launched an effort consistent with this direction, “Trusted Workforce 2.0” (see <https://www.performance.gov/trusted-workforce/>), to transform workforce vetting by employing a modernized and more efficient process for ensuring that only trusted individuals enter and remain in the Federal workforce. Key goals of the initiative are to capitalize on information technology capabilities that allow for the integration of automation and take advantage of a wider spectrum of data, reduce time-intensive manual processing, and promote greater mobility of the workforce by providing vetting processes that enable each individual's vetting status to be continuously up to date. This final rule helps advance the goals of the Trusted Workforce 2.0 initiative.

Explanation of OPM's Final Rule

Aligned Criteria

OPM is issuing revised suitability criteria at 5 CFR 731.202. The basis for the specific revisions to several of the existing suitability factors is explained in the section discussing § 731.202. Additionally, OPM is revising § 731.202 so that these criteria will be used for making both suitability and fitness

determinations except as otherwise noted in the regulation. Establishing the criteria as the minimum standards of fitness for much of the excepted service is done per the amended Civil Service Rule II (5 CFR 2.1(a)(iii) and (iv), making OPM responsible for setting standards of suitability for most Federal appointments and for setting minimum standards of fitness for positions in the excepted service, with certain exceptions.) Additionally, the aligned factors are consistent with E.O. 13467, as amended by E.O. 13764, which requires standards for suitability for appointment in the competitive service and standards for fitness for appointment in the excepted service be aligned “to the extent possible.” OPM is also revising 5 CFR 731.104 to specify the circumstances under which either a suitability or fitness determination is required. These changes are described in detail in the sections discussing §§ 731.104 and 731.202.

Aligned Position Designation Requirements, Investigative Standards, and Reciprocity

This final rule also implements several changes to improve consistency in the vetting process and to enhance mobility of the civil service, contractor employee, and nonappropriated fund workforces. Specifically, the rule aligns the requirements for position designation, investigations, and reciprocal acceptance of investigations and suitability or fitness determinations amongst these populations. Agencies will use the same system for designating position risk (*i.e.*, low, moderate, and high) for civil service, contractor employee and nonappropriated fund positions to determine the commensurate level of background investigation. Background investigations conducted for these positions will be done using the same investigative standards, which prescribe the investigative checks to be conducted at low, moderate, and high tiers that correlate to position risk. Finally, agencies will apply the same rules for determining whether reciprocal acceptance of prior background investigations and suitability or fitness determinations are required, promoting efficient transfer of trust determinations.

Civil Service Rule V (5 CFR 5.2(a)), as amended by E.O. 13764, section 1, establishes that, for positions in the excepted service for which the OPM Director has standard-setting responsibility under 5 CFR part 2, the Director may require agencies to designate positions based on risk in accordance with OPM guidance to determine the appropriate level of

investigation, and may prescribe investigative standards, policies, and procedures, and reciprocity standards for investigations and adjudications of suitability and fitness, except to the extent statute vests authority to apply additional fitness standards in an agency. Civil Service Rule VI (5 CFR 6.3(b)), as amended by E.O. 13764, section 1, likewise provides that appointments and position changes in the excepted service are “subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations” as prescribed by the Director.

Policies and procedures for suitability and fitness are required to be “aligned using consistent standards to the extent possible” and to “provide for reciprocal recognition.” (E.O. 13467, as amended, section 1.1.) Further, agencies are required to accept background investigations and adjudications conducted by other agencies except when an agency determines the prior investigation or adjudication does not meet its standards. (E.O. 13467, as amended, section 2.2.) The Director of OPM, as the Suitability and Credentialing Executive Agent, is responsible for establishing these requirements through regulations, guidance, and standards. (E.O. 13467, as amended, section 2.5.)

E.O. 13488, as amended by E.O. 13764, establishes that the same position designation requirements and investigative standards, policies, and procedures used for fitness determinations for civil service employees apply to contractor employee fitness and nonappropriated fund employee fitness. (E.O. 13488, as amended, section 3(b).) Likewise, section 3(c) of E.O. 13488, as amended, provides that fitness determinations for contractor employees and nonappropriated fund employees and their underlying investigations are subject to the same reciprocity requirements as those prescribed by OPM under the Civil Service Rules for employment in the civil service. Therefore, contractor employees, except those for which OPM is statutorily precluded from prescribing standards, and nonappropriated fund populations are subject to the same position designation, investigative, and reciprocity requirements as positions in the competitive service, the excepted service (including positions where the incumbent can noncompetitively convert to the competitive service), and for career appointments to the Senior Executive Service.

The position designation, reciprocity, and investigation requirements for

contractor employees that OPM is codifying in part 731 are not new. Since 2009, E.O. 13488 has covered contractor employee fitness, giving agency heads discretion on fitness criteria, but requiring them to take into account OPM guidance when determining if the criteria was equivalent for the purpose of making a reciprocally acceptable determination. Per E.O. 13488, reciprocity for fitness and suitability determinations applied to contractor employees, and agencies have been required to report the nature and results of background investigations and fitness determinations to the government-wide investigations and adjudications index (Central Verification System or successor). Likewise, the requirement that contractor employees be subject to the same investigative requirements as apply to Federal employees has been in place since 2012. In a December 6, 2012, memorandum issued by the Security, Suitability, and Credentialing Performance Accountability Council (PAC) titled *Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards*, the PAC determined, after consulting with the Department of Defense and other affected agencies, that contractor employees should be subject to the same Federal Investigative Standards as apply to Federal employees. Consistent with E.O. 13467, which authorized the PAC to assign functions related to matters such as alignment and improvement of investigations and contractor employee fitness, the PAC via this memorandum assigned the Director of OPM the function of prescribing investigative standards for “contractor employee fitness,” which at that time was defined in section 1.3(f) of E.O. 13467 as “fitness based on character and conduct for work for or on behalf of the Government as a contractor employee.”

The Federal Investigative Standards, which were issued by the Executive Agents in December 2012, applied “to all individuals working for or on behalf of the executive branch and individuals with access to federally controlled facilities and information systems.” The Standards were established for investigations to determine eligibility for logical and physical access, suitability for Government employment, eligibility for access to classified information, eligibility to hold a sensitive position, and fitness to perform work for or on behalf of the Government as a contractor employee.

This rule does not specifically address investigative requirements for eligibility for access to classified information or for employment in sensitive (national

security) positions. Those matters are addressed in 5 CFR part 1400 and in issuances by the Director of National Intelligence acting as the Security Executive Agent under E.O. 13467. However, this rule continues the existing requirement (5 CFR 731.106(a) and (c)(2)) that a position must be designated based both on its public trust risk and its national security sensitivity so that the appropriate level of investigation is conducted to address both suitability and national security concerns. Complementary language appears in 5 CFR 1400.201.

Continuous Vetting Requirements

Continuous vetting refers to the process of “reviewing the background of a covered individual at any time to determine whether that individual continues to meet applicable requirements.” (E.O. 13467, as amended, section 1.3.) In the context of suitability and fitness for employment, continuous vetting is used to determine if an individual remains suitable or fit for a position over time. A covered individual is, with limited exceptions, “a person who performs, or who seeks to perform, work for or on behalf of the executive branch (e.g., Federal employee, military member, or contractor), or otherwise interacts with the executive branch such that the individual must undergo vetting.” (Id.) In accordance with section 2.1 of E.O. 13467, as amended, all covered individuals are to be subject to continuous vetting under standards to be established by the Security Executive Agent or the Suitability and Credentialing Executive Agent exercising its Suitability Executive Agent functions, as applicable. Further, the Director of OPM as the Suitability Executive Agent is responsible for prescribing applicable investigative standards, policies, and procedures. With this final rule, any individual occupying a position that is subject to investigation, as described in revised § 731.104(a), including both public trust positions and low risk positions, is subject to continuous vetting. The nature and specificity of continuous vetting checks will be further defined in supplemental issuances, and requirements will account for position risk and sensitivity designations.

Elimination of Fixed, Five-Year Periodic Reinvestigation Requirement for Public-Trust Positions

With this final rule and OPM’s implementation of the continuous vetting requirement set forth in E.O. 13467, as amended, section 2.1, OPM has eliminated the fixed, five-year

periodic reinvestigation requirement for public trust positions.

Digest of Public Comments

In response to the proposed rule (88 FR 6192, January 31, 2023), OPM received 3,587 comments via the eRulemaking portal, one comment via email, and one comment by phone. All comments were received during the 60-day comment period. Comments received were from individuals, organizations, a labor union, and a Federal agency. Approximately 3,500 identical form comments were submitted by about 3,400 commenters.

In general, the comments ranged from categorical rejection of the proposed regulations to strong support. OPM carefully considered comments and arguments made in support of and in opposition to the proposed amendments. The comments are summarized and discussed in the subsequent sections. Comments are organized by general comments followed by comments specific to each section. A discussion of the suggested revisions that were considered and either adopted, adopted in part, or declined, and the rationale therefore is included. Comments beyond the scope of the proposed changes or which were vague or incomplete are not addressed.

General Comments

Some commenters offered support for the regulatory changes, believing that the changes to the regulation would serve to improve the Government’s ability to assess the integrity and efficiency of the service and streamline the process, while others suggested that the current process is sufficient and that changes are unnecessary.

Several commenters took issue with the relevant terminology, suggesting that the terms “character,” “suitability and fitness,” and “conduct necessary” are vague and could allow for discrimination, including against individuals who do not have the same educational or cultural background as other job applicants. Others commented more generally that the rule would allow for discrimination without regard to an individual’s qualifications, asserting that hiring managers could determine the level of character required and reject candidates based on their own ideology. Other commenters called the rule unconstitutional and illegal, suggesting it may allow for discrimination based upon political beliefs or protected speech.

In response to these comments, OPM agrees that this final rule advances important goals to strengthen and streamline personnel vetting. This rule

implements vetting reform requirements and initiatives that span three Administrations and were first initiated in 2017 and distilled into the transformational Trusted Workforce 2.0 framework beginning in 2018 with a focus on revamping the fundamental approach and supporting policy framework, overhauling business processes, and modernizing the information technology architecture. Effective Government operations require that the Government’s workforce be trusted to deliver on mission, provide excellent service, and demonstrate effective stewardship of taxpayer funds. Establishing and maintaining trust is a core goal of the Federal personnel vetting program. Further, as addressed in the previous sections (Background and Explanation of OPM’s Final Rule), the rule implements requirements established by the President via Executive orders. Therefore, the scope of the regulations with respect to the populations covered, including the excepted service, adheres to the direction of the Executive orders. As such, OPM will not make any revisions to the rule regarding the scope.

OPM disagrees with comments suggesting the language in the regulation may allow for discrimination. The terms called out by the commenters are well-established and their application to personnel vetting is not changing through this rule. As outlined in the regulation and elaborated upon in a body of guidance, such as the Suitability Processing Handbook, the Trusted Workforce 2.0 policy, and the Investigative Standards, OPM and agencies must base suitability determinations on the presence or absence of one or more of the specific factors in 5 CFR 731.202(b) while considering the additional considerations in § 731.202(c) to the extent they are deemed pertinent. OPM also disagrees that agencies, when acting in accordance with the rule, are at liberty to determine the level of character that applicants must possess arbitrarily, nor do the requirements allow for suitability or fitness decisions that are based upon the decision-maker’s personal ideology.

With respect to the concerns raised that some of the proposed changes are vague and may be illegal or unconstitutional, OPM disagrees that the proposed changes are illegal and unconstitutional. OPM acknowledges the concerns regarding clarity and is not moving forward with some of the proposed changes. This is discussed in subsequent sections.

Part 302—Employment in the Excepted Service

The final rule adds as an authority E.O. 13764, which amended the Civil Service Rules to extend authority by the OPM Director to establish the minimum standards of fitness for the excepted service, and amends the existing authority citations to comply with 1 CFR part 21, subpart B. This final rule adds § 302.108 to refer readers to part 731 for requirements on fitness determinations for excepted positions. Additionally, the section establishes that an agency must record its reason(s) for making fitness determinations under part 731 and must furnish a copy of those reasons to an applicant upon their request. Section 302.203 is revised to direct readers to part 731 for the minimum standards and criteria for determining fitness for employment based on character and conduct, allowing agencies to prescribe additional factors to protect the integrity and promote the efficiency of the service when job-related and consistent with business necessity.

One commenter wrote that the disqualifying factors in the existing part 302, which the commenter opines address an applicant's ability to effectively work for the Government, their ability to faithfully service the Federal Government, and other possible statutory concerns, are far different from the new factors OPM proposed in part 731. According to the commenter, the new factors in part 731 consider behavior that is entirely unrelated to the applicant's proven history with the law and the Federal Government and the applicant's capacity to perform the job.

OPM agrees that the disqualifying factors in part 302, although similar, were not entirely consistent with those in § 731.202. OPM disagrees with the commenter's notion that the intent of the disqualifying factors was far different than consideration of behavior as specified in part 731. As was explained in the notice of proposed rulemaking, the inconsistency is, in part, a basis for making the change in this rulemaking, as the President has called for an executive branch-wide vetting enterprise to use, to the greatest extent practicable, aligned and consistent vetting policies, procedures, and standards for determining suitability or fitness for Government employment. (See E.O. 13467, as amended.) Specifically, the President directed that the investigative and adjudicative standards for fitness must, to the extent practicable, be consistent with the standards for suitability. (E.O. 13467, sec. 2.1(c).) Therefore, OPM is

necessarily changing the way in which fitness is determined by aligning the factors and additional considerations used for fitness determinations with those used for suitability. OPM agrees that the President intended for the OPM Director to establish the minimum standards of fitness based upon character or conduct (see E.O. 13764, sec. 1(a)(iii), revising 5 CFR 2.1(a)(vi).); however, OPM disagrees with the suggestion that the fitness factors as aligned with the suitability factors evaluate fitness based on something other than an assessment of an individual's character or conduct. Each of the factors is designed to allow agencies to consider different aspects of an individual's past conduct, as identified during the vetting process, and how that conduct illustrates the individual's character. See discussion of § 731.202 for more information about the factors.

This same commenter suggested that permitting agencies to prescribe additional fitness factors is an extreme change that grants agencies near limitless power. The commenter suggested that this delegation to agencies is inconsistent with the direction of E.O. 13764 to promote consistency between agencies. The commenter suggested the terms "job-related" and "business necessity" must be defined very clearly, agencies must be required to publicly post and explain potential factors, and OPM must oversee and assess these factors.

OPM agrees that E.O. 13764 seeks to promote consistency between agencies. By aligning the minimum fitness factors with the suitability standards, application of reciprocity between agencies based on fitness determination should increase. Under the existing regulations, an agency has latitude for establishing reasons to deem an applicant unfit for an excepted service appointment. OPM regulations have provided a list of potential disqualifying reasons (which are referenced by the commenter) but have not required the use of any particular factors. This final rule, in establishing a specific list of factors that can be supplemented by an agency in making a fitness determination, is not a vast expansion of authority for agencies. Commenter's suggestion to the contrary is simply incorrect.

Nonetheless, the President amended the Civil Service Rules to make OPM responsible for the *minimum* standards of fitness based on character and conduct, and thus allowed agencies to supplement the fitness standards, where appropriate. (See E.O. 13764, amending 5 CFR 2.1(a)(i) and (ii) to state that OPM

is responsible for "Standards of suitability" for the competitive service but is responsible for "Minimum standards of fitness" for the excepted service.) The President also made clear that each agency is authorized to "determine[] that a particular background investigation or adjudication does not sufficiently address the standards used by *that agency* in determining the fitness" of its excepted service employees. (E.O. 13467, sec. 2.2, as amended (emphasis added).) Accordingly, OPM is not responsible for, nor is it required to approve or oversee, the establishment of additional fitness factors used by an agency in determining fitness for its excepted service positions.¹ OPM agrees, however, that additional fitness factors should be made known to applicants when such factors are used in making an unfavorable fitness determination, and therefore has included a requirement in § 302.108(b) for agencies to make additional factors a matter of record and furnish them to an applicant, upon request, in such circumstances.

OPM is not accepting the request to define what *job-related and consistent with business necessity* means because we do not agree it is needed in this context. This terminology is not unique to personnel vetting and is generally understood as the standard that agencies must meet to justify unique hiring requirements. These concepts appear in civil service hiring policy at least as early as the Uniform Guidelines on Employee Selection Procedures (1978), which the Civil Service Commission, the Equal Employment Opportunity Commission, the U.S. Department of Justice, and the U.S. Department of Labor helped develop. (See sec. 60–3, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR 38295 (Aug. 25, 1978).) OPM and agencies are well-versed in applying these concepts. (See, e.g., OPM's Delegated Examining

¹ See E.O. 13764, sec. 3(q), adding a new section 2.2 "Reciprocity" to E.O. 13467. The provision cited by the commenter ("Any additional requirements approved by the appropriate Executive Agent shall be limited to those that are necessary to address significant needs unique to the agency involved, to protect national security, or to satisfy a requirement imposed by law.") does not indicate that agency *fitness* factors are subject to this Executive Agent oversight. The preceding sentence states: "Except as *described above* and except to the extent authority to apply additional requirements is vested by statute in an agency, an agency may not establish additional . . . requirements . . . without the approval of the [appropriate Executive Agent]." This sentence applies to the suitability factors but does not apply to the fitness factors, which were "*described above*." Accordingly, the "additional requirements approved by the appropriate Executive Agent" refers only to suitability factors.

Operations Handbook, available at https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo_handbook.pdf.) Agencies also apply these concepts in administering Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), which prohibits selection criteria and standards that tend to screen out people with disabilities unless the procedures have been determined through a job analysis to be job-related and consistent with business necessity.

Part 731—Suitability and Fitness

This final rule revises the authorities by adding E.O. 13764, Civil Service Rule 6, and Presidential Memorandum—Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulties Through no Fault of Their Own, January 31, 2014. This rule also revises the formatting of existing authorities to comply with 1 CFR part 21, subpart B.

Section 731.101 Purpose

This section describes the purposes for this regulation, which are to establish investigation, continuous vetting, and reciprocity requirements; suitability requirements and the minimum standards of fitness; and the procedures for taking suitability actions. This section also provides definitions necessary for administration. Notably, OPM is adopting its proposed definition for the term “employment subject to investigation,” which is used throughout the revisions to part 731. This term captures the range of individuals subject to investigation by virtue of their appointment to the competitive service or career Senior Executive Service, an appointment to the excepted service, employment as a contractor employee, or employment as a nonappropriated fund employee.

OPM received no comments on this section; however, OPM is making several changes in the final rule to improve clarity and readability. For example, OPM has made minor wording changes to the definition of excepted service (e.g., moving the clause “of the executive branch” to follow the word “position,” which is the noun that the clause modifies). OPM is also revising the definition of suitability action, which referenced the list of actions in § 731.203. OPM has moved that list into the definition. Conversely, the definition of a suitability action included regulatory information of relevance in Subpart B and included information that was redundant with § 731.203(a); therefore, OPM has deleted

the redundant information from the definition and moved the remaining language to § 731.203(b). OPM is adopting minor clarifying edits to the proposed definitions of appointee, contractor employee, and employee.

OPM also is correcting a numbering error from the proposed rule. Proposed paragraph (b)(4) is not part of the “purpose” sentence in paragraph (b) and is renumbered as paragraph (c). Proposed paragraph (c) is codified at paragraph (d) in this final rule.

Section 731.102 Implementation

This section addresses the requirement to use investigations conducted under part 731 only in accordance with the Privacy Act and section 1.1(e) of E.O. 13467, as amended, and it establishes that OPM may issue requirements for implementing the rule. OPM received no comments on this section and is adopting the language as proposed.

Section 731.103 Delegation to Agencies for Competitive Service Positions

This section describes the limited delegation and related requirements that OPM makes to agency heads for adjudicating the suitability of applicants or appointees for competitive service and career Senior Executive Service positions (as defined in § 731.101) within the agency.

A commenter suggested OPM revise the rule to allow an agency head with delegated suitability authority to redelegate or convey outside of their agency the authority for making suitability adjudicative determinations for positions within their agency. OPM is not accepting this change. For the reasons described in the following paragraphs, OPM delegates limited authority for adjudicating suitability to agency heads. Agency heads may redelegate the function within their own agency, and agency records must show any redelegation.

Congress and the President have assigned to OPM the responsibility for adjudicating the suitability of certain individuals applying to or holding positions in the competitive service. (See 5 CFR parts 2 and 5; see generally 5 U.S.C. 3301 and 7301 and the Civil Service Rules established in E.O. 10577, as amended by E.O.s 12107 and 13764.) Congress has authorized the OPM Director to delegate any function vested in or delegated to the Director to heads of executive branch agencies and other agencies employing persons in the competitive service. (5 U.S.C. 1104(a)(2).) When OPM delegates functions, it must establish standards

that apply to OPM as well as to any agency under delegated authority, and OPM must oversee the performance of those delegated functions. And, when an agency does not wish to perform the function(s) delegated, the head of the agency may ask OPM to assist in performing the function on a reimbursable basis. (See 5 U.S.C. 1104(b)(4).) Additionally, section 2.5(b)(v) of E.O. 13467, as amended, requires the OPM Director, as the Suitability Executive Agent, to review agency suitability and fitness vetting programs on a continuous basis to determine whether they are meeting the executive order’s requirements.

Suitability determinations are case-by-case decisions based upon the nature of the conduct, as applicable, and the functions and responsibilities of the position. In making the delegation for suitability adjudications to agency heads, OPM recognized the important role an agency plays in comparing the nature of the position against the issues in an individual’s background. The agency, armed with the understanding of the job duties and agency mission, is best positioned to determine when conduct warrants a finding of unsuitability and, in that instance, determine the best course of action—whether it be taking suitability action in accordance with the agency’s delegated authority or looking to another authority more appropriate or applicable to the situation.

OPM retained the authority to adjudicate suitability in cases where the nature of the conduct causes the individual to be unsuitable for any position. Through suitability reviews, agency officials may identify cases that warrant referral to OPM for suitability review and action and can make those referrals as is required by the regulation. OPM proposed to retain authority to adjudicate suitability where there was evidence of conduct that fell within several proposed, new suitability factors. As addressed further in the pertinent section of this final rule, OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7) through (10) and is instead retaining the current factor at § 731.202(b)(7). Accordingly, OPM is modifying its proposed language at § 731.103(f) to specify that OPM has sole jurisdiction to adjudicate cases involving evidence of conduct that falls within § 731.202(b)(7).

Section 731.104 Investigation and Reciprocity Requirements

This section establishes investigation requirements and reciprocity requirements for investigations and for

suitability and fitness determinations. As an initial matter, a Federal agency recommended reorganizing the paragraphs in § 731.104(b) for clarity. OPM agrees and has made the following adjustments from the notice of proposed rulemaking:

- Section 731.104(b)(1) is now § 731.104(b).
- Section 731.104(b)(2) is now § 731.104(c).
- Section 731.104(b)(2)(i) is now § 731.104(c)(1).
- Section 731.104(b)(2)(ii) is now § 731.104(c)(2).
- Section 731.104(b)(2)(ii)(C) is now § 731.104(d).

In addition, OPM has edited the proposed regulatory language to improve clarity and readability. For example, OPM modified paragraphs (a)(1) and (2) from the proposal to use more consistent terminology throughout the section. Specifically, paragraphs (c)(1) and (2) (as renumbered) referred to a prior investigation being reciprocally accepted. In contrast, paragraphs (a)(1) and (2) discussed the concept of reciprocal acceptance of a prior investigation but did not use that phrasing. In rephrasing paragraphs (a)(1) and (2) to use more consistent language, OPM has also restated the requirement in terms of providing direction to the employing agency. OPM also revised paragraph (c)(2)(ii) (as renumbered) to make clear that the additional factors are permitted, but not required, by § 731.202(b). Finally, OPM revised paragraph (d) (as renumbered) to remove an inadvertent reference to reinvestigation. (See prior discussion in the Elimination of Fixed, Five-Year Periodic Reinvestigation Requirement for Public-Trust Positions section.)

Section 731.104 explains the requirements for employment subject to investigation (see § 731.101 discussion of definitions) and reciprocity requirements for populations covered. OPM's proposed revisions, which are adopted in this final rule, extend these requirements to include the "excepted service," "contractor employees," and "nonappropriated fund employees" in addition to appointments in the competitive service, appointments to the excepted service that can noncompetitively convert to the competitive service, and career appointments to the career Senior Executive Service. In general, these types of employment are subject to background investigations for suitability or fitness. However, as described in the new § 731.104(a)(3), certain short-term positions are not subject to background investigations for suitability and fitness

but checks to ensure suitability or fitness are still required.

Per revised 5 CFR 731.104(c), suitability determinations must be made for all appointments in the competitive service, excepted service when the position can noncompetitively convert to the competitive service, or career Senior Executive Service; and fitness determinations must be made for all appointments to excepted service positions, except under specified circumstances. Under § 731.104(c)(2), however, an agency is generally required to reciprocally accept a prior favorable determination, except under certain circumstances. The conditions under which an agency is not required to reciprocally accept a prior favorable suitability or fitness determination are addressed in the new § 731.104(c)(2)(i) and (ii). Additionally, OPM clarifies that agencies may reciprocally accept a prior *investigation* that is at or above the appropriate tier but for which a new suitability or fitness determination is needed. Prior to this change, the regulation could be misread to require a new investigation in this scenario.

The following are examples where an agency will reciprocally accept an existing background investigation while making a new suitability or fitness determination.

Example 1: An individual is employed with Agency A in a position that required a Tier 5 level background investigation. Agency A reported a favorable national security determination for the Tier 5 investigation and did not report a suitability determination. The individual is transferring to a position with Agency B which also requires a Tier 5 level background investigation. The new position is in the competitive service, so the agency is also required to make a suitability determination. Because there is no record of a favorable suitability or fitness determination, Agency B will request a copy of the existing Tier 5 background investigation and will review it to make a suitability determination.

Example 2: An individual works for Agency A as a Program Analyst. The individual had a Tier 4 level background investigation for which Agency A made a favorable suitability determination. The individual has now been given a conditional offer for employment with Agency B in a Fiduciary Service Representative position. Agency B sees that the individual has a Tier 4 level background investigation, which is sufficient for the new position. Agency B also sees that Agency A made a favorable suitability determination; however, the background

investigation record in the government-wide repository reflects the individual had financial issues. Given the financial duties of the new position, Agency B determines that a core duty determination² is warranted. Agency B must reciprocally accept the existing Tier 4 background investigation but will request a copy of it for review to determine whether the individual is suitable for the position with their agency.

With respect to break-in-service requirements, OPM is removing the 24-month break-in-service provision that applied to reciprocity (see current §§ 731.104(a)(5) and 731.202(d)). This requirement is replaced with a new process, established in the Federal Personnel Vetting Investigative Standards issued by the Suitability, Credentialing, and Security Executive Agents, which expands this window of time up to sixty months using a tiered, risk-based approach of graduated levels of investigation. Upon reentry, individuals will be enrolled into continuous vetting consistent with new requirements in § 731.106(d).

Finally, OPM updates requirements for "seasonal" positions to require a background investigation as addressed in § 731.106(c)(1). Seasonal employees, in accordance with 5 CFR 340.401(a), are permanent employees who are placed in a nonduty/nonpay status and recalled to duty in accordance with preestablished conditions of employment. Because of the permanent characteristics of the positions, they implicate different risks than temporary appointments.

An individual commented on the option for agencies to make a core duty determination, rather than reciprocally accept a prior favorable suitability or equivalent fitness determination. The commenter believes this option will require agencies to review the prior investigative record each time an individual changes positions and suggested instead that OPM consider stipulating a time period after which agencies would no longer need to consider the impact of past conduct, as indicated in a prior investigation, against the core duties of the new position. OPM does not agree with the commenter's interpretation. Agencies are not required to make a core duty determination each time an individual changes positions. Core duty

² An agency must consider the nature of the position in evaluating suitability or fitness if pertinent to a specific case. 5 CFR 731.202(c). This assessment, which considers the core duties of the position and the relevance of information discovered during an investigation, is called a "core duty determination."

determinations are only required when there is information in the individual's investigative record as reflected in the government-wide repository that shows the individual has engaged in conduct that may be incompatible with the core duties of the position to which the person is applying or transferring into. That prior conduct may make that person unsuitable or unfit for the new position, though they were suitable or fit for the current position. It would be inconsistent with the manner in which suitability should be assessed if OPM were to establish deadlines after which an agency may not consider how conduct may impact suitability or fitness for a new position. Take for example an individual moving into a law enforcement position where conduct of a criminal nature, even if dated, may be incompatible. While OPM is not making a change as a result of this comment, we acknowledge that enhancements to information technology systems allowing agencies more clarity regarding the nature of conduct contained within the investigation record would streamline and reduce processing times for agencies. Additionally, future system enhancements could avoid the need for agencies to request copies of prior files as is often required currently to make a new determination.

A labor union expressed support for the change to remove the 24-month break in service provision citing that investigations can be onerous and time-consuming for employees. The organization agreed that the change is a reasonable step towards minimizing that burden.

A Federal agency recommended that, as written, the proposed regulatory text requiring agencies to enroll individuals into continuous vetting when reentering service may not align with implementation guidance. Implementation guidance has not yet been made available for the full scope of this rule. OPM is revising the regulatory text in § 731.104(a)(2) for clarity by adding that agencies must request such checks as may be specified in implementing guidance and must enroll individuals re-entering service after a break in service into continuous vetting, consistent with the requirements in § 731.106(d). Additionally, OPM will continue to issue updated implementation guidance as continuous vetting is expanded to more populations.

Section 731.105 Authority To Take Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service

This section specifies OPM and agency authorities with respect to taking suitability actions. Changes from the current rule are for clarity and to address the additional circumstances under which OPM retains jurisdiction when the nature of the conduct would make an individual unsuitable to hold any covered position.

One commenter believed that, because the language in § 731.105(a)(1) was new (clarifying that suitability actions can be taken if an application is withdrawn, if an offer of employment is withdrawn, and if an appointed individual separates from employment), the authority to take suitability actions in these instances is also new. It is not. The authority to take suitability actions in these circumstances exists currently and updates to the regulation simply provide clarity and greater transparency on the situations when suitability actions can be taken. In regulatory changes made in 2008 (*see* 73 FR 20149), OPM revised the definition of "applicant" from "[a] person being considered for employment" to "a person who is being considered or has been considered for employment." In a notice explaining the regulatory changes, OPM stated "[s]uitability actions may be warranted for individuals who are not currently, but were previously, under consideration. For instance, if an individual provided fraudulent information in an attempt to obtain a Federal job, he or she might no longer be actively under consideration because the qualification requirements were not met. In such a case, it is in the best interests of the Government to refer the case to OPM for suitability adjudication." (*See* Federal Investigations Notice No. 09–06, available at <https://www.dcsa.mil/Portals/128/Documents/pv/GovHRSec/FINs/FY09/fin-09-06.pdf>.) The commenter also suggested that, by resigning from a position, the individual should be protected from a suitability action. However, if an individual who is undergoing a suitability review and whose suitability is in question has the job application or offer withdrawn or resigns or is terminated for reasons other than suitability, this will not prevent an agency or OPM from taking a suitability action, including the potential to impose a debarment so that the individual cannot serve in a position for a period of time. Imposing a debarment through the suitability action process not only stops an individual

from holding a covered position, it also offers a period of time for the individual to potentially rehabilitate from the concerning conduct that caused them to be deemed unsuitable, raising the possibility that they could be found suitable for a future position after the period of debarment has concluded. To improve clarity, OPM is adopting revised text at § 731.105(a)(1) to reflect the intent of the rule, which is to allow OPM or an agency to continue with an action that is in process. Specifically, we are revising "take" in the proposed rule to "complete" in this final rule.

At § 731.105(d), in addition to OPM having jurisdiction over material intentional falsification, OPM has added that only OPM is able to take a suitability action under part 731 against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202(b)(3), (7), or (8). As addressed further in the pertinent section of this final rule, OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7), (8), (9), or (10) and is instead retaining the current factors at § 731.202(b)(7) and (8). An individual commented that the proposed change to also retain jurisdiction over the (previously proposed) four distinct additional factors is unjustified as it seems to exist for the exclusive purpose of targeting ideological enemies. The commenter's concerns with the factors are moot now that OPM has decided not to proceed with those factors; but, with respect to the commenter's objection to OPM retaining suitability jurisdiction, OPM does not agree with the commenter's contention. OPM is assigned the authority to adjudicate suitability on behalf of the executive branch. Where OPM has determined that individual agencies are better positioned to make the suitability determination, OPM has delegated the responsibility to the respective agency head. However, where there is evidence of conduct that would make an individual unsuitable for any covered position, OPM retains jurisdiction as only OPM can impose a government-wide debarment.

Section 731.106 Designation of Public Trust Positions and Investigative Requirements

This section addresses requirements for agencies to designate position risk and sensitivity. OPM is adding a reference to 5 CFR part 1400, which is the complementary regulation, issued jointly by OPM and the Office of the Director of National Intelligence (ODNI), addressing position sensitivity designations. Additionally, OPM

clarifies the timing of initiating background investigations, which should occur prior to appointment. This is consistent with OPM's prior guidance for issuing personal identity verification credentials and with what is required for positions with a sensitivity designation, as specified in 5 CFR part 1400.

OPM is also moving the requirements regarding the timing of criminal and credit history collection from § 731.103 to this section by including the language that was published in the final rule to implement the Fair Chance to Compete for Jobs Act of 2019 (*see* 88 FR 60317). Finally, this section adds the requirement for continuous vetting for the low risk population and replaces periodic reinvestigations for the public trust population.

One commenter recommended that OPM should enhance training on position designation and provide additional guidance to agencies. The comment is outside the scope of the rule changes, but OPM will take the commenter's suggestion under consideration.

OPM received comments in support of and in opposition to continuous vetting. A labor union, in support of the change, acknowledged the importance of ensuring that the integrity and efficiency of the civil service is upheld but expressed concern with the current reinvestigation process, which they described as unnecessarily rigid and burdensome for employees.

The same labor union and another commenter urged OPM to consider the burden on employees, while two commenters opined that the nature and periodicity of the continuous vetting checks needs to be specified. One commenter expressed concern that the investigative service provider could determine the scope of the checks, causing the checks to be too intrusive. OPM acknowledges that, even with the shift to continuous vetting, individuals will be required to provide self-reported information and may be subject to interviews or inquiries as a result of information revealed via checks. OPM recognizes that the Privacy Act of 1974 requires collecting information, to the greatest extent practicable, from the individual and, accordingly, that there is a need to provide the individual with an opportunity to address issues an agency may determine to be adjudicatively relevant. OPM also agrees that the process should be designed in a way such that individuals undergoing vetting are not required to provide information or respond to requests unnecessarily. These individuals deserve transparency into the vetting

process in a way that will not jeopardize the nation's security. OPM and ODNI, in their respective roles as the Suitability and Security Executive Agents, establish the continuous vetting checks that are required, considering the positions' risk and sensitivity levels. The requirements specify the types of checks conducted along with the periodicity. Heads of agencies must follow policies and issuances by the Executive Agents, including investigative standards (*see* E.O. 13467, sec. 2.7, as amended) and all Federal personnel vetting conducted by the executive branch must comply with the standards established by the Executive Agents. Therefore, the mechanisms will be better understood and widely followed, resulting in consistent and standardized checks across the covered populations.

One commenter opined that, if periodic reinvestigations are replaced by continuous vetting, the initial check should only go back one year, while two commenters opined that individuals in positions designated as low risk should not be subject to continuous vetting or personnel vetting standards because they do not require security clearances, making it unfair for them to fall under the same scrutiny. Various commenters also expressed concern that the requirement is contrary to the Administration's position on second chance hiring, will result in less talent competing for Government positions, could cause difficulty keeping jobs, and is too invasive. An organization objected to the reduction in suitability and fitness review from an objective, five-year reassessment to a continuous review process on the basis that the current rule already permits this and that doing away with the five-year requirement could weaken agency security.

OPM agrees that the current rule permits checks for the public trust population at a higher periodicity if they take place at least once every five years but otherwise disagrees with these points. The requirement that individuals working for or on behalf of the Government be subject to some level of vetting dates back several decades. More recently, since 2008, under the Final Credentialing Standards for Issuing Personal Identity Verification Cards under Homeland Security Presidential Directive 12, a Tier 1 or equivalent investigation has been required to be granted a personal identity verification (PIV) credential. Investigative source and coverage requirements for full background investigations are established commensurate with the position risk and sensitivity designations and the

same will be true with continuous vetting requirements. The President, by Executive order, established the requirement for continuous vetting for covered individuals, and therefore, OPM is implementing that requirement via this rule. OPM has revised the regulatory text to state that checks must be conducted at regular intervals based on the type of check and with consideration of position risk and sensitivity. These provisions were in the proposed regulatory text but are reorganized to clarify the agency requirements. Similarly, OPM has made minor changes to the examples of public trust positions in the regulatory text to improve readability.

Another commenter raised questions about the authorities that agencies may consider when actionable information is returned as the result of continuous vetting checks. As has been the case with periodic reinvestigations, agencies will consider the substantive standards in § 731.202 when evaluating the results. A person's employment status, however, will determine the applicable agency authority and procedures to be followed in any action taken based upon the results. In many instances, based upon the time on the job and/or the conduct occurring post appointment, a suitability action under part 731 will not be applicable. Nonetheless, conduct that surfaces could be the basis for an adverse action under 5 CFR part 752. Whether to propose or take an adverse action based on results from continuous vetting checks is a matter within the discretion of the employing agency. How the results of continuous vetting may be addressed when a favorable determination cannot be made is not different from how agencies currently manage the results of periodic reinvestigations.

A commenter expressed concern with the language in the revised § 731.106(d)(1) specifying that individuals may only be subject to continuous vetting if they have signed an authorization for release of information permitting a disclosure for continuous vetting purposes. The commenter is concerned the continuous vetting requirement addressed in part 731 might be confused with other processes also referred to as continuous vetting where a release is not required. They asked that OPM replace the word "individual" to state more clearly to whom the continuous vetting requirements apply. Section 731.106(d)(1) addresses the continuous vetting requirements as being applicable to individuals occupying positions of *employment subject to investigation* and, under § 731.101, "employment

subject to investigation” generally includes an appointment to the competitive service or career Senior Executive Service, an appointment to the excepted service, employment as a contractor employee, or employment as a non-appropriated fund employee. Read as a whole, paragraph (d)(1) identifies the population to which continuous vetting and the corresponding requirements apply. In addition, the regulatory text explicitly states that continuous vetting may be conducted only after an individual has signed an authorization for release of information. Therefore, OPM is not making a change in response to this comment.

OPM is making a clarifying edit to § 731.106(g) with respect to the timing of credit history inquiries, consistent with OPM’s guidance since December 1, 2016 (81 FR 86555). For competitive service and career Senior Executive Service positions, agencies may not make specific inquiries concerning an applicant’s credit background unless the hiring agency has made a conditional offer of employment to the applicant or has been granted an exception by OPM. (See 5 CFR 330.1300.) The requirement with respect to timing of collection of credit history does not apply to other positions, though agencies may determine it to be a best practice.

Section 731.201 Standard

Section 731.201 has long provided the standard for protecting the integrity and promoting the efficiency of the service. This final rule extends the standard to fitness determinations.

OPM received comments from two individuals. One interpreted the change making the standard applicable to fitness determinations as suggesting that agencies may use part 752 procedures to take a removal action. The intent of the section, however, is to establish that, like suitability, fitness determinations must be based on the degree of impact an individual’s character or conduct may have on the integrity and efficiency of the service. As we explained in the response to comments regarding § 731.106 and also addressed in the regulation at § 731.105(e), an agency has discretion to take adverse actions against individuals under authorities other than part 731, as appropriate and applicable. For populations subject to assessment of fitness, rather than suitability, OPM does not establish in part 731 procedures by which the agency may take an action based upon an unfavorable fitness determination.

The other commenter suggested the standard is subject to interpretation by hiring officials and could lead to

prohibited personnel practices, discrimination, civil rights violations, and potential legal action. The commenter asked OPM to develop a specific definition for suitability and fitness that applies to all agencies. OPM agrees that one suitability and fitness standard that applies to all agencies, to the extent feasible, is desirable. To that end, the standard that a suitability action “will protect the integrity or promote the efficiency of the service” has been in place since 2000 when it was last updated to add the phrase “protect the integrity . . . of the service.” In addition to considering the risk to an agency’s accomplishment of its duties or responsibilities, or potential interference or prevention of effective service in the position, an important facet of the standard for suitability is the integrity of the merit system and fair and open competitions for positions. The standard, now applicable to fitness determinations, is consistent with the suitability standards to the extent practicable in accordance with E.O. 13467, as amended.

Section 731.202 Criteria for Making Suitability and Fitness Determinations

This section establishes the suitability and fitness factors and additional considerations that collectively, and in consideration of the standard set forth in § 731.201, are used by agencies to determine if an individual is suitable or fit.

OPM received comments on this section from one Federal agency, five organizations, one labor union, and numerous individuals. Comments were in support of and in opposition to the proposed changes. Some comments were general to the section while others related to specific factors. The general comments are summarized first. Comments on specific factors are discussed next.

One individual opposed the application of the minimum standards of fitness to contractor employees. The individual stated that, because contractors are owners, members, or non-federal employees conducting their personal matters inside private businesses, the invasion of privacy and other rights is especially damaging and an overreach in comparison to the factors that had existed in part 302. OPM disagrees but offers a clarification. First, Government contractors are not “conducting their personal matters inside private businesses.” The very reason that a contractor employee needs to be vetted is because they are working for or on behalf of the Federal Government. Second, the President directed that contractor employee

fitness be subject to the same vetting requirements (e.g., position designation requirements; investigative standards, policies, and procedures; reciprocity) as civil service employees as prescribed by OPM. (See E.O. 13488, as amended.) Further, OPM notes that this is not a new requirement—contractors have been covered by E.O. 13488 since it was issued in 2009. Under this Executive Order, agency heads were required to take OPM guidance into account when considering if adjudicative criteria were equivalent for the purposes of making a reciprocally acceptable determination. Contractor employees have also been subject to the same investigative requirements as Federal employees since 2012. This was the result of a decision by Security, Suitability, and Credentialing Performance Accountability Council, as authorized by E.O. 13467. Finally, OPM notes that the additional authority given to OPM by the President to establish the minimum standards of fitness relates to the excepted service. (See E.O. 13764, sec. 2(c), amending E.O. 13488, sec. 3(a).) As has been the case since 2009, agency heads retain the discretion to establish adjudicative criteria for determining fitness to perform work as a contractor employee but with due regard to the regulations and guidance prescribed by OPM for the civil service and directives of the Office of Management and Budget.

A commenter suggested adding a factor covering emotional, mental, and personality disorders. They suggested that an individual’s mental health may have the propensity to affect their conduct and should be a factor for suitability or fitness as is done with national security determinations. Further, they pointed to medical qualification assessments that may be available to agencies for civil service positions, but not for contractors, as a basis for adding mental health concerns as a factor in the fitness determination process. OPM disagrees. Suitability and fitness determinations are decisions on whether an individual’s past conduct and actions may introduce risk to an agency’s mission or are contrary to the integrity required of individuals working for or on behalf of the Government. Additionally, the medical qualification determination process is addressed in 5 CFR part 339 and, therefore, is outside the scope of this rulemaking.

Multiple individuals asked OPM to reconsider changes to the factors, stating they are inappropriate, vague, overly broad and open to personal interpretation which could lead to bias or discrimination. Several of these

commenters suggested the proposed changes are illegal and would violate constitutional rights. A few commenters suggested that individuals should be hired based upon their qualifications without consideration of the types of conduct which the criteria address. OPM generally disagrees that any of the proposed factors give OPM or agencies the ability or authority to consider information in a way that is unconstitutional; however, OPM is not moving forward with some of the proposed changes. These changes are discussed as part of the discussion of each factor in the following sections. Further, OPM agrees that the process for assessing qualifications of applicants is essential, though separate from the process of vetting individuals, such as for suitability or fitness. In 5 U.S.C. chapter 73, Congress authorizes the President to prescribe regulations for the conduct of employees in the executive branch and, in chapter 33, authorizes the President to prescribe regulations for admission into the civil service that will best promote the efficiency of the service and to ascertain the fitness of applicants for employment sought. As such, via the Civil Service Rules, the President has made OPM responsible for establishing qualification standards and, separately, standards of suitability and fitness.

Evaluating whether an individual is suitable or fit to work for the Federal Government (either directly or indirectly as a contractor employee) often occurs after a background investigation. Portions of that investigation are conducted by gathering information directly from the individual via personnel vetting forms and, in some cases, personal interviews. Additional information is gathered from other sources.

Once the background investigation is complete, an adjudicator evaluates the information obtained against the factors. Only conduct falling within a factor may be the basis for finding one unsuitable or unfit. The adjudicator, through application of pertinent additional consideration, will determine whether the individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

Factor 4—Dishonest Conduct

OPM proposed to split the existing factor regarding “criminal and dishonest conduct” into two separate factors to make it clear that dishonest conduct need not be criminal to be relevant to a determination of suitability or fitness. OPM is adopting “dishonest conduct” as Factor 4.

A Federal agency noted that financial concerns can be easily overlooked under the criteria for “dishonest conduct.” That Federal agency acknowledged that financial irresponsibility may be a suitability issue falling under the dishonest conduct factor but suggested adding a factor specifically to address intentional disregard for debt in finances. The agency expressed the view that adding a factor would provide better clarity as the agency recognized that, to be a basis for unsuitability, an agency must establish financial irresponsibility demonstrated by evidence of the individual deliberately accumulating debt of a significant nature and/or intentionally disregarding those debts. OPM agrees that an important aspect of establishing financial irresponsibility as a suitability or fitness concern is the requirement to have evidence of the dishonest actions by the individuals. However, OPM believes that the current factor of “dishonest conduct” sufficiently captures this intentional disregard. Therefore, the suggestion to add another factor, or to elaborate on the existing, is not adopted.

Factor 5—Excessive Alcohol Use, Without Evidence of Rehabilitation, of a Nature and Duration That Suggests the Applicant or Appointee Would Be Prevented From Performing the Duties of the Position in Question, or Would Constitute a Direct Threat to the Property or Safety of the Applicant, Appointee, or Others

OPM proposed to change “alcohol abuse” to “excessive alcohol use” to capture the intent that the relevance to suitability and fitness is the need to account for an individual's problematic misuse of alcohol over a period of time. As OPM described in the proposed rule, excessive alcohol use may suggest that the individual would be prevented from performing the duties of the position or would constitute a direct threat to the property or safety of themselves or others as a result. OPM also proposed to remove the requirement that rehabilitation be “substantial” to align the suitability and fitness factors.

A labor union agreed with the change to this factor as being more representative of the concern of accounting for an individual's problematic misuse of alcohol, over time. The labor union also agreed with not requiring evidence that rehabilitation be substantial. An individual, who also expressed support for the change, asked OPM to provide additional guidance or examples for identifying and distinguishing conduct that may fall within this factor as well

as what constitutes rehabilitation. The individual also asked that OPM emphasize the importance of following other laws which offer protections from discrimination based upon past alcohol use, such as the Americans with Disabilities Act.

OPM agrees and will continue to provide guidance on this factor via supplemental issuances to agencies. Though outside the scope of this rulemaking, OPM also agrees that agency personnel involved in the hiring process must be familiar with and abide by laws and requirements meant to protect the rights of job applicants.

Factor 6—Illegal Use of Narcotics, Drugs, or Other Controlled Substances, Without Evidence of Rehabilitation

OPM proposed to remove the requirement for evidence of “substantial” rehabilitation to provide consistency between Factors 5 and 6. A labor union and the individual commenting on Factor 5 in support of the change also commented on Factor 6. The labor union commended the changes to strike the requirement for evidence of rehabilitation to be substantial while the individual expressed support but asked OPM to provide additional guidance.

Another individual suggested striking Factor 6, amend it to not apply to marijuana, or modify Factor 5 to focus on excess use of marijuana because of shifts in state laws regarding marijuana usage. OPM is not adopting this change. Factor 6 may be used by agencies to assess an individual's illegal use of several substances, not only marijuana. Also, despite changes to state laws, marijuana continues to be classified as a controlled substance under the Controlled Substances Act (21 U.S.C. 802(16)). But as is the case with any of the suitability factors, agencies and OPM must apply additional considerations, as pertinent, to assess the potential for the individual, based upon their conduct, to negatively impact the integrity and efficiency of the service. Marijuana use, alone, is not a basis for automatically finding one unsuitable or unfit. Instead, the agency or OPM must demonstrate how, considering the nature of the position, the past usage will have negative impact. This is the case with any illegal use of drugs. Recognizing that past marijuana usage may factor into the suitability determination of job applicants who are well qualified, OPM has issued guidance³ for agencies on

³ Available at <https://www.chcoc.gov/content/assessing-suitabilityfitness-applicants-or-appointees-basis-marijuana-use-maintaining-drug>.

how marijuana use may or may not adversely affect the integrity and efficiency of the service, thereby impacting an individual's suitability or fitness for a position. Adjudicators will consider the person holistically, evaluating any impact to the integrity and efficiency of the service on a case-by-case basis.

Comments Applicable to Proposed Factors 7, 8, 9, and 10

OPM proposed to replace the existing Factor 7 with four distinct factors. Most of the comments received regarding OPM's proposed changes to the suitability factors were on these proposed changes. Some commenters, including multiple organizations, expressed general opposition to the changes, asking OPM to leave the existing Factor 7 unchanged, while others expressed specific concerns. Several commenters suggested that, without a stricter delineation of allowable or disqualifying conduct, the factors may be misused and could lead to findings of unsuitability for actions such as membership in organizations or movements that peacefully seek changes to our Nation's current laws and policies. The commenters offered other examples of conduct that they posited could lead to findings of unsuitability under the revised factors such as protesting at school board meetings or counseling a pregnant woman on her options. Finally, the commenters suggested the rule does not include any prohibition about applying the factors in a way that circumscribes an individual's personal liberties and recommended that OPM include an assertion that the factors address conduct not protected by the First Amendment. OPM does not agree with the commenters' assessment of how the factors could be applied or with the examples offered. As OPM explained in the proposed rule, the four new factors were intended to address conduct that has a clear nexus to the integrity and efficiency of the civil service, that poses significant insider threat risks to Federal agencies and the public and also is not protected by the First Amendment. (88 FR 6192, 6199.) OPM acknowledges the commenters' concerns regarding clarity. OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7), (8), (9), or (10) and is instead retaining at § 731.202(b)(7) the current factor, Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.

Proposed Factor 7—Knowing Engagement in an Act or Activity With the Purpose of Overthrowing Federal, State, Local, or Tribal Government

OPM is not moving forward with its proposed changes to Factor 7 and is retaining the existing provision at 5 CFR 731.202(b)(7). Two individuals and two organizations supported this factor as was proposed, but not Factors 8, 9, and 10 as were proposed. A Federal agency asked OPM to strike "knowing" to avoid agencies having to establish evidence of the individual's thoughts and intentions and eliminate the risk of not being able to establish conduct if the individual claims to have not acted knowingly. OPM acknowledges that direct evidence of knowledge may not be readily available thus requiring circumstantial evidence. But requiring evidence that the individual participated in an act or activity with the purpose of overthrowing the Government knowingly is critical if the conduct is to be considered as a basis for finding an individual unsuitable or unfit. Requiring this element to establish the Factor helps demonstrate that the individual understood that the conduct was wrongful and better avoids scenarios where an individual is found unsuitable or unfit solely because they were in the wrong place at the wrong time or were misled about the purpose or intent of an event.

Two organizations and an individual questioned the removal of the words "by force" from § 731.202(b)(7) and recommended re-inserting it for clarity. As discussed, OPM is not moving forward with its proposed changes and will retain the existing factor.

Proposed Factor (8)—An Act of Force, Violence, Intimidation, or Coercion With the Purpose of Denying Another Individual the Free Exercise of Rights Under the U.S. Constitution or any State Constitution

A Federal agency suggested revising the factor to include attempted acts, and two individuals requested that the factor be removed because it could be used to discriminate against people who hold different views than those in government. Another commenter, who suggested the existing provision at 5 CFR 731.202(b)(7) was sufficient, suggested the language in this factor is unclear, overreaches OPM's authority, and could infringe on individuals' rights. The commenter suggested that, with this factor, OPM or an agency could find someone unsuitable due to "praying outside of an abortion clinic or marching in a Black Lives Matter protest

march." An organization suggested the factor parrots the "Klan Act" which would already be covered by the criminal conduct factor.

OPM disagrees that the factor, as was proposed, could be used by an agency to find someone unsuitable for activity protected by the First Amendment. OPM agrees that conduct covered by the proposed factor includes conduct covered by another factor as applicable to the circumstances, such as criminal conduct (*see* 5 CFR 731.202(b)(2)). Therefore, OPM is not implementing this proposed factor in this final rule.

Proposed Factor (9)—Attempting To Indoctrinate Another or To Incite Another to Action in Furtherance of an Illegal Act

One individual requested that OPM remove this proposed factor because of its potential breadth—positing it could result in finding an individual unsuitable who sought to teach or influence another person in any context whatsoever. The individual commented that the language is vague and indoctrination must be defined. The commenter also suggested that this factor may be used to find unsuitable anyone who has ever attempted to persuade another person to lobby legislators to change laws and asked if even home schooling or holding political rights training sessions would be considered indoctrination. Two organizations commented that the factor is ambiguous with one asking if it makes it permissible for an agency to ask about all attempts to indoctrinate which could include serving as a youth group leader or posting about the pandemic on social media and another questioning whether indoctrination, a prolonged process, could lead to conduct in furtherance of an illegal act. OPM does not agree that the language is vague nor that "indoctrinate" needs further definition. Indoctrinate when used as a verb is generally understood to mean teaching another the ideas, opinions, or beliefs of a particular group. Under this factor, the attempt to indoctrinate or incite another must be done in furtherance of an illegal act. It is this latter point regarding illegality that sufficiently narrows the factor to answer commenters' various questions and hypotheticals and would be the relevant inquiry to be addressed in determining an individual's suitability or fitness. As discussed, however, OPM is not implementing this proposed factor in this final rule.

Proposed Factor (10)—Active Membership or Leadership in a Group With Knowledge of its Unlawful Aim, or Participation in Such a Group With Specific Intent To Further Its Unlawful Aim

A Federal agency suggested removing the element that the individual have knowledge of a group's unlawful aim. Three individuals suggested that "unlawful aim" will be difficult to prove and therefore, difficult to enforce. Two organizations suggested that the wording of the factor make it open to interpretation.

Similar to OPM's response relating to suggestions about Factor 7, this element helps demonstrate that the individual understood that the aim was wrongful and should be included to better avoid scenarios where being misled about a group's aim causes an individual to be found unsuitable or unfit.

Further, suitability and fitness determinations are based upon evidence of an individual's character or conduct and when that evidence supports a conclusion that the character or conduct will have an adverse impact on the integrity and efficiency of the service, OPM or the agency must not make a favorable suitability or fitness determination. The point of this factor was not to target individuals for holding views that may be in conflict with those of officials making adjudicative decisions or to find individuals unsuitable or unfit because of affiliations they may have with groups of others who share their opinions, for example. As specified in the text of the proposed factor, the factor required an unlawful aim or participation specifically for the purpose of furthering the unlawful aim. It is the knowing affiliation or intent to further illegal activities that raise the potential suitability or fitness concern. OPM agrees, though, that the nature of character or conduct that this tailored factor addresses, could be better addressed under another factor as applicable to the circumstances, such as criminal conduct (*see* 5 CFR 731.202(b)(2)). Therefore, OPM is not implementing this proposed factor in this final rule.

Factor (12)—Violent Conduct

OPM also proposed to add a factor for violent behavior to account for behavior that does not squarely fall under another factor, such as violent behavior that occurs outside of the workplace and may not be considered criminal or dishonest in nature. For the purposes of this regulation, the term "violent" means using or involving physical force

intended to hurt, damage, or kill someone or something. (88 FR 6192, 6200.)

For example, in certain jurisdictions, protection orders may be filed against individuals for sexual or physical violence regardless of whether the violent conduct constitutes a criminal act under the law of the relevant jurisdiction. The process for securing the protection order may be a civil matter. The addition of this factor gives agencies and OPM a way to consider, in such a scenario, if the individual's conduct is a basis for finding the individual to be unsuitable or unfit.

One individual expressed support for the factor but asked that the scope be limited to avoid application against, for example, those who participate in competitive boxing or recreational hunting as those activities could arguably fit with the definition of violent conduct, because they involve physical force intended to hurt, damage, or kill someone or something. Two commenters opposed to this factor expressed the same concern that the factor was vague and potentially covered those who use deadly force in self-defense, such as abused spouses or law enforcement officers. OPM appreciates these comments as another opportunity to elaborate on how suitability or fitness determinations are made.

When evaluating information to consider if it may warrant an assessment for suitability or fitness, OPM or the agency must first consider whether the information falls within one of the factors. If so, OPM or the agency will consider the impact on the integrity and efficiency of the service through application of the additional considerations. For example, while the act of hunting wild game could technically fall within the definition of conduct that is "violent" as it involves physical force intended to kill something, lawful hunting would not have an adverse impact on the integrity and the efficiency of the service. First, an individual would not be required to report legal hunting activities during the course of a background investigation. If it were reported, such as by a co-worker, it is unlikely to be identified as a potential issue in the background investigation. Even in the unlikely event an adjudicator were to make the initial consideration that legal hunting could cause the individual to be unsuitable or unfit, the subsequent process of relating the conduct to the factor, assessing the applicable additional considerations under 5 CFR 731.202(c) (such as the nature and seriousness of the conduct and the circumstances surrounding the

conduct), and ultimately assessing whether the conduct negatively impacts the integrity and efficiency of the service would yield a favorable determination. In sum, when evaluating the nature of the conduct or the circumstances surrounding it, OPM or the agency would conclude that it is not adjudicatively relevant.

As another example, while deadly force in self-defense could be considered violent conduct, in the scenarios offered by the commenter, the surrounding circumstances would also be considered under § 731.202(c)(3) to determine if the conduct was mitigated, thus not leading to a finding of unsuitability.

As discussed previously, OPM is retaining the existing Factor 7 without change. OPM is also retaining the existing Factor 8 without change. (Although OPM had proposed to renumber the factors, OPM did not propose any substantive changes to the existing Factor 8.) Accordingly, OPM is adopting this proposed Factor 12 as new Factor 9 at § 731.202(b)(9).

Section 731.203 Suitability Actions by OPM and Other Agencies for the Competitive Service or Career Senior Executive Service

OPM proposed to revise § 731.203 to limit the applicability of suitability actions to only individuals in the competitive service, in the excepted service that can noncompetitively convert to the competitive service, or the career Senior Executive Service. The change was necessary due to the implementation of the minimum standards of fitness for the excepted service.

OPM did not receive any comments on this section. OPM is adopting its proposed changes with several modifications as discussed in more detail in the section regarding § 731.101. Specifically, OPM has moved the list of actions from the proposed § 731.203 into the definition of a suitability action in § 731.101. OPM also moved the limitation that a suitability action may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of the part from the proposed definition of a suitability action to § 731.203.

Section 731.204 Debarment by OPM in Cases Involving the Competitive Service and Career Senior Executive Service

This section explains OPM's ability to impose debarment, including concurrent periods of debarment, when new conduct arises while an individual is under debarment. OPM also proposed to revise the text to explain that this

provision is limited to individuals in or seeking appointment to the competitive service or the career Senior Executive Service.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

Section 731.205 Debarment by Agencies in Cases Involving the Competitive Service and Career Senior Executive Service

OPM proposed to revise the text to explain that this provision is limited to individuals in or seeking appointment to the competitive service or the career Senior Executive Service.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

Section 731.206 Reporting Requirements for Investigations and Suitability and Fitness Determinations

This section specifies reporting requirements for agencies into the government-wide central repository. OPM proposed to revise this section to include references to continuous vetting.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

Sections 731.302 and 731.402 Notice of Proposed Action

Sections 731.302 and 731.402 govern the issuance of a notice of proposed action in a suitability action by OPM or an agency, respectively. OPM proposed to amend these sections to also permit delivery of correspondence by secure email.

OPM received no comments on these sections and sees no reason to amend the proposal. OPM is adopting its proposed changes.

Subpart Headings

OPM proposed to revise the headings of several subparts of part 731 to indicate that those provisions only apply to individuals in or applying to the competitive service, the excepted service that may noncompetitively convert to the competitive service, or career Senior Executive Service. OPM received no comments on those amendments, sees no reason to amend the proposal, and is adopting its proposed changes.

Subpart F—Savings Provision

OPM proposed to eliminate this subpart as obsolete. OPM received no comments on this subpart, sees no

reason to amend the proposal, and is removing the subpart in this final rule.

Expected Impact of This Final Rule

1. Statement of Need

OPM is issuing this final rule to establish standards and processes by which OPM and agencies efficiently and appropriately vet individuals to assess risk to the integrity and efficiency of the service. It implements several changes required by E.O. 13764. First, per the change to the Civil Service Rules expanding OPM's responsibilities for fitness, it sets the minimum standards of fitness for the excepted service. This change results in the same adjudicative factors and additional considerations being applicable across much of the civil service. Consistent with amendments to E.O.s 13467 and 13488, the changes also align position designation requirements, investigative standards, and reciprocity rules between the civil service, contractor employees, and nonappropriated funds workforces. Now, agencies will use the same system for designating position risk and sensitivity, background investigations will be conducted using the same standards, and the same rules for determining whether reciprocal acceptance of prior background investigations and suitability or fitness determinations will be applied across the workforce.

As required by E.O. 13467, as amended, the rule also implements continuous vetting for the low risk and public trust populations.

2. Regulatory Alternatives

OPM must comply with Executive order directions, as previously described, to establish minimum standards of fitness based on character and conduct for appointment to positions in the excepted service of the executive branch that are, to the extent practicable, consistent with the standards for suitability. OPM is likewise responsible for establishing in its regulations that excepted service employee, nonappropriated fund Department of Defense (DoD) employee, and contractor employee fitness is subject to enterprise position designation requirements, investigative standards, and reciprocity requirements. Similarly, continuous vetting for all populations subject to personnel vetting has been directed by Executive order to sustain an enhanced risk-management approach.

In implementing this requirement, OPM considered the cost to agencies of establishing policies and procedures to conform to OPM's regulation. There will

be costs associated with implementing aspects of the policies required by the E.O.s; however, there are also efficiencies resulting from policy implementation. The expected impact of aligned investigative and adjudicative standards is the increased application of reciprocity, which eliminates the need for a new investigation or new adjudication. Similarly, individuals enrolled in continuous vetting will not require periodic reinvestigations, nor will they require a repeat of initial vetting, as they have to date, when moving from one position level to a higher level or when returning to a vetted position after a break in service.

Still, agencies with a greater proportion of individuals in low risk positions will incur costs as a result of the requirement for continuous vetting of this population when periodic reinvestigations were not previously required. As noted in the section 4. of this preamble, these costs may be offset by cost savings realized as agencies implement continuous vetting across all populations, particularly for agencies with large populations of individuals in high risk positions. However, not all agencies will realize cost savings. While there is no alternative to the policy requirement, agencies may realize some cost avoidance in the near term through phased implementation of continuous vetting for low risk populations. As such, implementation of the required continuous vetting checks for enrolled individuals is eased through a phased introduction of the required checks over time.

OPM considered not only the cost to agencies but the burden of preparing for enrollment of the low risk and public trust populations into continuous vetting. Recognizing that agencies must validate the need of their current workforce to be enrolled into continuous vetting in accordance with this new requirement, a process that could be time intensive in particular for the low risk population not previously subject to a reinvestigation requirement, we established a phased approach. Beginning with the public trust population, agencies, working with their investigative service providers, will gradually enroll their workforces into the new continuous vetting service. This iterative approach avoids agency vetting professionals from being faced with enrolling their covered workforce all at the same time and adjudicating any resulting hits from continuous vetting checks. This enables agencies to adopt the necessary policy and procedural infrastructure needed to execute requirements.

3. Impact

The rule promotes a more trusted workforce to serve the American public through an enhanced risk management approach for personnel vetting, one which advances the mobility of the workforce to support agency mission needs. Establishing a continuous vetting approach for all populations subject to personnel vetting provides a framework for modernized investigative and adjudicative processes that leverage available, appropriate technology to replace costly and time-consuming labor-intensive processes that have burdened efforts by agencies to acquire top talent in a timely manner. Further, the new model assists agencies in managing and reducing risk by providing more timely information than was possible under the prior investigative model.

OPM is implementing these requirements in the least burdensome way possible while still effectuating what the President set forth in Executive orders. Individuals subject to continuous vetting are those populations already subject to Federal personnel vetting investigative standards, including contractor employees with long term access to Federal facilities and information systems. Even prior to recent Executive orders and policy requirements requiring personnel vetting investigations and determinations on contractors, the Federal Acquisition Regulation (FAR) Council published a final rule in November 2006, amending the FAR to require contracting officers to incorporate the requirement for contractors to comply with agency verification procedures—implementing HSPD–12, Office of Management and Budget (OMB) guidance M–05–24, and Federal Information Processing Standards Publication (FIPS PUB) number 201 when applicable to be performed under the contract. Aside from the new requirement for individuals in low risk positions to be continuously vetted, agencies and contractor employees requiring long term access to Federal facilities and information systems to support agencies should already be familiar with personnel vetting requirements.

This final rule provides greater consistency in vetting processes and, where possible, saves costs by reducing redundancy and duplication and modernizes processes for collecting information. By establishing minimum standards of fitness for the excepted service that align with OPM's suitability standards, there is a greater likelihood that individuals will be assessed using

consistent standards, thus providing a stronger basis for application of reciprocity when moving between positions. The impact to agencies' personnel vetting programs is reduced when they can reciprocally apply prior determinations rather than making new determinations or requesting new investigations.

OPM anticipates this final rule will reduce the burden on agencies as they transition from a full reinvestigation of every public trust employee every five years to reinvestigation only as needed and to continuous vetting that relies extensively on automated sources. Although agencies will also need to enroll their low risk population, which is not currently subject to reinvestigation requirements, into continuous vetting, the cost impacts may be offset by savings associated with the move from periodic reinvestigations to continuous vetting for their sensitive and non-sensitive public trust populations. Enrollment of the non-sensitive public trust population will occur throughout fiscal year 2025. Enrollment of the low risk population is projected to begin in fiscal year 2027. Through a phased process, agencies are initiating their populations into continuous vetting and, eventually, individuals will be enrolled into continuous vetting at the onset of their initial background investigations. Further, since each individual's investigation will always be up to date through the continuous vetting approach, agencies will no longer need to await results of a new background investigation. Instead, agencies will be able to onboard individuals more quickly into new positions, while only having to request investigation necessary to cover any investigative gaps that may be due to breaks in service or changes in position risk and/or sensitivity.

One organization suggested OPM provide data demonstrating the number of Federal civil service employees who were delayed in transferring to another agency and the processing burden to agencies as a result. An individual suggested that more research into the benefit of the scope and frequency of vetting could be beneficial, especially in the case of suitability or fitness vetting, which the commenter opines is less studied and scrutinized than that of security vetting. The individual offered that there is little objective research to support that this degree of vetting is effective and that there is little discussion of the goals and objectives of conducting vetting to this extent. As is outlined at the onset of this rule, OPM is required by Executive order to

establish continuous vetting requirements for the non-sensitive public trust and low risk populations to standardize investigative activities across the civil service, contractor employee, and DoD nonappropriated funds populations. OPM is not adopting substantial changes to the applicability of reciprocity requirements that have been in place since 2009. Further, by way of this rule, OPM is not increasing the scope of vetting requirements, though the periodicity of post-appointment checks are changing for the non-sensitive public trust population. The Federal Personnel Vetting Core Doctrine,⁴ which defines the personnel vetting mission, its guiding principles, key supporting processes, and policy priorities, provides more explanation in support of the new approaches.

4. Costs

An organization asked for a cost-benefit analysis of the change from periodic reinvestigations to continuous vetting. The organization recognized that the current regulation already authorizes a continuous reassessment so long as it occurs at least every five years. The organization suggested reassessments that decrease in periodicity may result in a cost savings but could weaken agency security. The commenter did not express questions or concerns with the cost analysis that was included in the notice of proposed rulemaking published in January 2023 or with the explanation of anticipated benefits with the changes. Therefore, OPM adopts the economic assessment provided in the proposed rule with only two sets of changes. First, OPM updated pricing of products by the Defense Counterintelligence and Security Agency (DCSA), which was an estimate at the time the proposed rule was issued. Second, OPM also updated the cost analysis to use the 2024 pay rates.

This rule will affect the operations of most Federal agencies in the executive branch—ranging from cabinet-level departments to small independent agencies. To comply with the regulatory changes, affected agencies will need to review the rule and update their policies and procedures. For this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2024 for GS–14, step 5, from the Washington, DC, locality pay table (\$157,982 annual locality rate and \$75.70 hourly locality rate). We assume that the total dollar

⁴ 86 FR 2705 (January 13, 2021), available at <https://www.federalregister.gov/documents/2021/01/13/2021-00547/federal-personnel-vetting-core-doctrine>.

value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$151.40 per hour. We estimate that, in the first year following publication of the final rule, the effort to update policies and procedures will require an average of 250 hours of work by employees with an average hourly cost of \$151.40. This effort would result in estimated costs in the first year of implementation of about \$37,850 per agency, and about \$3,028,000 in total government-wide. In subsequent years, the costs of regulatory compliance associated with this rule will be folded into agencies' routine costs.

The ongoing administrative costs to agencies for continuous vetting enrollment of existing and new individuals working for or on behalf of the Government will vary depending on the makeup of each agency's populations with regard to their affected Federal and contract positions and the risk levels of those positions. As noted, agencies' populations of individuals subject to continuous vetting are those already subject to Federal personnel vetting investigative standards as described previously, including contractor employees with long term access to Federal facilities and information systems. The extent to which such individuals have previously been subject to periodic reinvestigation requirements depended on the nature of their access or duties. Those in national security sensitive positions have long been subject to periodic reinvestigation requirements and more recently to continuous vetting requirements. Those in non-sensitive public trust positions have been subject to periodic reinvestigations for suitability, as described previously. Each agency is responsible for assessing the risk level at the low, moderate, or high level for each position within their agency. Each agency is therefore best positioned to know the number of employees in positions at each level and the number of individuals associated with the personnel vetting requirements at each respective investigative tier. Each agency will have different numbers of positions at each risk level and the proportion of low, moderate, and high risk positions will vary. Consequently, the cost of continuous vetting for the low risk and public trust population will vary amongst the Federal agencies.⁵

⁵ Federal agencies are responsible for appropriate vetting of their personnel according to standards set by the Security and Suitability & Credentialing Executive Agents and pay for background investigations and continuous vetting checks on

To assist Federal agencies in budget development, DCSA released in August 2024 its 2025 and 2026 products and services billing rates⁶ including pricing for the initial continuous vetting capability for non-sensitive public trust positions. For fiscal year 2025, agencies can expect to pay a \$3.25 monthly subscription fee for active enrollees in non-sensitive, public trust continuous vetting. By comparison, DCSA's price for a standard service, non-sensitive, high risk public trust reinvestigation (Tier 4) in fiscal year (FY) 2025 is \$2,505, which equates to \$41.75 monthly over five years. Agencies utilizing continuous vetting in FY 2025 for their non-sensitive, high risk, public trust populations would avoid \$2,310 in personnel vetting costs over five years for each such position. The difference between reinvestigation costs and initial continuous vetting checks for nonsensitive moderate risk positions is not as significant; still, agencies would avoid \$180 in personnel vetting costs over five years for such positions given the FY 2025 cost of \$375 for each non-sensitive moderate risk public trust reinvestigation. While DCSA's pricing for FY 2025 and 2026 does not establish the cost of the continuous vetting product for the low risk population, it will not be more than \$39–\$40.20 per year which are the FY 2025 and FY 2026 costs for the continuous vetting products for the non-sensitive, public trust populations.⁷ Future costs for continuous vetting for the low risk population are not expected to rise to the cost of checks for the national security population, since checks on the low risk population will be much less extensive than those on the national security population.

An additional factor that agencies need to consider when assessing budget impacts of continuous vetting is the cost avoidance realized by the move from periodic reinvestigations to continuous vetting of their sensitive populations. To illustrate how the impacts to agency budgets will vary, the following examples are provided for a department that is comprised mainly of non-sensitive positions, the Department of Veterans Affairs (VA), and a department that is comprised mainly of sensitive positions, DoD. The VA has vastly more

contractor personnel as well as Federal appointees and employees.

⁶ Available at https://www.dcsa.mil/Portals/128/Documents/about/err/FIN_24-01_FY25_and_FY26_Billing-Rates.pdf.

⁷ DCSA has established the FY 2025 cost for the interim continuous vetting product for the non-sensitive public trust population at \$39 per year versus the full Trusted Workforce 2.0 product which is priced at \$90.

non-sensitive positions (approximately 513,400) than sensitive positions (approximately 9,000). The VA's positions are largely non-sensitive, low risk, with approximately 455,000 Federal and contractor personnel in low risk positions; 41,200 in non-sensitive, moderate risk, public trust positions; and 17,200 in non-sensitive, high risk, public trust positions. Under the current requirement to request a reinvestigation for public trust positions every five years and considering FY 2025 DCSA pricing, the VA should anticipate paying \$58,536,000 for non-sensitive, public trust reinvestigations over five years. With continuous vetting, the annual cost of enrolling the public trust population for fiscal year 2025 is \$2,277,600, or \$11,338,000 over five years, equating to \$47,198,000 in cost avoidance for the non-sensitive, moderate and high risk positions over the five-year cycle. For continuous vetting of the low risk population, at a cost of \$39 per low risk position per year, VA would expect to pay DCSA \$17,745,000 annually or \$88,725,000 over five years. For any sensitive positions the VA has, they may also recognize the cost savings between the periodic reinvestigation products and continuous vetting product for sensitive positions. The cost implications for enrollment of VA's 9,000 sensitive positions into continuous vetting could range from an additional cost of \$810,000 over five years to cost avoidance of \$29,286,000 depending on the proportion of noncritical sensitive positions (Tier 3) and critical sensitive/special sensitive positions (Tier 5). Thus, the total cost of the shift to continuous vetting for all of VA's populations subject to this requirement, using VA's anticipated payments to DCSA for these services, will depend on the makeup of VA's population. Compare this to DoD, which has a much higher sensitive population than non-sensitive with approximately 3.5 million individuals in sensitive positions and approximately 283,000 in non-sensitive positions. With approximately 3,000 non-sensitive, moderate risk positions and 560 non-sensitive, high risk positions, the DoD could plan to spend \$3,465,440 on periodic reinvestigations over five years for their non-sensitive public trust positions whereas continuous vetting would result in a total cost of \$1,602,000 and therefore result in \$1,863,440 in cost avoidance over that same period. The cost of enrolling DoD's 280,000 federal and contractor low risk positions at \$39 per year subject to the requirement would equate to an annual

cost of \$11,037,000 or \$55,185,000 over five years; however, this cost would be offset not only by the cost avoidance of \$1,863,440 for the non-sensitive, public trust population but also by the cost savings associated with the shift to continuous vetting from periodic reinvestigations for the sensitive population. Given that the DoD has approximately 3.5 million individuals in national security positions undergoing continuous vetting in lieu of periodic reinvestigations, the expected cost savings would be expected to offset the cost for enrollment of their low risk populations into continuous vetting.

5. Benefits

The standardization in vetting resulting from the changes in this rule will increase efficiency across the executive branch while allowing for faster identification of issues that may adversely affect trust determinations of individuals. Mobility of individuals is enhanced by reciprocal acceptance of investigations and adjudications thus allowing individuals to move more quickly between and within Federal agencies and Government contractors. Additionally, the revised rule enables a more efficient re-entry to Federal service.

With respect to continuous vetting, agencies may recognize a cost savings by using continuous vetting rather than the traditional reinvestigation product that is currently required for public trust positions at a minimum five-year periodicity, and the extent of the cost savings will vary depending on the proportion of their populations with regard to risk and sensitivity levels. Additionally, cost savings may be realized since continuous vetting provides that the vetting of enrolled individuals will always be up to date. This will result in further cost avoidance whenever an individual requires an upgrade of their vetting level or when an individual returns to a vetted position after a break in service. Agencies will be able to onboard individuals more quickly into new positions while requesting only the investigative elements necessary to cover any investigative gaps that may be due to changes in position risk and/or sensitivity. This cost avoidance will be borne out as agencies begin to implement the new Trusted Workforce 2.0 policies that leverage continuous vetting for risk management. On balance, while we anticipate there may be additional costs to agencies with much greater proportions of low risk positions than non-sensitive, public trust or national security positions, we do not believe that this rule will

substantially increase the ongoing costs to most agencies, and the benefits outweigh the costs in providing agencies greater opportunities for timely talent acquisition and reduced risk to people, property, information systems, and mission through timely delivery of relevant information.

Severability

If any of the provisions of this final rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances, unless such holding is that the provision is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof. This final rule revises vetting requirements by broadening their applicability, establishing continuous vetting, and standardizing the way in which suitability and fitness determinations are made. As discussed elsewhere in this rule, there are various authorities for these provisions. The provisions of this final rule apply to different populations such as the competitive service, the excepted service, and contractor employees. Should provisions related to one of these populations be held to be invalid we believe that most of the provisions should be severable and would not be impacted. Similarly, many of the operational requirements have no bearing on other provisions and are severable. For example, a holding that a suitability or fitness factor is invalid should not impact other provisions related to how these decisions are made. In enforcing the provisions of this rule, OPM will comply with all applicable legal requirements.

Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866, 13563, and 14094, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with effects of \$200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a

“significant regulatory action” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

Regulatory Flexibility Act

The Acting Director of the OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$183 million. This regulation will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB Control Number.

Depending on the population, currently suitability and vetting information is collected through the following OMB Control Numbers.

- 3206–0261 (Standard Form 85, Questionnaire for Non-Sensitive Positions)
- 3206–0258 (Standard Form 85P, Questionnaire for Public Trust Positions and SF 85P–S, (Supplemental Questionnaire for Selected Positions))
- 3206–0005 (SF 86, Questionnaire for National Security Positions)

Additional information regarding these collections of information—including all current supporting materials—can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number. Data gathered through the information collection falls under the systems of record notice Personnel Vetting Records System, DUSDI 02–DOD (83 FR 52420).

In a parallel effort to this rule, and as part of its work with the PAC, OPM proposed a new information collection and renewal cycle, Personnel Vetting Questionnaire (PVQ), to streamline the existing information collections commensurate with on-going efforts to improve personnel vetting processes and the experience of individuals undergoing personnel vetting. OMB approved the PVQ information collection under control number 3206–0279 on November 15, 2023. See https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-3206-005. Once the new collection is implemented, OPM plans to discontinue the current information collections.

Some individuals or populations may be required to complete an updated questionnaire in order for continuous vetting to be conducted. In the notice of proposed rulemaking published in January 2023, OPM sought public comment on the cost and burden implications for this potential new population. However, no comments were received other than what has been addressed elsewhere within this rule.

List of Subjects in 5 CFR Parts 302 and 731

Administrative practices and procedure, Authority delegations (Government agencies), Government contracts, Government employees, Investigations.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 302 and 731 as follows:

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

- 1. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151. E.O. 10577, 19 FR 7521, 3 CFR 1954–1958 Comp., p. 218. Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95–454, 92 Stat. 1111. Sec. 302.501 also issued under 5 U.S.C. ch. 77. Sec. 302.107 also issued under 5 U.S.C. 9201–9206; sec. 1122(b)(1), Pub. L. 116–92, 133 Stat. 1607. Secs. 302.108 and 302.203 also issued under E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243.

- 2. Amend § 302.107 by revising the section heading to read as follows:

§ 302.107 Suitability and fitness inquiries regarding criminal history.

- 3. Add § 302.108 to subpart A to read as follows:

§ 302.108 Determinations of fitness for employment in an Excepted Service position.

(a) An agency must make fitness determinations for excepted service positions in accordance with the applicable requirements of part 731 of this chapter.

(b) An agency must record its reasons for making fitness determinations under part 731 of this chapter and must furnish a copy of those reasons to an applicant upon their request.

- 4. Revise § 302.203 to read as follows:

§ 302.203 Standard and criteria for determining fitness for employment in an Excepted Service position.

(a) The minimum standard and criteria for determining fitness for employment based on character and conduct are prescribed in part 731, subpart B, of this chapter.

(b) Agencies may prescribe additional factors to protect the integrity and promote the efficiency of the service when job-related and consistent with business necessity.

PART 731—SUITABILITY AND FITNESS

- 5. The authority citation for part 731 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 7301, E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p.

189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp. p. 243. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. 5 CFR parts 1, 2, 5, and 6.

- 6. Revise the heading for part 731 to read as set forth above.

- 7. Revise subpart A to read as follows:

Subpart A—Scope

Sec.

731.101 Purpose.

731.102 Implementation.

731.103 Delegation to agencies for the competitive service and career Senior Executive Service.

731.104 Investigation and reciprocity requirements.

731.105 Authority to take suitability actions in cases involving the competitive service and career Senior Executive Service.

731.106 Designation of public trust positions and investigative requirements.

§ 731.101 Purpose.

(a) The following definitions apply for the purposes of this part:

Applicant means an individual who is being considered or has been considered for employment in the competitive service or career Senior Executive Service.

Appointee means an individual who has entered on duty and is in the first year of employment in a competitive service or career Senior Executive Service position when it is employment subject to investigation. When the individual is serving a probationary or trial period, the individual's status as an appointee will extend through the end of the initial probationary/trial period, if longer than one year.

Competitive service or career Senior Executive Service, for the purposes of this part, refers to a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

Contractor employee means an individual who performs work for or on behalf of any agency under a contract and who, to perform the work specified under the contract, will require access to space, information, information technology systems, staff, or other assets of the Federal Government, and who could, by the nature of their access or duties, adversely affect the integrity or efficiency of the Government. Such contracts include but are not limited to: personal service contracts; contracts between any non-Federal entity and any agency; and subcontracts between any non-Federal entity and another non-Federal entity to perform work related

to the primary contract with the agency. The term contractor employee includes employees of a grantee of any agency or any other category of person who performs work for or on behalf of an agency but does not include a Federal employee.

Core duty means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission.

Days means calendar days unless otherwise noted in this part.

Employee means an individual who has completed the first year of an appointment in the competitive service or career Senior Executive Service when it is employment subject to investigation and is no longer serving the initial probation or trial period, if applicable. In the case of an appointee whose initial probation or trial period is for more than one year, the individual will be considered an employee at the completion of the initial probation or trial period.

Employment subject to investigation, except as described elsewhere in this part, includes an appointment to the competitive service or career Senior Executive Service, an appointment to the excepted service, employment as a contractor employee, or employment as a nonappropriated fund employee.

Excepted service means any position of the executive branch either excepted from the competitive service or which is not in the Senior Executive Service.

(1) For the purposes of this part, excepted service does not include:

(i) Any position in an element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent that the individual is not otherwise subject to OPM appointing authorities;

(ii) Any position where OPM is statutorily precluded from prescribing such standards; and

(iii) Any position when filled by political appointment.

(2) Senior Executive Service noncareer, limited term, and limited emergency appointments are not subject to suitability actions under this part.

(3) Excepted service does not mean any position excepted from the competitive service of the executive branch that could be noncompetitively converted to the competitive service.

Fitness is the level of character or conduct determined necessary for an individual to perform work for a Federal agency as an employee in the excepted service, as a contractor employee, or as a nonappropriated fund employee.

Fitness determination means a decision by an agency that an individual

has or does not have the required level of character and conduct necessary to perform work for a Federal agency as an excepted service employee. These determinations are based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

Material means, in reference to a statement, one that affects, or has a natural tendency to affect, or is capable of influencing, an official decision even if OPM or an agency does not rely upon it.

Nonappropriated fund employee means an employee paid from nonappropriated funds of an instrumentality of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces as described in 5 U.S.C. 2105.

Political appointment means an appointment by Presidential nomination for confirmation by the Senate, an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301 and 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

Suitability action means one or more of the following outcomes:

(1) Cancellation of eligibility;

(2) Removal;

(3) Cancellation of reinstatement eligibility; and

(4) Debarment.

Suitability determination means a decision by OPM or an agency with delegated authority that an individual is suitable or is not suitable for employment in the competitive service or career Senior Executive Service in the Federal Government or a specific Federal agency. A suitability determination is based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

(b) The purpose of this part is as follows:

(1) To establish investigation, continuous vetting, and reciprocity requirements for an appointment to a position in the competitive service and

excepted service and for career appointment in the Senior Executive Service. Contractor employee fitness and nonappropriated fund employee fitness, as addressed in sections 3(b) and 3(c) of Executive Order 13488, are also subject to the position designation requirements, investigative standards, and reciprocity-requirements in this part.

(2) To establish the criteria for making determinations of suitability for the competitive service or career Senior Executive Service and to establish a minimum standard of fitness for the excepted service.

(3) To establish the procedures for taking suitability actions in the case of the competitive service or career Senior Executive Service.

(c) An Agency shall exercise due regard to this part and supplemental guidance if determining fitness for employment as a contractor employee or as a nonappropriated fund employee.

(d) Any determination made and action taken under this part are distinct from: an objection to an eligible or pass over of a preference eligible; OPM's or an agency's decision on a request, made under 5 U.S.C. 3318 and 5 CFR 332.406; and any determination of eligibility for access to classified information or for assignment to, or retention in, sensitive national security positions made under E.O. 12968, E.O. 10865, or E.O. 13467, as amended, or similar authorities.

§ 731.102 Implementation.

(a) An investigation conducted under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation and section 1.1(e) of Executive Order 13467, as amended.

(b) OPM may set forth any policy, procedure, criteria, standard, quality control procedure, and supplementary guidance to implement this part in an OPM or joint Executive Agent issuance.

§ 731.103 Delegation to agencies for the competitive service and career Senior Executive Service.

(a) Subject to the limitations and requirements of paragraphs (b), (d), and (f) of this section, OPM delegates to the head of an agency authority for making a suitability determination and taking a suitability action (including limited, agency-specific debarments under § 731.205) in a case involving an *applicant* or *appointee*.

(b) When an agency, acting under delegated authority from OPM, determines that a government-wide debarment by OPM under § 731.204(a) may be an appropriate action, it must

refer the case to OPM for debarment consideration. An agency must make a referral prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s) to determine if a Government-wide debarment appears warranted.

(c) An agency exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and issuances described in § 731.102(b). An Agency must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these issuances.

(d) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud, in examination or appointment, and OPM will take a suitability action where warranted.

(e) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(b).

(f) OPM retains sole jurisdiction to make a final suitability determination and take an action under this part in any case where there is evidence that there has been a material, intentional false statement, or deception or fraud, in examination or appointment. OPM also retains sole jurisdiction to make a final suitability determination and take an action under this part in any case when there is evidence that there has been knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force. An Agency must refer these cases to OPM for suitability determinations and suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (such as 5 CFR part 315, 359, or 752) in cases involving conduct fitting within any of these factors. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary regardless of whether the agency may adjudicate under another authority.

§ 731.104 Investigation and reciprocity requirements.

(a) To establish an individual's suitability or fitness, employment

subject to investigation (see definitions § 731.101(a)) requires the individual to undergo investigation by an agency with authority to conduct investigations except as described in paragraphs (a)(1) through (3) of this section.

(1) An agency must reciprocally accept a prior background investigation in the event of promotion, demotion, reassignment, or transfer from employment subject to investigation to other employment subject to investigation without a break in service, unless the new employment is at a higher risk level.

(2) An agency must reciprocally accept a prior background investigation when the person entering employment subject to investigation has undergone a background investigation that is at or above the level required for the position as determined by position designation and has a qualifying break in service specified in supplemental guidance, unless the agency obtains new information in connection with the person's employment that calls into question the person's suitability or fitness under § 731.202. Agencies must request such checks as may be specified in implementing guidance and must enroll individuals re-entering service after a break in service into continuous vetting, consistent with the requirements in § 731.106(d).

(3) Positions that are intermittent, per diem, or temporary in nature, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation for suitability or fitness. The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability or fitness of the person. The employing agency must conduct such vetting as required under OPM issuances.

(b) An individual does not have to serve a new probationary or trial period in the Civil Service merely because the individual's employment is subject to investigation under this section. An individual's probationary or trial period in the Civil Service is not extended because the individual's employment is subject to investigation under this section.

(c) A suitability determination must be made for each appointment in the competitive service or career Senior Executive Service and a fitness determination must be made for each appointment in the excepted service, except as described in paragraph (c)(2) of this section.

(1) In the case of a prior investigation that is reciprocally accepted, if the record in the Central Verification

System or its successor system does not reflect a prior favorable suitability or fitness determination, the agency must review the prior investigation for the purpose of making a suitability or fitness determination.

(2) In the case of a prior investigation that is reciprocally accepted, if the prior investigation was favorably adjudicated for suitability or fitness, the agency must accept the prior determination except that the agency must make a new determination where:

(i) The investigative record on file for the individual shows conduct that is incompatible with the core duties of the relevant covered position; or

(ii) The agency has prescribed additional factors as permitted under § 731.202(b) that were not addressed in the prior favorable adjudication, in which case the agency must conduct an adjudication using only those additional factors.

(d) Continuous vetting requirements under § 731.106 are not affected by this section.

§ 731.105 Authority to take suitability actions in cases involving the competitive service or career Senior Executive Service.

(a) OPM or an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, the competitive service or career Senior Executive Service.

(1) OPM's or an agency's authority to complete a suitability action continues when an application is withdrawn, when an offer of employment is withdrawn, or when an individual appointed separates from employment.

(2) OPM's or an agency's authority to take a suitability action includes the case of an application for or appointment to the competitive service or career Senior Executive Service from another type of position when a prior investigation is being reciprocally accepted as described in § 731.104(a).

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on the criteria in § 731.202.

(c) Except as limited by § 731.103(b), (d), and (f), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202.

(d) Only OPM may take a suitability action under this part against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202(b)(3), (7), or (8).

(e) An agency may not take a suitability action against an *employee* in

the competitive service or career Senior Executive Service. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of 5 CFR part 752 or terminating a probationary employee under the procedures of 5 CFR part 315 or 359 or under agency specific authorities. An agency must notify OPM to the extent required in § 731.103(d) and (f) if it wants to take, or has taken, action under these authorities. OPM retains the right to take a suitability action even in those cases where the agency makes an adjudicative determination under another authority.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation.* For every position in the competitive service; in the excepted service; to be filled with a career appointment in the Senior Executive Service; or in which the occupant performs a service as a contractor employee or as a nonappropriated fund employee, an agency head must designate the position at high, moderate, or low risk level (in accordance with the risk designation system issued jointly by the Executive Agents; see § 731.102(b)), as determined by the position's potential for adverse impact to the efficiency or integrity of the service.

(b) *Public trust position.* A position at the high or moderate risk level is designated as a "public trust" position. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust such as positions involving access to or control of financial records or with significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.* (1) An individual entering employment subject to investigation under this part must undergo a background investigation as described in § 731.104. OPM establishes minimum investigative requirements correlating to the risk level. An investigation should be initiated before the individual is appointed or otherwise becomes employed by or on behalf of the agency; however, where an agency does not timely initiate the investigation, it must do so as soon as possible, even if the appointment has already occurred.

(2) Any position subject to risk designation under this section must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, Noncritical-Sensitive, or Non-sensitive,

as appropriate. This designation is complementary to the risk designation and may have an effect on the position's investigative requirement. Part 1400 of this title details the various sensitivity levels and investigative requirements for positions designated as sensitive. Procedures for determining investigative requirements for a position based upon risk and sensitivity will be published in issuances, as described in § 731.102(b) and 5 CFR part 1400.

(3) If a suitability or fitness issue develops prior to the required investigation, OPM or the agency may request investigation from an authorized investigative service provider sufficient to resolve the issue and support an unfavorable suitability or fitness determination. However, inquiries into criminal or credit history cannot occur until a conditional offer has been made, as specified in § 731.106(g). If warranted for positions in the competitive service or career Senior Executive Service, an agency may also take suitability action, in accordance with the authorities described in this part. If the individual is then appointed or otherwise becomes employed by or on behalf of the agency, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Continuous vetting requirements.* (1) Individuals occupying positions of employment subject to investigation are also subject to continuous vetting through periodic checks of their background at any time in accordance with standards issued by OPM. Checks must be conducted at regular intervals, based on the type of check and with consideration of position risk and sensitivity. The nature of a continuous vetting check, and any additional requirements and parameters, are specified in supplemental issuances as described in § 731.102(b). An individual may be subjected to continuous vetting only if they have signed an authorization for release of information permitting a disclosure for continuous vetting purposes. Continuous vetting for an individual in a public trust position satisfies the requirement for a periodic reinvestigation of an individual in a public trust position as directed in E.O. 13488, as amended. An agency must ensure that each continuous vetting check is conducted and a determination made regarding continued employment.

(2) An individual in a sensitive position who is continually vetted to standards established by the Security Executive Agent for satisfying periodic reinvestigation and/or continuous vetting requirements meets the continuous vetting requirements for a public trust position.

(3) An agency must notify each employee covered by this section of the continuous vetting requirements under this paragraph (d).

(e) *Risk level changes.* If an individual in employment subject to investigation experiences a change to a higher position risk level due to promotion, demotion, reassignment, or transfer, or the risk level of the individual's position is changed to a higher level, the individual may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 days after the promotion, demotion, reassignment, transfer or new designation of risk level is final or as otherwise required by 5 CFR part 1400.

(f) *Completed investigations.* An investigation or continuous vetting check under paragraphs (c) through (e) of this section supports a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as 5 CFR part 315, 359, or 752. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

(g) *Criminal or credit history inquiries.* A hiring agency may not make specific inquiries concerning an applicant's criminal background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). For competitive service or career Senior Executive Service, a hiring agency may not make specific inquiries concerning an applicant's credit background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provisions in 5 CFR part 330, subpart M. Agencies may make an inquiry into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(h) *Recordkeeping and use of information.* When an agency makes a suitability or fitness determination based on an investigation, the agency must:

(1) Ensure that any record used in making the determination is accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the individual in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, including the regulations in this part and issuances as described in § 731.102(b) have been observed;

(3) Consider all available information in reaching its final decision on a suitability or fitness determination or suitability action, except information furnished by a non-corroborated confidential source, which may be used only for limited purposes, such as information used to develop a lead or in interrogatories to a subject, if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency determination or action as required by issuances as described in § 731.102(b).

■ 8. Revise subpart B to read as follows:

Subpart B—Determinations of Suitability or Fitness; Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service

Sec.

731.201 Standard.

731.202 Criteria for making suitability and fitness determinations.

731.203 Suitability actions by OPM and other agencies for the competitive service or career Senior Executive Service.

731.204 Debarment by OPM in cases involving the competitive service or career Senior Executive Service.

731.205 Debarment by agencies in cases involving the competitive service or career Senior Executive Service.

731.206 Reporting requirements for investigations and suitability and fitness determinations.

§ 731.201 Standard.

The standard for a suitability and fitness determination and for a suitability action defined in § 731.203 is that the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria for making suitability and fitness determinations.

(a) *General.* OPM, or an agency to which OPM has delegated suitability authority, must base its suitability determination on the presence or absence of one or more of the specific

factors in paragraph (b) of this section. An agency is responsible for making a fitness determination for an excepted service position covered by this part but must apply the specific factors in paragraph (b) as the minimum standards for making the determination. When applying these criteria, an agency must also apply guidance in supplemental issuances, as described in § 731.102(b). If using these factors to also make a Personal Identity Verification (PIV) Credential determination as outlined in OPM issuances regarding PIV credentialing eligibility, an agency must also ensure they have verified the individual's identity.

(b) *Specific factors.* Only OPM may take a suitability action considering the factors in paragraph (b)(3) or (7) of this section. Agencies may use the factor in paragraph (b)(8) of this section in applicant and appointee suitability cases but not employee cases; however, OPM may use this factor in employee cases. When making a suitability determination, OPM or an agency will consider only the following factors to determine if one is suitable. When making fitness determinations, an agency must consider these factors as a minimum standard, but it may prescribe additional factors to protect the integrity and promote the efficiency of the service, when job-related and consistent with business necessity.

(1) Misconduct or negligence in employment;

(2) Criminal conduct;

(3) Material, intentional false statement, or deception or fraud, in examination or appointment;

(4) Dishonest conduct;

(5) Excessive alcohol use, without evidence of rehabilitation, of a nature and duration that suggests the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant, appointee, or others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;

(8) Any statutory or regulatory bar that prevents the lawful employment of the individual in the position in question; and

(9) Violent conduct.

(c) *Additional considerations.* OPM and an agency must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(1) The nature of the position for which the individual is applying or in which the individual is employed;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the individual involved at the time of the conduct;

(6) Contributing societal conditions; and

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

§ 731.203 Suitability actions by OPM and other agencies for the competitive service or career Senior Executive Service.

(a) This section pertains only to the competitive service or career Senior Executive Service as defined in § 731.101.

(b) A suitability action may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

(c) A non-selection, or cancellation of eligibility for the competitive service based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(d) A suitability action may be taken against an applicant or an appointee to the competitive service or career Senior Executive Service when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(b), (d), and (f).

(e) OPM may require that an employee in the competitive service or career Senior Executive Service be removed on the basis of one or more of the following:

(1) A material, intentional false statement, deception, or fraud in examination or appointment;

(2) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by illegal or unconstitutional means; and/or

(3) Statutory or regulatory bar that prevents the individual's lawful employment.

(f) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception, or fraud in examination or appointment.

(g) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under 5

CFR part 315, 359, or 752. Where conduct covered by this part may also form the basis for an action under 5 CFR part 315, 359, or 752, an agency may take the action under 5 CFR part 315, 359, or 752, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(f) if it wants to take, or has taken, action under these authorities. OPM reserves the right to also take an action under this part.

(h) An agency does not need approval from OPM before taking an unfavorable suitability action. However, it is required to report to the Central Verification System or its successor, each unfavorable suitability action taken under this part within 30 days after it takes the action. Also, each suitability determination based on an investigation must be reported to the Central Verification System or its successor as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

§ 731.204 Debarment by OPM in cases involving the competitive service and career Senior Executive Service.

(a) When OPM finds an individual unsuitable for any reason listed in § 731.202, OPM, in its discretion, may, for a period of not more than 3 calendar years from the date of the unfavorable suitability determination, deny that individual examination for, and appointment to, the competitive service and career appointment in the Senior Executive Service.

(b) OPM may impose an additional period of debarment following the expiration of a period of OPM or agency debarment or when new conduct arises while under debarment, but only after the individual again becomes an applicant, appointee, or employee subject to OPM's suitability jurisdiction, and the individual's suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

§ 731.205 Debarment by agencies in cases involving the competitive service and career Senior Executive Service.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the

unfavorable suitability determination, deny that individual examination for, and appointment to, either all, or specific competitive service positions and career appointment to all, or specific Senior Executive Service positions within that agency.

(b) The agency may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the individual again becomes an applicant or appointee subject to the agency's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(c) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if an individual applies for a position at that agency during the debarment period or is examined for or appointed to a position at that agency during the debarment period. This responsibility does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

§ 731.206 Reporting requirements for investigations and suitability and fitness determinations.

An agency must report to the Central Verification System or its successor the level or nature, result, and completion date of each background investigation, reinvestigation, or enrollment in Continuous Vetting; each agency decision based on such investigation, reinvestigation, or Continuous Vetting; and any personnel action taken based on such investigation or reinvestigation, as required in supplemental guidance.

■ 9. Revise the heading of subpart C to read as follows:

Subpart C—OPM Suitability Action Procedures for the Competitive Service or Senior Executive Service

■ 10. Amend § 731.302 by revising paragraph (c) to read as follows:

§ 731.302 Notice of proposed action.

* * * * *

(c) OPM will serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the proposed action to the

respondent's last known residence or duty station.

* * * * *

■ 11. Revise the heading of subpart D to read as follows:

Subpart D—Agency Suitability Action Procedures for the Competitive Service or Career Senior Executive Service

■ 12. Amend § 731.402 by revising paragraph (c) to read as follows:

§ 731.402 Notice of proposed action.

* * * * *

(c) The agency must serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

* * * * *

■ 13. Revise the heading of subpart E to read as follows:

Subpart E—Appeal to the Merit Systems Protection Board of Suitability actions in cases involving the Competitive Service or Career Senior Executive Service

Subpart F—[Removed]

■ 14. Remove subpart F, consisting of § 731.601.

[FR Doc. 2024–29799 Filed 12–17–24; 8:45 am]

BILLING CODE 6325–66–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 950

Combined Federal Campaign: Authorization of Short-Term Regulatory Variation

AGENCY: Office of Personnel Management.

ACTION: Notification.

SUMMARY: The Office of Personnel Management (OPM) is providing notice that the Acting Director is authorizing a variation from the regulatory public accountability standards to relieve practical difficulties and unnecessary hardships in complying with the strict letter of the regulation. The Acting Director has found that such a variation is within the spirit of the regulations and will ensure the achievement of campaign objectives. Specifically, for an 18-month period, OPM is modifying certain revenue thresholds for the various public accountability standards

for charities participating in the Combined Federal Campaign (CFC).

DATES: The authorization of short-term regulatory variation standards are effective on December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Keith Willingham, Director, Office of the CFC, keith.willingham@opm.gov, 202-606-2564.

SUPPLEMENTARY INFORMATION: The CFC is the world's largest and most successful annual workplace charity campaign, with 35 CFC campaign zones throughout the country and overseas and raising millions of dollars each year. Pledges made by Federal civilian, retiree, postal, and military donors during the campaign season support non-profit organizations that meet CFC regulations and provide health and human welfare benefits throughout the world.

To provide public accountability, OPM generally requires participating charities to undergo a third-party audit of their finances. In a 1995 rulemaking, OPM exempted local charities from the audit requirement if they had annual revenue of less than \$100,000. In 2014, OPM eliminated the distinction between "local" and "national" charities and expanded the exemption to all charities with revenue of less than \$100,000. *See* 5 CFR 950.203(a)(2)(i). In that rulemaking, OPM also added a second tier, allowing charities with revenue of \$100,000 to under \$250,000 to participate without an audit but with a review by an independent certified public accountant instead. *See* 5 CFR 950.203(a)(2)(ii).

Participation by charities in the CFC dropped precipitously over the last decade, however. Charities have explained that the audit requirement serves as a barrier to participation. Revenue reported by charities has increased, and more than 75 percent of charities now exceed the current audit threshold of \$250,000 in reported revenue. At the same time, costs of audits have risen dramatically and now often exceed the value of donations collected through the CFC. Audit services can now range from \$15,000–\$30,000. Accordingly, a charity cannot justify the expense of the audit, which yield a net loss to the charity.

The mission of the CFC is to promote and support philanthropy through a program that is employee-focused, cost-efficient, and effective in providing all Federal employees the opportunity to donate. The CFC provides employees with an easy way to contribute to their charities of choice; so, when employees no longer find their favorite charity on the CFC list, they may not give as much

or as often. Therefore, to attract more donors to the CFC and to retain and attract a more diverse group of charities, OPM is adjusting the audit requirements in an 18-month pilot program.

OPM's CFC regulations authorize the Director of OPM to "waive any of these [public accountability] standards and certifications upon a showing of extenuating circumstances." 5 CFR 950.203(e). In addition, the Director may "exercise general supervision over all operations of the CFC and take all necessary steps to ensure the achievement of campaign objectives." 5 CFR 950.102(c). Recognizing that the financial thresholds have not been adjusted in over ten years (and that the \$100,000 threshold is almost 20 years old), OPM finds that immediate steps are warranted to facilitate participation by charities in the CFC.

Based on the feedback OPM has received from charities, the Acting Director has found that the current financial thresholds present extenuating circumstances that impair the achievement of campaign objectives as the thresholds have not been adjusted for inflation in over 10 years. Furthermore, the thresholds are inconsistent with the standards applied by other areas of the government. For example, the Office of Management and Budget currently requires audits for organizations that expend \$750,000 or more in Federal funds. *See* 2 CFR part 200, subpart F. Similarly, many similar state programs have raised their audit thresholds to \$1,000,000. Because the existing regulatory thresholds are having a negative impact on the effectiveness of the CFC and revised thresholds would provide some necessary financial relief, the Acting Director finds that a limited waiver is appropriate. Specifically, waiving the audit requirement for charities with annual revenue of \$1 million or less, and waiving the requirement for an independent review of financial statements for charities with annual revenue above \$1 million but that receive less than \$750,000 in CFC pledges will help address the extenuating circumstances of the increased revenues received by charities combined with the increased costs of financial auditing and review services without commensurate inflationary adjustments to the regulatory thresholds.

Accordingly, OPM provides notice that, for the 18-month period after December 18, 2024, OPM will waive the regulatory thresholds for audits and/or reviews of financial statements for organizations with annual reported revenue of \$1,000,000 or less on its IRS

Form 990 or pro forma IRS Form 990 and will waive the regulatory thresholds for audits of financial statements for organizations with annual reported revenue above \$1,000,000 and with less than \$750,000 coming from CFC. Details are available at <https://cfccharities.opm.gov/app/#!/home>.

All other organizations (e.g., an organization with annual reported revenue above \$1,000,000 and with \$750,000 or more coming from CFC) continue to be required to undergo an annual financial statement audit for CFC purposes. The organization must account for its funds based on generally accepted accounting principles. A copy of the audited financial statements and auditors report must be included with the application. *See* 5 CFR 950.203(a)(2)).

Next Steps

OPM plans to update its regulations governing the CFC (RIN 3206-AO66). OPM will assess the effectiveness of this waiver in terms of encouraging charity participation in CFC and whether there is a resultant increase in employee participation. OPM will also assess the extent to which these pilot programs affect the number of charities participating in CFC and which charities meet these proposed thresholds. OPM charity application reviewers at the local national, and international levels will study the audits and financial reviews submitted with applications to ensure that these thresholds are providing appropriate levels of accountability.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024-29992 Filed 12-17-24; 8:45 am]

BILLING CODE 6325-58-P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245-AI21

ALP Express Pilot to Permanent Status

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration ("SBA" or Agency) is making permanent the increased delegated authorities made available under the ALP Express Pilot for Certified Development Companies ("CDCs") approved for the Accredited Lenders Program ("ALP"). These increased delegated authorities for 504

loans of \$500,000 or less (“ALP Express authority”) were authorized under the Economic Aid to Hard-hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act or EAA). When these EAA-increased delegated authorities expired on September 30, 2023, SBA implemented the ALP Express Pilot (Pilot) in October 2023 to allow SBA to further evaluate the improved customer service levels for SBA Borrowers and the use of these increased delegated authorities by ALP CDCs. The ALP Express Pilot is scheduled to expire on September 30, 2025. Due to the success of the Pilot, SBA is revising regulations and proceeding to make the Pilot permanent after receiving supportive public comments and no objections to SBA’s October 24, 2024, notice of proposed rulemaking. SBA notified Congress of the intent to convert the Pilot to become a permanent part of the 504 Loan Program in September 2024.

DATES: This rule is effective as of January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Gregorius Suryadi, Office of Financial Assistance, U.S. Small Business Administration at (202) 205-6806 or gregorius.suryadi@sba.gov. The phone number above may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission’s TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background Information

The 504 Loan Program is an SBA financing program authorized under title V of the Small Business Investment Act of 1958, as amended, 15 U.S.C. 695 *et seq.* (“Small Business Investment Act”). Under the 504 Loan Program, loans are made to small business applicants by Certified Development Companies (“CDCs”), which are certified and regulated by SBA to promote economic development within their community.

There are three types of CDCs that participate in the 504 Loan Program. This document relates to the temporary increased delegated authorities that were granted, in accordance with section 328(b) of the Economic Aid Act (“EAA”), to CDCs that are approved by SBA to participate in the Accredited Lenders Program (hereafter “ALP CDCs”), which is authorized under section 507(a) of the Small Business Investment Act. Under section 507(c) of the Small Business Investment Act, SBA is authorized to develop an expedited

procedure for processing a loan application or servicing action submitted by ALP CDCs. [15 U.S.C. 697d.]

Prior to the Economic Aid Act, ALP CDCs were required to obtain SBA’s approval on both the loan’s eligibility and creditworthiness determinations. In addition, ALP CDCs only had delegated authority to make certain “No Adverse Change” certifications prior to loan closing without SBA’s review and approval and were only authorized to close 504 loans under the expedited loan closing procedures applicable to a Priority CDC. Further, ALP CDCs were required to obtain SBA’s approval for most servicing actions. Section 328(b) of the EAA temporarily provided ALP CDCs increased delegated authority to “approve, authorize, close and service covered loans,” for loans of not more than \$500,000 and that are not made to a borrower in an industry with a high rate of default as defined by SBA. SBA implemented these increased delegated authorities with the publication of an interim final rule on June 27, 2022. (87 FR 37979). Pursuant to the EAA, these delegated authorities were to expire on September 30, 2023.

In order to evaluate the use of these increased delegated authorities by ALP CDCs and to identify opportunities for further modification, SBA developed the ALP Express Pilot program to provide these increased delegated authorities through September 30, 2025, to ALP CDCs (hereafter referred to as “ALP Express Pilot Loans”). The ALP Express Pilot’s delegated authorities in effect represented a continuation of the ALP Express authority provided by the Economic Aid Act. (88 FR 69529 (October 6, 2023)). Pursuant to its authority set forth in section 507(c) of the Small Business Investment Act (15 U.S.C. 697d(c)), which authorizes SBA to develop expedited procedures for processing a loan application or servicing action submitted by ALP CDCs, SBA published a notice of proposed rulemaking on October 24, 2024 (89 FR 84831), proposing to make permanent the increased delegated authorities available under the ALP Express Pilot. With this document SBA also requested public comment to help the Agency identify which parts of the pilot have been successful and which may need further modification.

II. Summary of Comments Received

On November 25, 2024, the notice of proposed rulemaking comment period ended. SBA received 11 comments to the notice of proposed rulemaking of which one was beyond the scope of the NPRM. Of the 10 unique comments

received, 2 were from national trade associations, 7 were from Certified Development Companies, and one was from an individual. The one comment that was beyond the scope of the notice of proposed rulemaking was from an individual. Public comments received to further expand the pilot authorities will be addressed in the Section-by-Section Analysis. Of the 10 comments received, 9 supported the changes as set forth in the notice of proposed rulemaking. One comment supported the changes and requested additional modification, and the comment from the individual was nonresponsive as it did not comment on the proposed rule but instead suggested revisions to the ALP Express Guide. SBA did not receive any comments opposing the changes. In addition to comments on these regulations there were also comments requesting that SBA implement policies and procedures on electronic signatures, electronic closings, and digital debentures to improve efficiencies across the 504 loan program for both ALP and non-ALP CDCs.

III. Section-by-Section Analysis

A. CDC’s Authorities. Under the ALP Express Pilot, SBA delegated to ALP CDCs the authority to make the final decision with respect to the applicant’s creditworthiness on ALP Express Pilot Loans. SBA continued to be responsible for reviewing each 504 loan to ensure that it meets all loan program requirements for program eligibility, and its risk management enhancement within E-Tran provided a tool to assist with fraud detection and prevention. SBA proposed to make these increased authorities permanent for loans that meet ALP Express eligibility criteria. SBA is not making additional changes to current ALP Express underwriting, servicing or closing authorities beyond those established by the ALP Express Pilot Program. In its public comments the National Association of Development Companies (NADCO), a national trade association, stated that additional delegated authorities cannot be implemented because SBA lacks this authority under the Accredited Lenders Program. Based on the excellent performance of this cohort of the 504 loans portfolio, there has been low risk to the national 504 portfolio due to the implementation of the ALP Express Pilot. SBA expects ALP CDCs to continue to use this delegated authority as prudent lenders and will monitor the national portfolio of ALP Express loans. Of all ALP Express loans approved since inception of the Pilot and through June 30, 2024, none were in default or in liquidation. SBA will monitor the risk of

this cohort on a continuous basis going forward.

SBA also delegated to ALP CDCs the authority to approve certain servicing actions after closing on ALP Express Pilot Loans (though ALP CDCs were still required to notify the appropriate SBA servicing center of their approval of any servicing action on ALP Express Pilot Loans). In addition, SBA delegated to ALP CDCs the responsibility to undertake all actions necessary to close the ALP Express Pilot Loan and Debenture in accordance with the expedited loan closing procedures applicable to a Priority CDC and with 13 CFR 120.960. SBA is making these increased authorities permanent for loans that meet ALP Express eligibility criteria (hereafter referred to as “ALP Express Loans”). CDCs would use these delegated authorities to approve certain servicing actions after closing. SBA has not found any issues or concerns with the ALP Express loan cohort that would prompt SBA to reconsider making permanent these increased delegated authorities. SBA will continuously monitor the risk of this cohort due to these permanent servicing and closing delegations going forward.

In their own discretion, ALP CDCs may decide not to exercise their increased delegated authority with respect to an ALP Express Loan and may instead submit the loan to SBA under nondelegated procedures. ALP CDCs may not use their ALP Express authority to service a loan that was approved under non-delegated authority that could have been made as an ALP Express Loan. In addition, Premier Certified Lender Program (PCLP) CDCs may decide to process an ALP Express Loan under their status as an ALP CDC instead of as a PCLP CDC, thereby not requiring the CDC to comply with Loan Loss Reserve Fund requirements for that loan. A PCLP CDC that decides to process a loan as an ALP Express Loan however may only use ALP Express authorities, not PCLP authority, for that loan.

In making, closing, servicing, or liquidating an ALP Express Loan, CDCs are required to follow all Loan Program Requirements. This includes the loan closing and disbursement procedures in SOP 50 10 7.1 and any updates to the servicing and liquidation requirements in 13 CFR 120.535, 120.536, 120.540, 120.842 and 120.960, as well as SOP 50 55. SBA is not further expanding any of these responsibilities in making permanent the increased authorities available to ALP CDCs under the ALP Express delegations of authority.

SBA received public comments recommending a further expansion of

ALP Express delegated authorities. The commenters recommended that SBA: (1) Allow full delegated processing, approval, and authorization of ALP Express Loans; (2) Allow ALP CDCs to prepare, finalize, and execute the Loan Terms and Conditions; (3) Allow ALP CDCs to process and approve all loan modifications between loan approval and loan closing and enter changes directly in the Capital Access Financial System (CAFS); (4) Implement a loan scoring model for use by ALP CDCs in approving ALP Express Loans. SBA is not including these recommendations because SBA lacks this authority under the Accredited Lenders Program.

For further guidance on ALP Express authority, please review the ALP Express Pilot Program Guide. This guide will apply to the increased delegated authorities made permanent under this final rule and will be updated as needed.

Finally, in response to public comments, SBA is revising its regulations under 13 CFR 120.953 related to certain responsibilities of Trustee appointed by SBA to facilitate 504 Debenture sales and the related definition of “Debenture” in 13 CFR 120.802. Pursuant to 13 CFR 120.953(c), SBA must appoint a Trustee to maintain physical possession of 504 Debentures for SBA and the Certificate holders. In practice, this requirement limits CDCs, and indirectly SBA borrowers, to executing only physical paper Debentures and prohibits the adoption of electronic Debentures and all their corresponding advantages and efficiencies. SBA is revising the definition of “Debenture” in 13 CFR 120.802 to allow for either paper or electronic Debentures. A revision to the requirements set forth in 13 CFR 120.953(c) will clarify that the SBA shall use a trustee to hold in trust paper Debentures. The consequence of adopting electronic Debentures will be a streamlined loan closing process and modernized documentation retention procedures for these documents, thereby lowering costs for CDCs and SBA borrowers.

B. Application and Reporting Requirements. CDCs are required to comply with the reporting requirements in 13 CFR 120.830, using the application forms for current 504 loan processing, and are required to execute an SBA Terms and Conditions document for each 504 loan, including ALP Express Pilot loans, as set forth in SOP 50 10. ALP CDCs use SBA Form 1244 to document its ALP Express authority when submitting an application for an ALP Express Pilot loan. In doing so, SBA tracks whether

the ALP CDC was using its ALP Express increased delegated authority for the loan. In making the increased authorities available to ALP CDCs under the ALP Express Pilot Program permanent, SBA is not changing ALP CDC reporting requirements and related responsibilities. No further changes to Form 1244 are needed.

C. Lender Oversight. ALP CDC oversight procedures shall continue to follow the requirements set forth in 13 CFR part 120, subpart I, SOP 50 53 (Lender Supervision and Enforcement) and SOP 51 00 (On-Site Lender Reviews and Examinations). The SOPs can be found on the SBA website. ALP CDCs will be monitored both for performance and other risk characteristics. The ALP CDC must comply with the requirement that it only make ALP Express Loans in an amount of \$500,000 or less, along with all other loan program requirements. ALP CDCs also will be subject to 13 CFR 120.1400 through 120.1600 and the provisions of SOP 50 53 concerning supervision and enforcement. SBA is not changing these responsibilities in making permanent the increased authorities available to ALP CDCs.

Compliance With Executive Orders 12866, 12988, 13175, 13132, 13563, and 14094, the Congressional Review Act, Paperwork Reduction Act, and Regulatory Flexibility Act Executive Orders 12866, 13563, and 14094

Executive Order 12866, “Regulatory Planning and Review,” directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563, “Improving Regulation and Regulatory Review,” emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094, “Modernizing Regulatory Review,” amends section 3(f) of Executive Order 12866 and supplements and reaffirms the principles, structures and definitions governing contemporary regulatory review established in Executive Order 12866 and Executive Order 13563. The OMB Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action. SBA has drafted a cost-benefit analysis for the public’s information in the next section.

A. Cost-Benefit Analysis

Is there a need for the regulatory action?

Access to capital is one of the primary challenges for small businesses to start, grow, and sustain their businesses. The SBA 504 loan program serves an important role in business lending for small businesses that do not have credit available elsewhere from conventional sources on reasonable terms. The Agency believes that a streamlined process for small dollar loans particularly for loans of \$500,000 or less will facilitate increased participation by small business owners, especially those in underrepresented communities. SBA observed that upon implementing the increased delegated authorities required by the EAA, SBA was able to reduce the processing and approval time of loan applications of \$500,000 or less for small businesses that needed immediate financial assistance.

The ALP Express Pilot increased delegated authorities have proven that ALP CDCs are able to process, approve, and service ALP Express loans within the guidelines issued by the SBA. Due to the success of the Pilot, SBA is now making these delegations permanent. Accordingly, the permanent program change will reduce regulatory burdens, reduce the number of hours spent processing an application to deliver a loan for both SBA and CDCs and increase access to capital for small businesses.

With respect to adopting electronic 504 Debentures, SBA believes this change will streamline the loan closing process and lower costs for CDCs and SBA borrowers.

B. Benefits and Costs of the Rulemaking

What are the potential benefits and costs of this regulatory action?

SBA anticipates that making permanent the ALP Express Pilot Loan authority and providing ALP CDCs with greater authority to approve and service loans will reduce processing time and therefore benefit small businesses, their employees, and the communities they serve.

Indeed, SBA observed that the processing and approval time for ALP Express Pilot loans averaged 2.3 business days whereas the processing time for regular 504 loans using non-delegated authority averaged 5 days. Therefore, small businesses will have access to capital to start, grow, and sustain their businesses in a shorter timeframe. SBA does not anticipate additional costs or impacts on the subsidy once these increased delegated authorities are made permanent.

Finally, adoption of electronic Debentures will expedite the loan closing process and lower documentation storage and transmission costs.

C. What alternatives have been considered?

SBA could allow the ALP Express Pilot to expire and resume the level of ALP authorities that were in place prior to the implementation of the Economic Aid Act. Due to the efficiency gains under the ALP Express pilot, SBA considered it more prudent to retain these increased delegated authorities to reduce regulatory burdens for ALP CDCs and to responsibly streamline the processing, approval and closings of 504 loan application under \$500,000 without substantially increasing the risk of waste, fraud, or abuse of the programs, or threatening the integrity of the business loan programs or the waste of taxpayer dollars.

SBA reviewed public comments and received recommendations for alternatives that cannot be implemented because SBA does not have this authority under the Accredited Lenders Program. These include: (1) Allowing full delegated processing, approval, and authorization of ALP Express Loans; (2) Allowing ALP CDCs to prepare, finalize, and execute the Loan Terms and Conditions; (3) Allowing ALP CDCs to process and approve all loan modifications between loan approval and loan closing and enter changes directly in the CAFS; (4) Implementing a loan scoring model for use by ALP CDCs in approving ALP Express Loans.

Finally, as an alternative to the changes being contemplated to § 120.953, SBA could maintain its current physical Debenture regime where physical paper is shipped and stored. Due to the efficiency gains afforded by electronic Debentures, SBA considered it more prudent to transition to the use of electronic Debentures.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, *Civil Justice Reform*, to minimize litigation, eliminate ambiguity, and reduce burden. The action would not have preemptive effect or retroactive effect.

Executive Order 13175

This final rule will not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the

Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13132

This final rule will not have federalism implications as defined in Executive Order 13132, *Federalism*. It would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. chapter 35. In order to implement the Economic Aid Act, SBA determined that it was necessary to temporarily modify SBA Form 1244, which was approved on November 22, 2022, under OMB Control Number 3245-0071, *Application for Section 504 Loans*, to conform the application with the revised requirements for ALP Express Loan authority. The changes did not add any new burdens for the respondents. SBA made the following technical corrections and clarifying changes to SBA Form 1244 which became effective October 1, 2024: (1) revised question number 4 on page 2 to include the updated language as a result of the Criminal Justice Reviews for the SBA Business Loan Programs, Disaster Loan Programs, and Surety Bond Guaranty Program (89 FR 34094); (2) added a paragraph on page 4 authorizing the SBA to release information regarding existing SBA loan to Lender/CDC; (3) revised the instructions on page 5 (*Purpose of the Form*) to clarify that CDCs with ALP Express Loan authority must use the form; (4) added a new ALP Express checkbox to page 8 in the *Submission Method* field; (5) added an additional row to the project table on page 9 for Other Secured Debt to be Refinanced; and (6) updated the instructions on pages 11 and 12 (*Required Exhibits*) to identify which exhibits must be completed and uploaded in SBA's E-Tran system for ALP Express Loans and which exhibits non-ASM CDCs must complete and upload into E-Tran. No additional modifications to SBA Form 1244 were necessary for the ALP Express Pilot, and no additional modifications to SBA Form 1244 will be necessary for purposes of making the ALP Express

increased authorities permanent through this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601, *et seq.*, requires administrative agencies to consider the effect of their actions on small businesses, small organizations, and small governmental jurisdictions. Pursuant to the RFA, when an agency issues a proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis to address the impact of the rule on small entities. SBA published a notice of proposed rulemaking on October 24, 2024, with comments due on or before November 25, 2024, and received 10 supportive comments and no opposing comment. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The rulemaking will have a positive impact and will be beneficial for all ALP CDCs. By making permanent the temporary increased delegated authorities available under the ALP Express Pilot program this rulemaking will improve the approval time of 504 loan applications for loans in an amount of \$500,000 or less.

Between FY 2022 (June 27, 2022) and FY 2025 (October 31, 2024) SBA approved 4,971 non-ALP Express loans of \$500,000 or less, for a total dollar amount of \$1,511,075,000. In the same period SBA approved 2,364 ALP Express and ALP Express Pilot loans for a total dollar amount of \$1,283,386,000. The total number of approved 504 loans of \$500,000 or less over this period was 7,335 loans, in the amount of \$2,794,461,000. Based on the total 504 loans of \$500,000 or less approved since ALP Express implementation, ALP CDCs have demonstrated success in processing and servicing loans using their increased ALP Express delegated authority. In addition, since ALP Express implementation, there have been no instances of ALP Express loans in default or in liquidation.

SBA estimates the burden for completing SBA Form 1244, “Application For Section 504 Loans”, including time for reviewing instructions, gathering data and documentation needed, and completing and reviewing the form, is 2.5 hours. SBA will not need to change SBA Form 1244 as a result of this rulemaking. SBA anticipates the final rule will increase the number of CDCs making loans of \$500,000 or less and increase the number of approved 504 program loans

as a whole. The ALP Express Pilot added no additional cost burdens to SBA, CDCs, or small business borrowers and there were minimal changes to SBA forms. SBA used existing staff to implement the Pilot. No further changes to SBA forms or staffing levels are anticipated to make permanent the ALP Express increased delegated authorities. Finally, the ALP Express Pilot cohort of loans had no defaults and no liquidations. SBA will continue to monitor the risk of this cohort to SBA’s 504 portfolio going forward.

With respect to the electronic Debenture change, SBA currently must appoint a Trustee to maintain physical possession of 504 Debentures for SBA and the Certificate holders. In practice, this requirement limits CDCs, and indirectly SBA borrowers, to executing only physical paper Debentures and prohibits the adoption of electronic Debentures and all their corresponding advantages and efficiencies. A revision to the requirements set forth in 13 CFR 120.953(c) will authorize SBA to maintain possession of electronic (or digital) versions of 504 Debentures, thereby streamlining the loan closing process and lowering costs for CDCs and SBA borrowers.

Based on the foregoing, the Administrator of the SBA hereby certifies that this rulemaking will not have a significant economic impact on a substantial number of small businesses. The SBA invited comments from the public on the certification for the proposed rule. SBA did not receive any objections to its certification.

Congressional Review Act

This rule has been determined not to meet the criteria set forth in 5 U.S.C. 804(2). SBA will submit the rule to Congress and the Government Accountability Office consistent with the Congressional Review Act’s requirements.

List of Subjects in 13 CFR Part 120

Administrative practice and procedure, Banks, Banking, Business and industry, Child support, Community development, Confidential business information, Credit, Disaster assistance, Employee benefit plans, Energy conservation, Environmental protection, Equal employment opportunity, Exports, Flood insurance, Flood plains, Foreign trade, Fraud, Individuals with disabilities, Lead poisoning, Loan programs—business, Loan programs—energy, Loan programs—veterans, Reporting and recordkeeping requirements, Small businesses, Solar energy, Trusts and trustees, Veterans.

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR part 120 as follows:

PART 120—BUSINESS LOANS

■ 1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3) and (7), and 697(a) and (e); sec. 521, Pub. L. 114–113, 129 Stat. 2242; sec. 328(a), Pub. L. 116–260, 134 Stat. 1182.

■ 2. Amend § 120.802 by revising the definition of *Debenture* to read as follows:

§ 120.802 Definitions.

* * * * *

Debenture is an obligation issued by a CDC and guaranteed 100 percent by SBA, the proceeds of which are used to fund a 504 loan. SBA, in its discretion, may authorize either paper or electronic Debentures.

* * * * *

■ 3. Amend § 120.842 by revising paragraph (a) and removing paragraph (d) to read as follows:

§ 120.842 ALP Express Loans.

(a) *Definition.* For the purposes of this section, an ALP Express Loan means a 504 loan in an amount that is not more than \$500,000 and which is underwritten, approved, closed and serviced using the authorities set forth in this section.

* * * * *

■ 4. Amend § 120.953 by revising paragraph (c) to read as follows:

§ 120.953 Trustee.

* * * * *

(c) Hold in trust paper Debentures composing a Debenture Pool for the benefit of SBA and the Certificate holders;

* * * * *

Isabella Casillas Guzman,
Administrator.

[FR Doc. 2024–29706 Filed 12–17–24; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 3

[Docket No. 241210–0320]

RIN 0605–AA64

Implementation of HAVANA Act of 2021

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: This rule implements the HAVANA Act of 2021 (the Act) for the Department of Commerce (Department). The Act provides the authority for the Secretary of Commerce and other agency heads to provide payments to certain individuals who have incurred qualifying injuries to the brain. The rule covers current and former Department employees and dependents of current or former employees.

DATES: This final rule is effective December 18, 2024.

ADDRESSES: Public comments and materials associated with this final rule are available through the Federal eRulemaking Portal at <http://www.Regulations.gov>, Docket No. DOC–2023–0001.

FOR FURTHER INFORMATION CONTACT: Charles Cutshall, Chief Privacy Officer, at 202–482–5735 or ccutshall@doc.gov.

SUPPLEMENTARY INFORMATION:**Background**

This rule implements the Helping American Victims Affected by Neurological Attacks (HAVANA) Act of 2021, Public Law 117–46, codified in 22 U.S.C. 2680b(i), which (among other things) required Department heads to prescribe regulations implementing the HAVANA Act for covered individuals. The Department published an interim final rule (IFR) on April 19, 2023 (88 FR 24110), which laid out the process for HAVANA Act claimants to submit claims for payment for a qualifying injury to the brain suffered by current and former employees of the Department, and dependents of current or former employees. Under the IFR, the criteria for a qualifying injury to the brain are based on current medical practices related to brain injuries. Further, the injury must have occurred in connection with certain hostile acts or other incidents designated by the Secretary of State or the Secretary of Commerce. Further background is contained in the preamble to the IFR. The IFR provided for 30 days of public comment, and the Department provides responses to those comments below.

Responses to Comments

The Department received a total of eight public comment submissions in response to the IFR. Many comments provided input on multiple subjects. The Department received identical comment submissions from four commentors. All comments are addressed below.

Several commentors focused on the Department's definition of “qualifying

injury to the brain.” First, numerous commentors urged the Department to adopt a broad definition of a “qualifying injury to the brain.” Under the IFR, individuals may be eligible for a HAVANA Act payment if they meet one of three criteria under the definition of “qualifying injury to the brain”: (1) An acute injury to the brain such as, but not limited to, a concussion, penetrating injury, or as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies (to include computed tomography scan (CT), or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG); or (2) A medical diagnosis of a traumatic brain injury (TBI) that required active medical treatment for 12 months or more; or (3) acute onset of new persistent, disabling neurologic symptoms as demonstrated by confirming correlative findings on imaging studies (to include CT or MRI), or EEG, or physical exam, or other appropriate testing, and that required active medical treatment for 12 months or more.

The Department believes that this definition is broad and flexible enough to cover a wide range of brain injuries. The Department also notes that this definition is consistent with regulations issued by the State Department (Jan. 25, 2023, at 88 FR 4722). Therefore, this final rule does not change the IFR definition of “qualifying injury to the brain.”

Multiple comments requested that the Department remove the requirement that an individual receive 12 months of active medical treatment before they are eligible for a HAVANA Act payment. Of the three criteria for a qualifying brain injury, as set forth above, only (2) and (3) require 12 months of treatment. Under (1), 12 months of treatment is not required if an individual demonstrates permanent alterations in brain function with confirming correlative findings on imaging studies. The Department believes that the requirement for 12 months of treatment, which is consistent with State Department regulations (Jan. 25, 2023, at 88 FR 4722), demonstrates that an individual suffers from a chronic condition even if that individual does not demonstrate a permanent condition. Further, even if a covered individual has not yet received 12-months or more of treatment as outlined in (2) or (3), the covered individual may nevertheless qualify at a later time if treatment lasts for twelve months or more.

A number of comments asked that the Department establish an eligibility

threshold for benefits that does not rest in whole or in part on the contemporaneous diagnosis of a brain injury. Instead, the commentors urged the Department to allow claimants to establish eligibility based on the presence of one or more of the symptoms that have come to be associated with Anomalous Head Injuries. The Department does not believe that it is appropriate to grant claims without appropriate medical documentation of a qualifying injury to the brain. The Department also notes that the standard that it uses to determine payment eligibility is consistent with the standard used by the Department of State.

One comment asked that the Department recognize a “qualifying brain injury” even when an individual is receiving ongoing treatment; or the treatment was “split up” or the individual was diagnosed years later. Nothing in the IFR prevents the payment of compensation under such circumstances, provided that the definition of a “qualifying brain injury” is otherwise met.

One comment focused on the date of the injury, expressing a belief that the Department should compensate individuals who suffered qualifying injuries prior to January 1, 2016. The Department is unable to accept this suggestion. The HAVANA Act specifies that payments are for injuries occurring on or after January 1, 2016. The Department does not have the authority to provide payments for injuries occurring prior to that date without an amendment to the HAVANA Act or additional legislative action.

In addition to the comments discussed above concerning the Department's definition of a “qualifying brain injury,” multiple comments urged that the final rule incorporate some mechanism to facilitate changes to the Department's framework for determining eligibility for payment based on science or diagnostic breakthroughs. The Department declines to incorporate such a mechanism into this final rule but may conduct rulemaking in the future in accordance with existing laws and regulations, should circumstances so dictate.

One comment urged the Department to provide reasons for a denial of requests for benefits to a claimant and develop a meaningful appeals process that employees can use in the event of a denial of benefits. Under the IFR, the Department already provides claimants who have been denied a payment with the reason for the denial. Additionally, the Department believes that its current appeals process, which provides for

higher-level review of any denial, offers adequate and meaningful review of denials.

One comment, seeking to ensure greater transparency about the Department's decision-making process, raised concerns with the use of non-public information maintained by the State Department in the Department's consultation process with the State Department. Consultation with the State Department may assist the Department in determining, in part, a claimant's eligibility for benefits under the HAVANA Act. In particular, because a qualifying injury to the brain must have occurred in connection with war, insurgency, hostile act, terrorist activity, or other incidents designated by the Secretary of State or the Secretary of Commerce, consultation with the State Department may assist in determining whether an injury is connected to an incident designated by the Secretary of State. However, the State Department, not the Department of Commerce, determines whether such information is administratively controlled or made publicly available.

Regulatory Analysis

Administrative Procedure Act

Because this rule is a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, it is exempt from the requirements of 5 U.S.C. 553. *See* 5 U.S.C. 553(a)(2). Furthermore, because this final rule does not change the regulatory provisions previously implemented by the IFR, a delay in effective date is unnecessary and therefore the Department finds good cause for this rule to take effect immediately. Furthermore, because this final rule does not change the regulatory provisions previously implemented by the IFR, a delay in effective date is unnecessary and therefore the Department finds good cause for this rule to take effect immediately. *See* 5 U.S.C. 553 (d)(3).

Regulatory Flexibility Act

The Chief Counsel for Regulations for the Department certified that this rulemaking does not have a significant impact on a substantial number of small entities. This rule applies only to certain individuals who are current and former Department employees and family members who are eligible for payments as a result of certain injuries. The rule provides for payments to certain individuals and is not expected to impact any small entities. As a result, a regulatory flexibility analysis is not required under the Regulatory

Flexibility Act (5 U.S.C. 601, *et seq.*), and none has been prepared.

Executive Order 12866 and Executive Order 13563

This rule has been determined to be a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094.

The Department has reviewed the rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and finds that the benefits of the rule (in providing mechanisms for individuals to obtain compensation for certain injuries) outweigh any costs to the public. The Department has also considered this rulemaking in light of Executive Order 13563 and affirms that this proposed regulation is consistent with the guidance therein.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), the information collection associated with this final rule was approved by the Office of Management and Budget (OMB) under OMB Control Number 0690-0037. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Accordingly, the Department of Commerce adopts the interim rule published April 19, 2023, at 88 FR 24110, as final without change.

Dated: December 13, 2024.

Jeremy Pelter,

Deputy Assistant Secretary for Administration, performing the non-exclusive functions and duties of the Chief Financial Officer and Assistant Secretary of Commerce for Administration, U.S. Department of Commerce.

[FR Doc. 2024-29993 Filed 12-17-24; 8:45 am]

BILLING CODE 3510-17-P

DEPARTMENT OF COMMERCE

15 CFR Part 29

[Docket No. 241211-0323]

RIN 0605-AA57

Promoting the Rule of Law Through Improved Agency Guidance Documents Rescission

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule rescinds the Department's regulations on guidance document procedures in accordance with a 2021 Executive order to revoke previous Executive orders concerning Federal regulation.

DATES: This final rule is effective December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Xenia Kler, Office of the Assistant General Counsel for Legislation and Regulation, 202-482-5354, or via email xkler1@doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," sought to ensure that when Federal agencies issue guidance documents, the agencies: do not treat those guidance documents alone as imposing binding obligations both in law and in practice, except as incorporated into a contract; take public input into account in formulating significant guidance documents; and make guidance documents readily available to the public. (84 FR 55235, Oct. 15, 2019). On September 28, 2020, the Department issued an interim final rule, "Promoting the Rule of Law Through Improved Agency Guidance Documents" to implement E.O. 13891. (85 FR 60694). The interim final rule established 15 CFR part 29 for guidance document procedures, procedures for withdrawal or modification requests from the public, and procedures for significant guidance documents.

On January 20, 2021, President Biden issued E.O. 13992, "Revocation of Certain Executive Orders Concerning Federal Regulation," revoking a number of Executive orders including E.O. 13891. (86 FR 7049, Jan. 25, 2021). E.O. 13992 directs agencies "to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the revoked Executive orders."

After review and consideration, the Department concluded that its rule on guidance documents deprives the Department of necessary flexibility in determining when and how best to issue guidance based on particular facts and circumstances consistent with the policy directive in E.O. 13992. Therefore, the Department is issuing this final rule to rescind its regulations at 15 CFR part 29. The Department will continue to pursue ways to make its guidance documents more accessible to the public. Additionally, in accordance with M-09-13, "Guidance for Regulatory Review," the Office of Management and Budget will continue

to review the Department's actions and documents subject to the Office of Information and Regulatory Affairs review under E.O. 12866. These reviews include policy and guidance documents that OMB determines are significant.

Classification

This final rule is a rule of agency organization, procedure, or practice, codifying in the CFR the Department's existing procedures. Therefore, pursuant to 5 U.S.C. 553(b)(3)(A), notice and public comment are not required. Because a notice and public comment are not required for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

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

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

List of Subjects in 15 CFR Part 29

Administrative practice and procedure, Guidance documents.

PART 29—[REMOVED AND RESERVED]

■ For the reasons stated in the preamble and under the authority of 15 U.S.C. 1512, the Department of Commerce amends subtitle A in title 15 of the Code of Federal Regulations by removing and reserving part 29.

Dated: December 12, 2024.

Nell Abernathy,

Director, Office of Policy and Strategic Planning, U.S. Department of Commerce.

[FR Doc. 2024–29890 Filed 12–17–24; 8:45 am]

BILLING CODE P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 402

[Docket No. SSA–2021–0049]

RIN 0960–AI07

Availability of Information and Records to the Public

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: The Social Security Administration (SSA) is finalizing revisions to our Freedom of Information Act (FOIA) regulations to conform with the requirements of the FOIA Improvement Act of 2016. The FOIA

Improvement Act of 2016 requires Federal agencies to issue regulations on procedures for disclosure of records consistent with the amendments to the FOIA by such Act. We are also finalizing the reorganization of our FOIA regulation to make our FOIA procedures easier for the public to understand and use.

DATES: This rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Sarah Reagan, Office of Privacy and Disclosure, Social Security Administration, WHR G401, 6401 Security Boulevard, Baltimore, MD 21235, (410) 966–5855.

For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at <https://www.ssa.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

The FOIA is a Federal statute that allows the public to request records from the Federal government. The FOIA provides that any person has a right, enforceable in court, to obtain access to federal agency records subject to the FOIA, except to the extent that any portions of such records are protected from public disclosure by one of nine exemptions. Under the FOIA, agencies must make records specified in 5 U.S.C. 552(a)(2) (e.g., instructional manuals issued to our employees, general statements of policy, other materials used in processing claims, etc.) available for public inspection in an electronic format. The FOIA also statutorily requires Federal agencies to annually report on numerous and various metrics to the Department of Justice (DOJ).

Since the time the SSA became an agency independent of the Department of Health and Human Services, Congress enacted two significant laws. These laws, the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act of 2007)¹ and the FOIA Improvement Act of 2016,² guide how agencies implement the requirements of the FOIA. We are finalizing our proposed updates and revisions to our regulation at 20 CFR part 402 to conform with these laws, as well as the FOIA Improvement Act of 2016's requirement to issue regulations on

procedures for disclosure of records in accordance with its amendments.

On June 6, 2023, we published a notice of proposed rulemaking (NPRM) to update, reorganize, and clarify our FOIA processes for the public.³ In the NPRM, we proposed comprehensive revisions to the entirety of 20 CFR part 402. This reorganization starts with our FOIA policies and procedures for processing FOIA requests and concludes with information on records available for public inspection. Our revisions, finalized here with some modifications from the NPRM, streamline our FOIA regulations at part 402 by creating new sections, consolidating sections based on content, and revising section headings to more clearly capture the information contained therein. We also proposed updates to reflect office name changes, as well as general text changes consistent with the plain language initiative.⁴

Our proposed revisions to our FOIA regulation at 20 CFR part 402, which we are finalizing with minor revisions, are supported by the requirements of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016.

These changes also correlate with the guidelines on the FOIA that Attorney General Merrick Garland issued within his March 2022 *Memorandum for Heads of Executive Departments and Agencies*. As summarized by DOJ's Office of Information Policy, Attorney General Garland's memorandum "direct[s] the heads of all executive branch departments and agencies to apply a presumption of openness in administering the FOIA and make clear that the Justice Department will not defend nondisclosure decisions that fail to do so." Attorney General Garland stated that proactive disclosures are "fundamental to the faithful application of FOIA," and advised agencies of the need "to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains."

In the NPRM, and in this final rule, we explained and justified the rulemaking on the requirements of the

³ 88 FR 36980.

⁴ The Plain Writing Act of 2010 requires Federal agencies to use clear communication that the public can understand and use. Federal agencies are required to follow plain language principles; <https://centerforplainlanguage.org/learning-training/five-steps-plain-language/>. In fiscal year 2021, the Center for Plain Language graded Federal agencies' Coronavirus Update pages and main FOIA web pages. SSA received an overall grade of B+ and received positive reviews on our FOIA main web page.

¹ Public Law 110–175; <https://www.congress.gov/bills/110/congress/senate-bill/2488/text>.

² Public Law 114–185; <https://www.congress.gov/bills/114/congress/senate-bill/337/text>.

OPEN Government Act of 2007⁵ and the FOIA Improvement Act of 2016.⁶

The changes we are finalizing in this final rule to conform with the requirements of the OPEN Government Act of 2007 are as follows:

- Within revised § 402.60, we are updating and clarifying the following business practices: our acknowledgement of FOIA requests, when a request is considered perfected, our multi-tracking procedures, unusual circumstances, and tolling of the 20 business day statutory time period;
- Within revised §§ 402.70 through 402.80, we are clarifying our rules concerning fees;
- Within revised §§ 402.05 and 402.100, we are introducing and providing information on the services of the FOIA Public Liaison and the Office of Government Information Services (OGIS); and
- Within revised § 402.10, we are defining “representative of the news media,” amending the definition of “record,” and defining new terms (such as the FOIA Public Liaison, OGIS, and Chief FOIA Officer).

The changes we are finalizing in this final rule to conform with the requirements of the FOIA Improvement Act of 2016 are as follows:

- Within revised §§ 402.15(a) and 402.60(k), we are adding the foreseeable harm standard;
- Within revised § 402.105, we are updating the appeal timeframe to 90 days (from 30 days);
- Within revised §§ 402.05 and 402.100, discussed earlier, we are addressing the FOIA Public Liaison and OGIS;
- Within revised §§ 402.70 through 402.80, we are clarifying our fee charging rules, including when unusual circumstances apply;
- Within revised § 402.135(a), we are revising the deliberative process privilege to provide that this privilege cannot be applied to records that are 25 years or older at the time of the FOIA request; and,
- Within revised § 402.155(a), we are addressing our public posting of records requested three or more times.

Changes We Made From the NPRM to the Final Rule

- In § 402.10, we clarified the definition of “commercial interest” in response to public comment.
- In § 402.10, we added the definition of “commercial use” to differentiate “Commercial interest” from “commercial use.” “Commercial use” is

terminology used in our fee waiver provisions and is not intended to impact the “commercial use” FOIA fee category.

- In § 402.10, we clarified the definition of “educational institution.” While we did not receive public comment on this definition, the language we added aligns with DOJ FOIA guidance and case law. The added language specifies that we may seek verification from the requester that the request is in furtherance of scholarly research.

- In § 402.10, we clarified the definition of “fee category.” While we did not receive public comment on this definition, we removed “noncommercial” so the language now states: “The categories are: commercial use requests; scientific or educational institutions and news media requests; and all other requests.” “Commercial use” is its own fee category; therefore, the term “noncommercial” is redundant.

- In § 402.10, we changed the term “reading room” to “FOIA library” to align with DOJ FOIA guidance. We also added the following sentence to further explain what may be maintained in a FOIA library: “Posted records may include those provided under agency discretion and not required pursuant to FOIA.” We changed the term “reading room” to “FOIA library” throughout the regulation.

- In § 402.10, we modified the definition of “representative of the news media.” While we did not receive public comment on this definition, we removed the phrase “based on the requester’s intended use of the requested records” to align with the FOIA statute.

- In § 402.10, we clarified the definition of “Trade secrets and commercial or financial information.” While we did not receive public comment on this definition, we adjusted the terminology of the definition to make it easier to understand. The term now reads: “Trade secrets and confidential commercial or financial information.”

- In § 402.20(b), we changed the language from stating the agency “will handle” your request under the Privacy Act to the agency “may handle” your request under the Privacy Act. This change clarifies that not all individuals requesting their own records that are maintained in a system of records, or parents or legal guardians authorized to act under § 401.75 of this chapter who are seeking the records about a minor or individual who has been declared incompetent, would be entitled to access records under the Privacy Act.

For instance, SSA maintains systems of records that are exempt from access under § 401.85 and third-party information within a subject’s systems of records may not be accessible under the Privacy Act. Further, requesters must verify their identity to make a Privacy Act request. In cases where a requester who filed a FOIA would not be entitled to records under the Privacy Act, we will handle their request under FOIA. We further clarified that “Privacy Act requests are also processed under the FOIA, when appropriate, to give you the benefit of both statutes. You must verify your identity in accordance with our regulations.” Given our central processing of FOIA, it is not feasible for Privacy Act initial denials to be processed under FOIA prior to denial of administrative appeal because OPD, the sole decisionmaker under FOIA, does not process initial denials but does process administrative appeal denials.

- In § 402.25, we modified the language to align more with the FOIA statute by changing “member of the public” to “person.”

- In § 402.30(a)(4), we consolidated two separate sentences into one for clarity and readability. The sentence now reads: “The request must clearly state and reasonably describe what SSA records are being requested in sufficient detail to enable OPD to locate them with a reasonable amount of effort.” We also changed the word “should” to “may” in the following sentence to clarify that providing the information specified therein is not a requirement: “If the request is for electronic communications, such as email records, the request may identify the names, position titles, or other identifying information about the agency employees involved, as well as the applicable timeframe.”

- In § 402.35, we added the National FOIA Portal as an additional resource through which requesters can submit FOIA requests to SSA, and we removed the agency’s fax number. This section, however, continues to provide requesters codified directions to our website at <https://www.ssa.gov/foia> for additional contact information, as well as an email address for inquiries and a physical mailing address.

- In § 402.45, we changed the name of the section heading and revised the content to more clearly describe how we handle certain requests. The “Requests not processed under the FOIA” is now *Requests handled outside of the FOIA process*. We added a clarifying sentence, “When records (a) through (d) below are requested from OPD, OPD will respond to the requester and provide information for requesting the records sought,” to

⁵ 88 FR at 36981.

⁶ 88 FR at 36982.

articulate how we respond outside of the FOIA process.

- In § 402.55, we edited the language to further clarify how we handle consultations and referrals, *e.g.*, we added language to explain referrals of requests in whole or in part. Our practices as described in this section align with DOJ's FOIA guidance and how other agencies similarly handle consults and referrals. While we did not receive public comment on this section, we clarified the language in § 402.55(a) to state that “[w]hen reviewing records located by SSA in response to a request, SSA will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA.” We further clarify that we may refer records, in whole or in part to an outside agency. Within modified § 402.55(a)(1), finalized in this rule, we now state: “We will notify the requester in writing when we opt to refer records in whole or in part to another agency for direct response from that agency, including the name(s) or the agency(s) to which the record was referred and that agency’s FOIA contact information, unless notification would cause harm to an interest protected under the FOIA. In such instances, in order to avoid harm to an interest protected by an applicable exemption, we coordinate to seek the view of the originating agency.”

- We moved § 402.55(b) *Referral of requester to another agency*, to § 402.60(k) and edited the language to more clearly describe SSA’s actions. The sub-heading now reads: *Directing a requester to another agency*. This subsection describes our practices that are not technically referrals as defined in the FOIA statute. This move provides more clarity on our FOIA process.

- In § 402.60(a)(1), we revised the first sentence concerning our acknowledgement of FOIA requests for consistency with the FOIA statute. The language now reads: “If we receive a FOIA request that will take longer than 10 working days to process, we will provide an acknowledgment.”

- In § 402.60(b) and elsewhere throughout the regulation, we changed the term “business days” to “working days” for consistency with the FOIA statute.

- In § 402.60, we reorganized *Expedited processing* within 402.60(c) *Multi-tracking procedures*. Section 402.60(c), clarifies that there are three multi-track types: “FOIA requests are categorized simple, complex, or expedited. Unless granted expedited processing, we process FOIA requests in each track according to a first-in, first-out basis.” We further clarify in

§ 402.60(c)(2) how long it takes the agency to process requests placed in the complex multi-track: “We will place into a complex processing queue any request that cannot be completed within 20 working days due to the complex nature of the request, including consultation with components that may maintain records subject to the request.”

- In § 402.60(d), we clarify that “[w]hen unusual circumstances exist, we will process the request under the complex track.” We received a public comment concerning SSA’s “unusual circumstances” practice. As explained within the “Comments and Responses” portion of this final rule, we modified our final regulation to reflect that “unusual circumstances” exist “[w]hen unusual circumstances exist, we will process the request under the complex track.” This change is a clarifying statement but not a change in practice. We currently use multi-tracks under § 402.140(c) and similarly define longer tracks to include situations where there is a need to consult with other SSA offices and the FOIA defines unusual circumstances under 5 U.S.C. 552(a)(6)(B)(iii) to exist when there is a need to search for and collect the requested records from offices separate from the office processing the FOIA request. Thus, the change to § 402.60(d) is merely a clarifying statement of how our tracks align with the unusual circumstance requirements in FOIA.

- In § 402.60(d)(2), we added language about our “unusual circumstances” notification for consistency with the FOIA statute. We added the following sentence: “We will notify the requester of the date by which we estimate completing the request.”

- In § 402.60(f), we clarified our fees by adding “duplication” among the items subject to a fee. The language now reads: “FOIA requesters are issued a fee notice that informs them of the estimated search, review, and duplication time associated with processing their FOIA request.”

- In § 402.60(g)(2), we clarified language regarding our administrative closing of requests. The language now reads: “The processing time will resume upon our receipt of the requester’s response. There may be instances when we require multiple clarifications on a FOIA request. After the first request for clarification, any additional clarifications are performed without tolling the clock. If we do not receive a response to our clarification attempts within 30 calendar days from the date of our first contact to the requester, we will close the FOIA request.”

- In 402.60(i), we renamed the title of the subsection to reflect the content

more clearly. The subsection’s title changed from “Unproductive searches” to *No records determinations*.

- In § 402.60(j), we removed the word “only” from the first sentence, so it now reads as follows: “We will furnish copies of records in whole or in-part, unless we reasonably foresee that disclosure would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law.”

- In § 402.65, we modified (a), (a)(2), and (b). Under § 402.65(a), we removed the phrase “such as” before we list the criteria for expedited processing. For § 402.65(a)(2), for clarity and plain language usage, we changed the language from “the request is from the media, or other” to “the requester is.” In response to public comment, we also removed the word “immediate” in describing the urgency to inform the public necessary for expedited processing. Under § 402.65(b), we added language to clarify and more closely align with the FOIA statute⁷ to reflect the requester’s requirements when submitting a request for expedited processing. Our regulation now clearly states what information the requester must provide when submitting a request for expedited processing, *i.e.*, “A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. We will notify the requester within 10 calendar days of receipt of the request for expedited processing of our decision to grant or deny expedited processing.” We added one more sentence, clarifying our processing of requests for expedited processing: “Requests granted expedited processing will be given priority and processed as soon as practicable.”

- In § 402.85, in response to public comment, we modified the language by further clarifying the public interest criteria and what a requester should provide when submitting a request for a fee waiver citing public interest. We expand on this change within the “Comments and Responses” portion of this final rule.

- In § 402.90(c)(3), to align more with the electronic age and requesters’ use of credit card payment forms, we added language clarifying that we will dispose of payment information or return it. For example, if a requester faxed us their credit card payment information and the credit card payment information is no longer needed, rather than returning the completed credit card payment form via postal mail, we may dispose of the payment information.

⁷ 5 U.S.C. 552(a)(6)(E)(vi).

• In § 402.105(a)(2) and (a)(3), we added language further clarifying the timeframe to submit an appeal and what information a requester should provide when submitting an appeal. While we did not receive public comment on this section, we added the phrase “or in the case of electronic submissions, transmitted” and the word “calendar” to § 402.105(a)(2), so it now reads: “Be received, or in the case of electronic submissions, transmitted within 90 calendar days from the date of the determination the requester is appealing.” Under § 402.105(a)(3), we expand on what the appeal should include by adding two more sentences, so it now reads: “Explain what the requester is appealing and include additional information to support the appeal. The appeal should clearly identify the agency determination that is being appealed and the assigned request’s tracking number. To facilitate handling when submitted via mail or fax, the requester should mark the appeal letter, or subject line of the electronic transmission, ‘Freedom of Information Act Appeal.’”

• In § 402.105(b), we revised the first sentence concerning our

acknowledgement of FOIA appeals for consistency with the FOIA statute. The language now reads: “If we receive an appeal that will take longer than 10 working days to process, we will provide an acknowledgment.”

• In § 402.105(c)(2), we clarify how long it takes the agency to process appeals placed in the complex multi-track: “Appeals of complex requests cannot be completed within 20 working days.”

• In § 402.115 through § 402.145, we revised some of the introductions within the FOIA Exemptions to account that there may be considerations beyond the Exemption itself.

• In § 402.130, we clarified Exemption 4 regarding the Submitter’s Notice to make clear how we may handle transmission of submitter notices in cases involving many submitters. We also clarified some of the language to make it consistent throughout the regulation.

• In § 402.135, Exemption 5, we added “may” to the following sentence to clarify that these records are examples: “Such internal government communications may include an agency’s communications with an outside consultant or other outside

person, with a court, or with Congress, when those communications are for a purpose similar to the purpose of privileged intra-agency communications.”

• In § 402.145(e), we modified the language to mirror the FOIA statute concerning Exemption 7(E).

• In § 402.155, we added the phrase, “SSA’s public” in front of “Hearings, Appeals, and Litigation Law Manual.” We received public comment regarding the agency’s proactive disclosures; therefore, our addition of the phrase “SSA’s public” clarifies that the agency posts a public version of the Hearings, Appeals, and Litigation Law Manual.

• In § 402.160(a), we added “(a)(5) By posting in the FOIA Library,” to the list of places where the agency publishes records.

To visualize our reorganization of part 402, we provided a table that identifies the old (existing) regulatory sections, the sections to which the content moved, and the names of the new sections, which we are also including for ease-of-use and transparency in this final rule.⁸

Section-by-Section Changes

20 CFR PART 402 REORGANIZATION OF SECTIONS

Reorganization of 20 CFR part 402

Existing section	Existing → New	New section
402.5. Scope and purpose	402.5 → 402.05	402.05. Scope and purpose of this part.
402.10. Policy	402.10 → 402.15	402.10. Definitions.
402.15. Relationship between the FOIA and the Privacy Act of 1974.	402.15 → 402.20	402.15. SSA’s FOIA policy.
402.20. Requests not handled under the FOIA	402.20 → 402.45	402.20. Relationship between the FOIA and the Privacy Act of 1974.
402.25. Referral of requests outside of SSA	402.25 → 402.55	402.25. Who can file a FOIA request?
402.30. Definitions	402.30 → 402.10	402.30. Requirements of a FOIA request.
402.35. Publication	402.35 → 402.160	402.35. Where to submit a FOIA request.
402.40. Publications for sale	402.40 → 402.165	402.40. Requests for deceased individual’s records.
402.45. Availability of records	402.45(a) → 402.05	402.45. Requests handled outside of the FOIA process.
402.50. Availability of administrative staff manuals	402.50 removed	402.50. FOIA Officer’s authority.
402.55. Materials available at district offices and branch offices.	402.55 → 402.155	402.55. Referrals and consultations.
402.60. Materials in field offices of the Office of Hearings and Appeals.	402.60 → 402.155	402.60. How does SSA process FOIA requests?
402.65. Health care information	402.65 removed	402.65. Expedited processing.
402.70. Reasons for withholding some records	402.70 → 402.95(b)	402.70. Fees associated with processing FOIA requests.
402.75. Exemption one for withholding records: National defense and foreign policy.	402.75 → 402.115	402.75. FOIA fee schedule.
402.80. Exemption two for withholding records: Internal personnel rules and practices.	402.80 → 402.120	402.80. Charging under section 1106(c) of the Social Security Act.
402.85. Exemption three for withholding records: Records exempted by other statutes.	402.85 → 402.125	402.85. Waiver of fees in the public interest.
402.90. Exemption four for withholding records: Trade secrets and confidential commercial or financial information.	402.90 → 402.130	402.90. Notification of fees and prepayment requirements.
402.95. Exemption five for withholding records: Internal memoranda.	402.95 → 402.135	402.95. Release of records.

⁸ 88 FR at 36983.

20 CFR PART 402 REORGANIZATION OF SECTIONS—Continued

Reorganization of 20 CFR part 402		
Existing section	Existing → New	New section
402.100. Exemption six: Clearly unwarranted invasion of personal privacy.	402.100 → 402.140	402.100. FOIA Public Liaison and the Office of Government Information Services.
402.105. Exemption seven for withholding records: Law enforcement.	402.105 → 402.145	402.105. Appeals of the FOIA Officer's determination.
402.110. Exemption eight and nine for withholding records: Records on financial institutions; records on wells.	402.110 → 402.150	402.110. U.S. District Court action.
402.115. Reserved	Reserved → New section 402.115.	402.115. The FOIA Exemption 1: National defense and foreign policy.
402.120. Reserved	Reserved → New section 402.120.	402.120. The FOIA Exemption 2: Internal personnel rules and policies.
402.125. Who may release a record	402.125 → 402.50	402.125. The FOIA Exemption 3: Records exempted under other statutes.
402.130. How to request a record	402.130 → 402.35	402.130. The FOIA Exemption 4: Trade secrets and confidential commercial or financial information.
402.135. Where to send a request	402.130 → 402.30 and 402.35	402.135. The FOIA Exemption 5: Internal documents.
402.140. How a request for a record is processed	402.140(a)–(c) → 402.60	402.140. The FOIA Exemption 6: Clearly unwarranted invasion of personal privacy.
402.145. Responding to your request	402.140(d) → 402.65	402.145. The FOIA Exemption 7: Law enforcement.
402.150. Release of records	402.145(d) → 402.15(a)(2)	
	402.145(a)–(c) → 402.60	
	402.150 → 402.95	402.150. The FOIA Exemptions 8 and 9: Records on financial institutions; records on wells.
402.155. Fees to be charged—categories of requests	402.155 → 402.70–402.75	402.155. Records available for public inspection.
402.160. Fees to be charged—general provisions	402.160 → 402.70–402.75	402.160. Where records are published.
402.165. Fee schedule	402.165 → 402.75	402.165. Publications for sale through the Government Publishing Office.
402.170. Fees for providing records and related services for program purposes pursuant to section 1106 of the Social Security Act.	402.170 → 402.80	Transferred as Shown, and Unused in Revised part 402.
402.175. Fees for providing information and related services for non-program purposes.	402.170(b) → 402.85(d)	
402.180. Procedure on assessing and collecting fees for providing records.	402.175 → 402.80	Transferred as Shown, and Unused in Revised part 402.
402.185. Waiver or reduction of fees in the public interest.	402.180 → 402.90	Transferred as Shown, and Unused in Revised part 402.
402.190. Officials who may deny a request for records under FOIA.	402.185 → 402.85	Transferred as Shown, and Unused in Revised part 402.
402.195. How a request is denied	402.190 → 402.50	Transferred as Shown, and Unused in Revised part 402.
402.200. How to appeal a decision denying all or part of a request.	402.195 → 402.60	Transferred as Shown, and Unused in Revised part 402.
402.205. U.S. District Court Action	402.200 → 402.105	Transferred as Shown, and Unused in Revised part 402.
	402.205 → 402.110	

Comments Summary

We received five public comments on our NPRM from June 6 through August 7, 2023. All the comments are available for public viewing at <https://www.regulations.gov/document/SSA-2021-0049-0001>. These comments were from:

- Two individuals; and
- Three advocacy groups, Public Citizen, Community Legal Services of Philadelphia, and Justice in Aging.

We carefully considered the public comments we received. Comments from individuals and advocacy provided a mix of support for the revisions and reorganization as well as recommended revisions.

We received some comments that were outside the scope of this rulemaking because they did not relate

to our proposals. Even though outside the scope, we address some of these other comments where they related to the FOIA more generally because a response might help the public understand our program better.

The next section summarizes and responds to the public comments.

Comments and Responses

Comment: Two commenters requested that we ensure the application of the fee waiver provision is consistent with the FOIA statute within the introductory language of 20 CFR 402.85. The commenters urged us to ensure that our application of the new fee waiver regulation is “more consistent with the FOIA statute.” The commenters explained that we deny fee waiver requests made in the public interest.

Response: We understand the commenters' concern; however, we consistently follow the statutory and our regulatory requirements to disclose records at no fee or a reduced fee. Because SSA charges fees when the request is not directly related to the administration of the Social Security Act based on our authority in section 1106(c) of the Social Security Act, which applies notwithstanding the FOIA provisions in 5 U.S.C. 552 and 552a, the FOIA statutory fee provisions would not apply.⁹ When a public interest fee waiver is sought, we will approve waiver when the criteria in our regulation at 20 CFR 402.85 (formerly 20 CFR 402.185) have been met; this aspect of our fee charging and waiver procedures has not changed in this final

⁹ See 42 U.S.C. 1306(c).

rule from our current regulations. In seeking waiver requests, the requester should explain with reasonable specificity why their request meets the “public interest” criteria for a fee waiver under 20 CFR 402.85. Our regulation at § 402.85, explains the factors we consider when determining whether a request meets the “public interest” criteria necessary to reduce or waive the fee. The modifications we made to this section of our final regulation further clarify what a requester should provide when submitting a request for a fee waiver citing public interest. Under § 402.85(b)(1), we added the phrase “in writing” to the following sentence: “A requester must make the request for a fee waiver or reduction in writing at the same time they make their request for records.” In describing the public interest criteria under § 402.85(b)(2), we modified § 402.85(b)(2)(iii) and added § 402.85(b)(2)(iv). Within § 402.85(b)(2)(iii), we added the phrase “of those operations or activities” so the sentence now reads: “Whether the contribution to public understanding of those operations or activities would be significant.” Newly added § 402.85(b)(2)(iv) further clarifies that specificity is necessary when requesting a fee waiver in the public interest, *i.e.*: the requester “must be reasonably specific in your waiver request as to the specific Government operation or activity and provide direct, clear (not remote or attenuated) connections to the meaningful information you seek. Generalized interest in government programs is not reasonably specific to grant waiver.”

Comment: Several commenters requested that we change our proposed definition of “commercial interest” in 20 CFR 402.10. They asserted that our proposed definition of “commercial interest” suggests that interests related to non-profit corporations, such as the work performed by claimant advocacy entities, are commercial. These commenters suggested that our proposed definition does not accurately reflect the standard for a finding of a noncommercial use in the FOIA statute.

Response: We disagree that our proposed definition, finalized here, is inconsistent with the FOIA statute. Similar to our response regarding “public interest” above, commercial interests could be present regardless of the identity of the requester (individual, non-profit corporation, for-profit corporation). In response to the comment, we revised the definition of “commercial interest” to clarify that the interests could exist regardless of the requester’s identity. We also added the

definition of “commercial use” to address the FOIA fee category.

Comment: Several commenters agreed with our proposed revisions to 20 CFR 402.155 to provide responsive FOIA records in electronic format, particularly those documents related to statements of policy and interpretation, consistent with 5 U.S.C. 552(a)(2)(B). The commenters further advocated that our Program Operations Manual System (POMS) be proactively disclosed in its entirety and indexed, as well as all Emergency Messages (EM) and Administrative Messages (AM).

Response: POMS and EMs are not categorically subject to the proactive disclosure requirements of the FOIA. Nonetheless, in the interest of transparency, SSA now publishes indexes of POMS and EM titles, which are updated quarterly, on our public-facing website.¹⁰ SSA has a longstanding practice of making agency non-sensitive POMS and EMs public, even when the policies are not subject to the FOIA’s proactive disclosure requirements. Our current policy publication process directs authoring components to flag sensitive POMS and EMs that should be proactively disclosed under FOIA.¹¹ Any such flagged policies then undergo a FOIA review and are published with appropriate redactions if they contain non-exempt content.

AMs, which are informational or staff reminders and do not contain new instructions or policy, are also not categorically subject to proactive disclosure requirements. Our regulations and policy publication practices reflect these distinctions.

Comment: Commenters requested that when requesting electronic communications, they do not need to provide identifying information about the agency employees involved and that a request can be reasonably described even if it seeks a large number of documents. They requested that we revise the scope of proposed § 402.30, which described the requirements of a FOIA request, without necessarily providing detailed information regarding the individual(s) from whom the records are sought.

Response: SSA processes the FOIA centrally within the Office of Privacy and Disclosure (OPD); therefore, we need the requester to clearly state and reasonably describe what SSA records are being requested so that we can

properly determine the scope of the FOIA request. When seeking emailed communications, we understand that requesters may not know the name of specific employees whose records they want to be searched; therefore, we do not require such information. As stated in our proposed regulation, “When known, requests should identify the records sought by providing the name/ title of the record, applicable date range, subject matter, offices or employees involved, and record type. If the request is for electronic communications, such as email records, the request may identify the names, position titles, or other identifying information about the agency employees involved, as well as the applicable timeframe.”¹² While we are clarifying the above examples are not required, technology limitations may prevent the agency from conducting searches without this information. Absent sufficient details, the agency may be unable to search for or locate the records sought.

Comment: One commenter requested that we modify the final rule to specify that the agency will respond to initial requests within 20 working days, unless we provide written notice to the requester “setting forth the unusual circumstances for [an] extension and the date on which a determination is expected to be dispatched,” as articulated in the FOIA statute at 5 U.S.C. 552(a)(6)(B)(i). The commenter acknowledged, however, that the agency may extend its response time beyond 20 business days only if it provides written notice to the requester. Further, the commenter stated that the proposed rule, in contrast, makes no mention of notifying the requester if the agency is going to take more than 20 working days to respond to an appeal.

Response: SSA processes the FOIA centrally within the Office of Privacy and Disclosure (OPD) and we frequently search, collect, and consult with components outside of OPD to process complex requests and appeals. We place requests and appeals in the complex multitask type because they will generally take more than 20 working days to process due to the complex nature of the request, including consultation with components that may maintain records subject to the request. We modified our final regulation to reflect that “[w]hen unusual circumstances exist, we will process the request under the complex track.” This change is merely a clarifying statement of how our complex multi-track aligns with the unusual circumstances requirements in FOIA. “Unusual

¹⁰ See link at, <https://secure.ssa.gov/apps10/reference.nsf/instructiontypecode!openview&restricttocategory=INSTTTLES>.

¹¹ See instructions at, <https://secure.ssa.gov/apps10/reference.nsf/links/12202023010304PM>.

¹² 20 CFR 402.30(a)(4).

circumstances” exist when requests or appeals require OPD to: search for and collect records from SSA components or field locations that are separate from OPD; search for, collect, and review a voluminous number of records that are part of a single request; or consult with two or more SSA components or another agency having substantial interest in the request before releasing the records. We acknowledge the FOIA’s requirements at 5 U.S.C. 552(a)(6)(B) to provide notice to the requester when unusual circumstances exist. Within the agency’s acknowledgement letters and emails, we advise requesters that requests and appeals placed in a complex processing track meet unusual circumstances.

Comment: One commenter requested that we modify the final rule by deleting language in proposed *tolling* § 402.60(h)(2) stating that the agency reserves the right to administratively close a request within 10 business days if we do not receive a response to our request for clarification from the FOIA requester.

Response: The agency makes every reasonable effort to secure clarification from requesters before we administratively close a request. We contact requesters via email, phone, and or postal mail in our attempt to gain the clarification necessary to process FOIA requests. To avoid confusion, we clarified the language in § 402.60(g)(2) by removing the 10-business day language. The language now reads: “The processing time will resume upon our receipt of the requester’s response. There may be instances when we require multiple clarifications on a FOIA request. After the first request for clarification, any additional clarifications are performed without tolling the clock. If we do not receive a response to our clarification attempts within 30 calendar days from the date of our first contact to the requester, we will close the FOIA request.” Our authority, finalized in § 402.60(g)(2) is an administrative discretion that we will use in instances where a FOIA requester never responds to our requests for clarification. If our only course of communication with a requester is postal mail, we understand that delays may occur, and are mindful to allow additional time to accommodate postal mail delivery. We cannot process requests that are not reasonably described; therefore, when a requester does not respond to any correspondence wherein we request clarification, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.

Comment: One commenter requested that we modify the proposed rule in § 402.65(a) to remove the word “immediate” in describing the urgency to inform the public necessary for expedited processing. The commenter stated that our proposed language closely aligns with the statutory language in 5 U.S.C. 552(a)(6)(E)(v)(II) of the FOIA statute, but the word “immediate” before “urgency” is not in the statute.

Response: We agreed with the commenters’ suggestion and adopted this change in order to more closely align with the statute.

Regulatory Procedures

Executive Order (E.O.) 12866, as Supplemented by E.O. 13563

We consulted with the Office of Management and Budget (OMB) and they determined that this rule does not meet the criteria for a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563. Therefore, OMB did not formally review it.

Anticipated Costs to Our Program

The Office of the Chief Actuary estimates that there are no direct effects on scheduled Old-Age, Survivors, and Disability Insurance benefit payments and Federal Supplemental Security Income payments.

Anticipated Administrative Benefits to the Social Security Administration

The Office of Budget, Finance, and Management estimates an administrative effect of less than 15 work years and \$2 million annually.

Anticipated Qualitative Benefits

We anticipate qualitative benefits from the revisions to the FOIA regulation from streamlined and clarified FOIA policies and procedures. We expect the clarified regulations will benefit both SSA and the public because the administration of the FOIA for SSA and our public customers would be better organized and easier to follow. The purpose of the FOIA is to provide the public with access to government records, and administrative transparency is paramount to a successful FOIA program. Since the FOIA is processed centrally at SSA, our regulation must be easy for agency employees to understand so components outside of OPD understand the importance of the FOIA and their roles in the agency’s administration of the FOIA. When our policies are clear for agency employees, we are able to process FOIA requests in a more efficient manner, which benefits both the agency and the public.

Our revised regulation at part 402 provides information in a cascading fashion that is easier to follow than our existing regulation, and accurately reflects amendments implemented by the FOIA Improvement Act of 2016. Our revisions account for the roles of the FOIA Public Liaison and OGIS, which is useful for correct points of contact internally and for the public, increasing efficiency and lowering confusion. The revisions also update inaccurate information, such as the timeframe for the public to appeal adverse decisions, which presently state 30 days, but is 90 days under the FOIA Improvement Act of 2016.

The FOIA is designed to build trust between the public and Federal agencies. SSA’s revised regulation at 20 CFR part 402 strengthens this trust with transparency by explaining in plain language how SSA processes FOIA requests and appeals, and further describes our proactive posting of agency records. Clear communication with the public is paramount to our administration of the FOIA. Updating and revising our FOIA regulation serves to enhance our communication with the public, making it easier for the public to know how to submit FOIA requests and where to review proactively posted records.

E.O. 13132 (Federalism)

We analyzed this final rule in accordance with the principles and criteria established by E.O. 13132 and determined that the rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. We also determined that this rule will not preempt any State law or State regulation or affect the States’ abilities to discharge traditional State governmental functions.

Regulatory Flexibility Act

We certify that this rule will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

While this final rule mentions the public reporting requirements for the public to submit FOIA requests to the agency, we already obtained OMB approval for these public reporting requirements under the current OMB approved information collections for 0960–0566 (SSA 3288) and 0960–0665 (SSA–711 and Online FOIA Request). As we already cover these requirements under OMB-approved information

collections, and these revised rules merely move those requirements to new CFR citations but do not change them, these revised rules will not require Office of Management and Budget approval under the Paperwork Reduction Act. Rather, upon publication of the final rule, we will submit Change Requests to update the CFR citations for OMB No. 0960–0566 and 0960–0665.

List of Subjects in 20 CFR Part 402

Administrative practice and procedure, Freedom of information.

The Acting Commissioner of Social Security, Carolyn W. Colvin, having reviewed and approved this document, is delegating the authority to electronically sign this document to Erik Hansen, a Federal Register Liaison for the Social Security Administration, for purposes of publication in the **Federal Register**.

Erik Hansen,

Associate Commissioner, for Legislative Development and Operations, Social Security Administration.

■ For the reasons set forth in the preamble, the Social Security Administration revises 20 CFR part 402 to read as follows:

PART 402—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

Sec.

- 402.05 Scope and purpose of this part.
- 402.10 Definitions.
- 402.15 SSA's FOIA policy.
- 402.20 Relationship between the FOIA and the Privacy Act of 1974.
- 402.25 Who can file a FOIA request?
- 402.30 Requirements of a FOIA request.
- 402.35 Where to submit a FOIA request.
- 402.40 Requests for deceased individual's records.
- 402.45 Requests handled outside of the FOIA process.
- 402.50 FOIA Officer's authority.
- 402.55 Referrals and consultations.
- 402.60 How does SSA process FOIA requests?
- 402.65 Expedited processing.
- 402.70 Fees associated with processing FOIA requests.
- 402.75 FOIA fee schedule.
- 402.80 Charging under section 1106(c) of the Social Security Act.
- 402.85 Waiver of fees in the public interest.
- 402.90 Notification of fees and prepayment requirements.
- 402.95 Release of records.
- 402.100 FOIA Public Liaison and the Office of Government Information Services.
- 402.105 Appeals of the FOIA Officer's determination.
- 402.110 U.S. District Court action.
- 402.115 The FOIA Exemption 1: National defense and foreign policy.
- 402.120 The FOIA Exemption 2: Internal personnel rules and practices.

- 402.125 The FOIA Exemption 3: Records exempted by other statutes.
- 402.130 The FOIA Exemption 4: Trade secrets and confidential commercial or financial information.
- 402.135 The FOIA Exemption 5: Internal documents.
- 402.140 The FOIA Exemption 6: Clearly unwarranted invasion of personal privacy.
- 402.145 The FOIA Exemption 7: Law enforcement.
- 402.150 The FOIA Exemptions 8 and 9: Records on financial institutions; records on wells.
- 402.155 Records available for public inspection.
- 402.160 Where records are published.
- 402.165 Publications for sale through the Government Publishing Office.

Authority: 42 U.S.C. 405, 902(a)(5), and 1306; 5 U.S.C. 552 and 552a; 18 U.S.C. 1905; 26 U.S.C. 6103; 31 U.S.C. 9701; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

§ 402.05 Scope and purpose of this part.

(a) The purpose of this part is to describe the Social Security Administration's (SSA) policies and procedures for implementing the requirements of the Freedom of Information Act (FOIA) 5 U.S.C. 552. The FOIA mandates disclosure to the public of Federal agency records unless specific exemptions apply. The FOIA also requires an agency to proactively disclose records and make certain records available for public inspection.

(b) The rules in this part describe how SSA makes records available to the public, including:

- (1) What constitutes a proper request for records;
- (2) How to make a FOIA request;
- (3) Who has the authority to release and withhold records;
- (4) What fees may be charged to process a request for records;
- (5) The timing of determinations regarding release;
- (6) The exemptions that permit the withholding of records;
- (7) Requesters' right to seek assistance from the FOIA Public Liaison;
- (8) Requesters' right to appeal the agency's FOIA determination;
- (9) Requesters' right to seek assistance from the Office of Government Information Services and then go to court if they still disagree with our release determination; and
- (10) The records available for public inspection.

(c) The rules in this part do not revoke, modify, or supersede SSA's regulations relating to disclosure of information in part 401 or 403 of this chapter.

§ 402.10 Definitions.

As used in this part:

Agency means the Social Security Administration (SSA). Agency may also refer to any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the Federal Government, or any independent regulatory agency. A private organization is not an agency even if it is performing work under contract with the Government or is receiving Federal financial assistance.

Chief FOIA Officer means a senior official of SSA who has an agency-wide responsibility for ensuring efficient and appropriate compliance with the FOIA, monitoring implementation of the FOIA throughout the agency, and making recommendations to the head of the agency to improve the agency's implementation of the FOIA. The Commissioner of SSA designated the General Counsel as the Chief FOIA Officer for SSA. The Chief FOIA Officer or the Chief FOIA Officer's designee is authorized to make final decisions in response to appeals of the FOIA Officer's determinations.

Commercial interest includes interests relating to business, trade, and profit. These interests could be present regardless of the identity of the requester (e.g., individual, non-profit corporation, for-profit corporation). The interest of a representative of the news media in using the information for news dissemination purposes will not be considered a commercial interest.

Commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. Agencies will notify requesters of their placement in this category.

Component means each separate office, division, commission, service, center, or administration within SSA that may maintain agency records subject to a request under the FOIA.

Duplication means the process of reproducing a copy of a record, or of the information contained in it, to the extent necessary to respond to a request. Copies include paper, electronic records, audiovisual materials, and other formats of agency records.

Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with their role at the educational institution. To qualify for

this category, a requester must show that the FOIA request is authorized by, and is made under the auspices of or in connection with the requester's role at a qualifying institution and that the records are sought to further a scholarly research goal of the institution, and not for a commercial use or purpose, or for individual use or benefit. SSA may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

Exemption means one of the nine exemptions to the mandatory disclosure of records permitted under section 552(b) of the FOIA.

Expedited processing means the process set forth in the FOIA that allows requesters to request faster processing of their FOIA request, if they meet specific criteria noted in § 402.65.

Fee category means one of the three categories established by the FOIA to determine whether a requester will be charged fees under FOIA for search, review, and duplication. The categories are: commercial use requests; scientific or educational institutions and news media requests; and all other requests.

Fee waiver means the waiver or reduction of fees if a requester is able to demonstrate the requirements set forth in § 402.85.

FOIA Library means an electronic location(s) that SSA uses to post records that are made available to the public without a specific request. SSA makes FOIA library records electronically available to the public through our website, www.ssa.gov, including at www.ssa.gov/foia. Posted records may include those provided under agency discretion and not required pursuant to FOIA.

FOIA Officer means an SSA official whom the Commissioner of Social Security delegated the authority to release or withhold records; to assess, waive, or reduce fees in response to FOIA requests; and to make all other determinations regarding the processing of a FOIA request. In this capacity, the FOIA Officer is authorized to request and receive responsive records that may be maintained by other agency components. Except for records subject to proactive disclosure pursuant to subsection (a)(2) of the FOIA, only the FOIA Officer has the authority to release or withhold records or to waive fees in response to a FOIA request.

FOIA Public Liaison means an agency official who reports to the agency Chief FOIA Officer and serves as a supervisory official to whom a requester can raise concerns about the service the requester received concerning the processing of the FOIA request. This

individual is responsible for increasing transparency in the agency's FOIA business process, helping requesters understand the status of requests, and assisting in the resolution of disputes. The FOIA Public Liaison may be contacted via email to FOIA.Public.Liaison@ssa.gov.

FOIA request means a written request that meets the criteria in § 402.30.

Freedom of Information Act or FOIA means the law codified at 5 U.S.C. 552 that provides the public with the right to request agency records from the Federal executive branch agencies.

Non-commercial scientific institution means an institution that does not further the commercial, trade, or profit interests of any person or entity and is operated for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

Numident refers to the "Numerical Identification System," the SSA system that contains information available on an Application for a Social Security Card (Form SS-5). The Numident record contains the name of the applicant, place of birth, and other information.

OGC means the Office of the General Counsel.

Online FOIA portal means the electronic application that SSA uses to process FOIA requests. The public may also submit requests directly to SSA via the online FOIA portal.

OPD means the Office of Privacy and Disclosure.

Other requester means any individual or organization whose FOIA request does not qualify as a commercial-use request, representative of the news media request (including a request made by a freelance journalist), or an educational or non-commercial scientific institution request.

Production means the process of preparing the records for duplication, including the time spent in preparing the records for duplication (*i.e.*, materials used, records/database retrieval, employee and contractor time, as well as systems processing time).

Record(s) means any information maintained by an agency, regardless of format, that is made or received in connection with official agency business that is under the agency's control at the time of the FOIA request. Record(s) includes any information maintained for an agency by a third party.

(1) Record(s) does not include personal records of an employee, or other information in formally organized and officially designated SSA libraries and FOIA library, where such materials are available under the rules of the particular library.

(2) Record(s) includes information maintained by the State Disability Determination Services related to performing the disability determination function and medical source information pertaining to consultative examinations performed for the Social Security program when obtained by, created on behalf of, or otherwise, in the control of SSA.

Redact means delete or mark over.

Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals, including print and online publications that disseminate news and make their products available through a variety of means to the general public. We do not consider FOIA requests for records that support the news-dissemination function of the requester to be a commercial use. We consider "freelance" journalists who demonstrate a solid basis for expecting publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, we also consider a requester's past publication record. We decide whether to grant a requester media status on a case-by-case basis.

Request means asking for records, whether or not the requester refers specifically to the FOIA. Requests from Federal agencies, subpoenas, and court orders for documents are not included within this definition.

Review, unless otherwise specifically defined in this part, means examining records responsive to a request to determine whether any portions are exempt from disclosure. Review time includes processing a record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions. It does not include the process of resolving general legal or policy issues regarding exemptions.

Search means the process of identifying, locating, and retrieving records responsive to a request, whether in hard copy or in electronic form or format, or by manual or automated/electronic means.

Special services means performing additional services outside of that

required under the FOIA to respond to a request. Examples include using an overnight mail service to send the agency's response to a FOIA request.

SS-5 means an Application for a Social Security Card. It is used to request an original, different, or replacement Social Security Card.

SSA means the Social Security Administration.

Submitter means any person or entity that provides trade secrets or commercial or financial information to the agency, and includes individuals, corporations, other organizational entities, and state and foreign governments.

Tolling means temporarily stopping the running of a time limit. We may toll a FOIA request to seek clarification from the requester or to address fee issues, as further described in § 402.60(h).

Trade secrets and confidential commercial or financial information means trade secrets and confidential commercial or financial information that is obtained by the agency from a submitter, such that it may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

§ 402.15 SSA's FOIA policy.

(a) *Presumption of openness.* SSA will withhold information only if we reasonably foresee that disclosure would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law.

(b) *Authority to release and withhold records.* As described in § 402.50, the agency's FOIA Officer, or the FOIA Officer's designee, has the authority to:

(1) Release or withhold records in response to initial requests;

(2) Grant or deny expedited processing; and

(3) Reduce or waive fees.

(c) *Records publicly available.* We make available for public inspection in an electronic format records that are final and have been requested and released three or more times and other specified records described in § 402.155. We do not make available for public inspection records that are not static, such as the Open Access Death Master File.

(d) *Required record production.* The FOIA does not require an agency to give opinions, conduct research, answer questions, or create records.

§ 402.20 Relationship between the FOIA and the Privacy Act of 1974.

(a) *Coverage.* The FOIA and the rules in this part apply to all SSA records. The Privacy Act, 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records.

(b) *Requesting your own records.* If you have filed a FOIA request and are an individual requesting your own records that are maintained in a system of records, or if you are a parent or legal guardian authorized to act under § 401.75 of this chapter who is seeking the records about a minor or individual who has been declared incompetent, your request may be handled under the Privacy Act. See § 401.40 of this chapter. If we handle your request under the Privacy Act, we will provide you with written notification with further processing instructions. Privacy Act requests are also processed under the FOIA, when appropriate, to give you the benefit of both statutes. You must verify your identity in accordance with our regulations. See § 401.45 of this chapter.

§ 402.25 Who can file a FOIA request?

Any person may submit a FOIA request to SSA. Under the FOIA, "any person" includes requests from individuals, corporations, State and local agencies, as well as foreign entities. Requests from Federal agencies and Federal or State courts are not covered by the FOIA.

§ 402.30 Requirements of a FOIA request.

(a) To be considered a FOIA request under this part, the following must occur:

(1) The request must be written (either by hand or electronically);

(2) The request must be submitted in accordance with § 402.35;

(3) The requester must provide the following required contact information: Requester's name, U.S. or foreign postal address, description of records sought, and fee willing to pay. While not required, we encourage requesters to provide us with their email address and phone number; and

(4) The request must clearly state and reasonably describe what SSA records are being requested in sufficient detail to enable OPD to locate them with a reasonable amount of effort. Broad, sweeping requests and vague requests are not reasonably described. When known, requests should identify the records sought by providing the name/title of the record, applicable date range, subject matter, offices or employees involved, and record type. If the request is for electronic communications, such as email records, the request may identify the names, position titles, or other identifying information about the agency employees involved, as well as the applicable timeframe. Absent sufficient details, the agency may be unable to search for or locate the records sought. The greater the date range, the

longer it may take to process the request and the greater amount of fees that may be charged.

(b) Requests that do not meet the required criteria in paragraph (a) of this section are not considered proper FOIA requests.

§ 402.35 Where to submit a FOIA request.

(a) *Submission of requests.* Except as specified in paragraph (b) of this section, requesters must submit FOIA requests in writing to OPD through the following options:

(1) *Online FOIA portal:* Link available from the agency's www.ssa.gov/foia website or the National FOIA Portal at www.FOIA.gov.

(2) *Email:* FOIA.Public.Liaison@ssa.gov.

(3) *Mail:* SSA Office of Privacy and Disclosure, ATTN: Freedom of Information Officer, 6401 Security Boulevard, Baltimore, MD 21235.

(b) *Requests for copies of Deceased Individual's Application for a Social Security Card (SS-5) or Numident record.* Requesters may use the Form SSA-711, *Request for a Deceased Individual's Social Security Record*, to request a copy of a deceased individual's original SS-5 or Numident record. When the Form SSA-711 is used, it may be submitted to the office listed on the form or as directed in paragraph (a) of this section.

§ 402.40 Requests for deceased individual's records.

(a) The agency will disclose the records concerning a deceased individual when we have acceptable proof of death unless Federal law or regulations prohibits the disclosure.

(b) Proof of death includes:

(1) A copy of a public record of death of the number holder;

(2) A statement of death by the funeral home director;

(3) A statement of death by the attending physician or the superintendent, physician, or intern of the institution where the person died;

(4) A copy of the coroner's report of death or the verdict of the coroner's jury;

(5) An obituary that we determine has sufficient identifying information; or

(6) Other certified record of death that we determine within our discretion is acceptable.

(c) If upon review of the provided proof of death, we cannot determine that the individual is deceased or we have questions about the authenticity of the proof, then the proof is not acceptable. When we do not have acceptable proof of death, we will treat the request in accordance with

§ 402.20(b), requests for information about a living person.

§ 402.45 Requests handled outside of the FOIA process.

When records outlined in paragraphs (a) through (d) of this section are requested from OPD, OPD will respond to the requester and provide information for requesting the records sought:

(a) To the extent a request asks for records that are currently publicly available, either from SSA or from another part of the Federal Government. See § 402.155.

(b) If the records sought are distributed by SSA as part of its regular program activity, for example, public information leaflets distributed by SSA. See §§ 402.155 through 402.165.

(c) If the records sought are earnings records covered by § 422.125 of this chapter.

(d) If a request does not meet the requirements of a FOIA request as defined in § 402.30. We will send written correspondence to the requester:

(1) Providing instructions for how to submit a proper FOIA request; or

(2) Asking for additional information to make the request a proper FOIA request.

§ 402.50 FOIA Officer's authority.

(a) *Release determination.* Only the Deputy Executive Director for OPD or their designee is authorized to make determinations about:

(1) Release or withholding of records;
(2) Expedited processing;
(3) Charging or waiver of fees; and
(4) Other matters relating to processing a request for records under this part.

(b) *Determination provided in writing.* The FOIA Officer's determination is provided in writing to the requester via emailed communication or, in the absence of the requester's email address, via U.S. postal mail. If the requester disagrees with the FOIA Officer's determination in response to items identified in paragraph (a) of this section, the requester may appeal the determination to the Executive Director for OPD, as described in § 402.105.

§ 402.55 Referrals and consultations.

(a) *Consultation and referral.* When reviewing records located by SSA in response to a request, SSA will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, SSA will proceed in one of the following ways:

(1) *Referral of FOIA records in whole or in part to an outside agency.* We will

notify the requester in writing when we opt to refer records in whole or in part to another agency for direct response from that agency, including the name(s) or the agency(s) to which the record was referred and that agency's FOIA contact information, unless notification would cause harm to an interest protected under the FOIA. In such instances, in order to avoid harm to an interest protected by an applicable exemption, we coordinate to seek the view of the originating agency.

(2) *Agency consultation.* If a request is for records that were created by, or provided to us by, another agency that is not subject to the FOIA, we may consult with that agency, as described in paragraph (b) of this section.

(b) *Consultation with another agency or entity.* If a request is for records that originated with SSA but contain information of interest to another agency or entity, we may consult with the other agency or entity prior to issuing our release determination to the requester.

§ 402.60 How does SSA process FOIA requests?

(a) *Acknowledgement.* (1) If we receive a FOIA request that will take longer than 10 working days to process, we will provide an acknowledgment. The acknowledgement email or letter restates the FOIA request and provides the requester with the request's tracking number.

(2) If we require clarification to process the FOIA request, we will contact the requester either via email, U.S. postal mail, or phone call. We attempt to contact requesters twice. If we do not receive a response to our clarification attempts within 30 calendar days from the date of our first contact to the requester, we will close the FOIA request due to insufficient information.

(b) *Perfected requests.* FOIA requests are considered "perfected," i.e., the 20-working day statutory time begins, when the request meets the requirements of the proper FOIA request listed in § 402.30. There may be times that we require more information from the requester after perfecting a request. The 20-working day period may be extended in unusual circumstances by written notice to the requester. See paragraph (d) of this section.

(c) *Multi-tracking procedures.* FOIA requests are categorized simple, complex, or expedited. Unless granted expedited processing, we process FOIA requests in each track according to a first-in, first-out basis.

(1) *Simple.* For most non-expedited requests, we make a determination

about release of the record(s) requested within 20-working days.

(2) *Complex.* We will place into a complex processing queue any request that cannot be completed within 20-working days due to the complex nature of the request, including consultation with components that may maintain records subject to the request. We make good faith efforts to notify requesters in writing if it is necessary for us to take additional time to process a request and of the requester's right to seek dispute resolution services with the Office of Government Information Services. See § 402.100.

(3) *Expedited processing.* Unless granted expedited processing, we process FOIA requests according to a first-in, first-out basis. See § 402.65 for information on expedited processing.

(d) *Unusual circumstances.* (1) Unusual circumstances exist when there is a need to:

(i) Search for and collect records from SSA components or field locations that are separate from OPD;

(ii) Search for, collect, and review a voluminous number of records that are part of a single request; or

(iii) Consult with two or more SSA components or another agency having substantial interest in the request before releasing the records.

(2) Within the unusual circumstances letter to the requester, we will provide an estimated date that we will contact the requester with the applicable fee notice and/or further correspondence. We will notify the requester of the date by which we estimate completing the request. We will also advise the requester that they may modify or narrow the scope of their request.

(3) When unusual circumstances exist, we will process the request under the complex track.

(e) *Aggregating requests.* We may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request, involving clearly related matters, which would otherwise involve unusual circumstances. In the event requests are aggregated, they will be treated as one request for estimating response time and calculating fees.

(f) *Fee notice.* FOIA requesters are issued a fee notice that informs them of the estimated search, review, and duplication time associated with processing their FOIA request. For more information on fees, see §§ 402.70 through 402.80.

(g) *Tolling.* (1) We may stop or toll the 20 working days in two circumstances:

(i) We may stop the clock once if we require additional information regarding the specifics of the request; and

(ii) We may stop the clock as many times as needed regarding fee assessments.

(2) The processing time will resume upon our receipt of the requester's response. There may be instances when we require multiple clarifications on a FOIA request. After the first request for clarification, any additional clarifications are performed without tolling the clock. If we do not receive a response to our clarification attempts within 30 calendar days from the date of our first contact to the requester, we will close the FOIA request.

(h) *Retrieving records.* We are required to furnish copies of records only when they are in our possession or we can retrieve them from storage. We will make reasonable efforts to search for records except when such efforts would significantly interfere with the operation of our automated information system(s). The Federal Government follows National Archives and Records Administration rules on record retention. Records are retained or destroyed under the guidelines of the Federal Records Act.

(i) *No records determinations.* We will search for records to satisfy a request using methods that can be reasonably expected to produce the requested records. Nevertheless, we may not be able to always find the records requested using the information provided by the requester, or they may not exist. If we advise that we have been unable to find the records despite a diligent search, the requester may appeal the no records determination to the Executive Director for OPD, as described in § 402.105.

(j) *Furnishing records.* We will furnish copies of records in whole or in-part, unless we reasonably foresee that disclosure would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law. When information within a responsive record(s) is exempt from disclosure, the information is redacted and the applicable FOIA exemption(s) are noted within the redacted cell. We will make reasonable efforts to provide the records in the form or format requested if the record is readily reproducible in that form or format. We may provide individual records as we process them on a rolling basis, or we may release all responsive records once the request is completed. See § 402.95 for more information on SSA's release of records.

(k) *Directing a requester to another agency.* If a request is for records that are not SSA records for purposes of the

FOIA, and we believe the records may be maintained by another agency, we may advise the requester to submit their request to that other agency. In such cases, we will provide the requester with the other agency's name in our response letter. Our recommendation that the requester submit their request to the other agency is not a guarantee the other agency will have or disclose the records requested.

(l) *Burdensome requests.* The FOIA requires an agency to provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. We will not search or produce records in response to a FOIA request that we determine would be unduly burdensome to process. FOIA requests are determined to be unreasonably burdensome when processing the FOIA request would significantly interfere with the ongoing operation of the agency's programs.

§ 402.65 Expedited processing.

(a) Expedited processing must be requested at the same time as the FOIA request. We provide expedited processing when the requester can demonstrate a "compelling need" for the requested information:

(1) When there is an imminent threat to the life or safety of a person;

(2) When the requester is primarily engaged in disseminating information, and shows an urgency to inform the public about actual or alleged government activities; or

(3) When the requester can show, in detail and to our satisfaction, that a prompt response is needed because the requester may be denied a legal right, benefit, or remedy without the requested information, and that it cannot be obtained elsewhere in a reasonable amount of time.

(b) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. We will notify the requester within 10 calendar days of receipt of the request for expedited processing of our decision to grant or deny expedited processing. Only the FOIA Officer may make the decision to grant or deny expedited processing. Requests granted expedited processing will be given priority and processed as soon as practicable. Requests that do not meet the "compelling need" criteria, will be processed normally. If we do not grant the request for expedited processing, the requester may appeal the denial to the Executive Director for OPD. In the appeal letter, the requester should

explain why they believe their request demonstrates a "compelling need," such as describing how the request meets the criteria in paragraphs (a)(1) through (3) of this section. The process described in § 402.105 will also apply to these appeals.

§ 402.70 Fees associated with processing FOIA requests.

(a) *Charging authorities*—(1) *Section 1106(c).* Section 1106(c) of the Social Security Act (42 U.S.C. 1306(c)) allows the agency to charge for FOIA requests that are not directly related to SSA's administration of the Social Security Act. See § 402.80 for information on the agency's authorization under section 1106(c) to charge requesters. Requesters may request a fee waiver, as described in § 402.85.

(2) *FOIA fee categories.* The FOIA establishes three fee categories of requesters, *i.e.*, commercial use, non-commercial scientific or educational institutions and representatives of the news media; and other requesters. The category of the requester determines the fees that may be charged; see § 402.75 for the FOIA fee schedule. Requesters may request a fee waiver, as described in § 402.85.

(b) *Hourly rate when charging under section 1106(c) and the FOIA fee categories.* (1) When we search for and review records, we charge an hourly rate, based in 15-minute increments, depending on the grade(s) of the employee(s) and/or contractors performing the search and review. The hourly rate is the same when charging under the FOIA fee provisions or section 1106(c) of the Social Security Act. SSA uses the current General Schedule (GS) salary table for the locality pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA. We use the following criteria to compute our hourly rates for search or review:

(i) When performed by employees at grade GS-1 through GS-8, SSA will charge an hourly rate based on the salary of a GS-5, step 7, employee;

(ii) When performed by a GS-9 through GS-14, SSA will charge an hourly rate based on the salary of a GS-12, step 4, employee; and

(iii) When performed by a GS-15 or above, SSA will charge an hourly rate based on the salary of a GS-15, step 7, employee.

(2) When work is performed by a contractor, we will charge an hourly rate based on the GS equivalent of the contractor's hourly pay rate. We compute the hourly rate by taking the current hourly rate for the specified grade and adding 16 percent of that rate

to cover benefits and rounding to the nearest whole dollar. These rates are adjusted as Federal salaries change. Federal salary rates are available from the Office of Personnel Management. When a search and review involves employees at more than one of these GS levels, we will charge the rate appropriate for each. We may charge a fee for search time even if we are unable to locate any responsive records or the records are exempt from disclosure.

§ 402.75 FOIA fee schedule.

(a) *Fee schedule category.* Requesters whom SSA charges under the FOIA fee schedule are subject to the following fees dependent upon their fee category:

(1) *Commercial.* Commercial use requesters are charged for search, review, and duplication.

(2) *Non-commercial educational or scientific institutions and representative of the news media.* Requesters that fit this category are charged for the duplication of documents. We will not charge requesters the copying costs for the first 100 pages of duplication.

(3) *Other.* If the FOIA request does not fall within a category described in paragraph (a)(1) or (2) of this section, we will charge for search and duplication; however, we will not charge for the first two hours of search time or for the duplication costs of the first 100 pages.

(b) *Certification.* If a requester asks for certification of the record(s) responsive to their FOIA request and OPD agrees to provide it, we will notify the requester of the appropriate certification fee via written correspondence.

(c) *Record(s) production and duplication—(1) Electronic records.* We will charge the actual costs for producing and duplicating the record and the time spent by the employees or contractors in production, duplication, or otherwise processing the FOIA request, at the rates given in § 402.70(c).

(2) *Photocopying standard size pages.* For noncommercial requesters, we will charge \$0.10 per page after the first 100 pages, which are free. The FOIA Officer may charge lower fees for particular documents where:

(i) The document has already been printed in large numbers;

(ii) The program office determines that using existing stock to answer this request, and any other anticipated FOIA requests, will not interfere with program requirements; and

(iii) The FOIA Officer determines that the lower fee is adequate to recover the prorated share of the original printing costs.

(3) *Photocopying odd-size documents.* For photocopying documents, such as punch cards or blueprints, or

duplicating other records, such as tapes, we will charge the actual costs of operating the machine, plus the actual cost of the materials used, plus charges for the time spent by the operator, at the rates given in § 402.70(c).

(d) *Cost of service less than cost of issuing a bill.* We will not charge a fee when the cost of the service is less than the cost of sending the requester a bill. However, where an individual, organization, or governmental unit makes multiple separate requests, we will total the costs incurred and bill the requester for the services rendered.

(e) *Fee waiver.* We may waive or reduce the fee if we find that waiver is in the public interest. See § 402.85 for fee waiver information.

§ 402.80 Charging under section 1106(c) of the Social Security Act.

Section 1106(c) of the Social Security Act permits the agency to charge the full cost to process requests for information for purposes not directly related to the administration of program(s) under the Social Security Act. This may be done notwithstanding the fee provisions in FOIA, the Privacy Act, or any other provision of law. In responding to FOIA requests for non-program purposes, we will charge the full cost (both direct and indirect costs) of our services, regardless of the requester's fee categorization, unless the cost of the service is less than the cost of issuing a bill as stated in paragraph (b) of this section.

(a) *Full costs.* The agency may charge full costs for processing records or information requests, including but not limited to:

(1) *Search.* We may charge for search time even if we are unable to locate any responsive records or the records are exempt from disclosure. We will notify the requester in writing if the records estimated as responsive are determined unreasonably burdensome for the agency to process and/or the search would cause significant interference with the operation of SSA's automated information systems.

(2) *Review.* Review includes the reviews performed at any level (staff through executive), including but not limited to review by multiple people and offices.

(3) *Production and duplication of record(s).* We may charge the full cost of the systems' processing (e.g., computer search time, computer processing database retrieval), materials used to produce and duplicate the requested record(s), and time spent by agency employee(s) and/or contractor(s) in production, duplication, or otherwise processing the FOIA request.

(4) *Certification.* We will charge the full costs for certification.

(5) *Employee's time.* The full cost of an employee's time includes fringe benefits and overhead costs, such as rent and utilities.

(6) *Forwarding/delivering materials.* If special arrangements for forwarding material are requested, we will charge the requester the full cost of this service (e.g., if express mail or a commercial delivery service is requested). If no special forwarding arrangements are requested, we will charge the requester the full cost of the service, including the U.S. Postal Service cost.

(7) *Performing other special services.* If we agree to provide any special services requested, we will charge the full cost of the time of the employee(s) or contractor(s) who perform the service, plus the full cost of any systems processing time and materials that the employee or contractor uses.

(b) *Cost of service less than cost of issuing a bill.* We will not charge a fee when the cost of the service is less than the cost of sending the requester a bill. However, where an individual, organization, or governmental unit makes multiple separate requests, we will total the costs incurred and bill the requester for the services rendered.

(c) *Standard administrative fees for non-program information.* The information in this part does not revoke, modify, or supersede the schedule of standard administrative fees the agency charges for specified non-program information requests.

(d) *Non-program purpose.* Non-program purposes constitute any purpose that is not program related.

(1) We consider a request to be program related if:

(i) The information must be disclosed under the Social Security Act (Act); or

(ii) The information will be used for a purpose which is directly related to the administration of a program under the Act for which SSA has responsibility. In deciding whether this paragraph (d)(1)(ii) applies, the major criteria SSA considers is whether the information is:

(A) Needed to pursue a benefit under a program that SSA administers under the Act.

(B) Needed solely to verify the accuracy of information obtained in connection with a program that SSA administers under the Act.

(C) Needed in connection with an activity under SSA's purview which is authorized under the Act.

(D) Needed by an employer to carry out taxpaying responsibilities under the Federal Insurance Contributions Act or section 218 of the Act.

(2) We will consider each request on a case-by-case basis when the criteria in this paragraph (d) are not met but the requester claims a request is for a program-related purpose for another reason. We will not conclude a request is program-related solely because the records sought are about programs administered by SSA or are claimed to be of public interest.

(e) *Disagreement with program or non-program determination.* Only the FOIA Officer has the authority to make the program/non-program decision. If a requester disagrees with the FOIA Officer's non-program determination, they may appeal the decision to the Executive Director for OPD. In the appeal letter, the requester should explain why they believe the request meets the requirements in paragraph (c) of this section. The process described in § 402.105 will also apply to these appeals.

§ 402.85 Waiver of fees in the public interest.

A requester may request waiver or reduction of fees, whether charged under § 402.75 or § 402.80, if the release of the requested records is in the public interest. We will waive or reduce the fees we would otherwise charge if disclosure of the requested information:

- (a) Is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
- (b) Is not primarily in the commercial interest of the requester.

(1) *Procedure for requesting a waiver or reduction.* A requester must make the request for a fee waiver or reduction in writing at the same time they make their request for records. The requester should explain with reasonable specificity why they believe a waiver or reduction is proper under the analysis in paragraphs (b)(2) and (3) of this section. Only the FOIA Officer may make the decision whether to waive, or reduce, the fees. If we do not completely grant the request for a waiver or reduction, the requester may appeal the denial to the Executive Director for OPD. In the appeal letter, the requester should explain why they believe the request meets the requirements in paragraphs (b)(2) and (3) of this section. The process prescribed in § 402.105 will also apply to these appeals.

(2) *Public interest.* We consider the factors below when analyzing whether disclosure is in the public interest:

- (i) How the records pertain to the Federal Government's operations or activities;
- (ii) Whether disclosure would reveal any meaningful information about

Government operations or activities not already known to the public; and

(iii) Whether the contribution to public understanding of those operations or activities would be significant.

(iv) Regarding the above criteria, you must be reasonably specific in your waiver request as to the specific Government operation or activity and provide direct, clear (not remote or attenuated) connections to the meaningful information you seek. Generalized interest in government programs is not reasonably specific to grant waiver.

(3) *Not primarily in requester's commercial interest.* If the disclosure is determined to be in the public interest as described in paragraph (b)(2) of this section, we will then determine whether it also furthers the requester's commercial interest and, if so, whether this effect outweighs the advancement of that public interest. We consider the following factors when analyzing whether disclosure is not primarily in the requester's commercial interest:

(i) Would the disclosure further a commercial interest of the requester, or of someone on whose behalf the requester is acting?

(ii) If disclosure would further a commercial interest of the requester, would that effect outweigh the advancement of the public interest defined in paragraph (b)(2) of this section? Which effect is primary?

(4) *Burden on SSA to produce the record(s).* If the disclosure meets the requirements in paragraphs (b)(2) and (3) of this section, we reserve the right to charge a fee if special services are needed to provide the records.

(5) *Deciding between waiver and reduction.* If the disclosure meets the requirements in paragraphs (b)(2) and (3) of this section, we will normally waive fees. However, in some cases we may decide only to reduce the fees. For example, we may do this when disclosure of some but not all of the requested records meet the fee waiver criteria.

§ 402.90 Notification of fees and prepayment requirements.

Requesters must agree to pay the fee, whether charged under § 402.75 or § 402.80, before we will begin the search for record(s).

(a) *Cost estimate.* OPD will issue a fee notice to the requester for the processing of their request for records that includes an estimated fee based on the time we estimate it will take to process the record(s) requested. We issue fee notices via email or, when the requester does

not provide an email address, via U.S. postal mail.

(b) *Advanced payment information required.* The requester must agree to pay the estimated fee provided within the fee notice and provide the agency with payment information within 30 calendar days from the date of our fee notice. Payment information is required before OPD will begin the search for the requested record(s). Unless otherwise specified in the schedule of standard administrative fees the agency charges for specified non-program information requests, OPD will process payment when the request is closed, *i.e.*, when the FOIA Officer issues a decision on records release. If the payment information provided by the requester expires during the course of OPD's processing of the FOIA request, the requester must provide updated payment information. If updated payment information is not provided within 30 calendar days of our written request for the payment information, we reserve the right to administratively close the request.

(c) *Changes in estimated fee.* (1) If the time spent to search for records is more or less than the time estimated in the fee notice, OPD will issue the requester a revised fee notice after the responsive component(s) performs the records search and retrieval.

(2) If the record(s) provided to OPD for review are more or less than those from which OPD estimated search and review time, OPD will issue the requester a revised fee notice after the responsive component(s) perform the records search and retrieval.

(3) OPD will either dispose of the payment information or return the payment information to the requester when OPD issues the revised fee notice.

(4) The requester must agree to pay the revised fee before we will continue processing the request. If the requester disagrees with the revised fee, the requester may appeal to the Executive Director for OPD. Appeals will be processed as described in § 402.105.

(d) *Prompt payment.* We will administratively close the FOIA request if we do not receive a response or appeal within 30 calendar days from the date of the fee notice. "Response" includes:

(1) Requesting to narrow the scope of the request; or

(2) Providing payment in response to the fee notice. Appeals will be processed as described in § 402.105.

(e) *Methods of payment.* We accept payment by check or money order made payable to the Social Security Administration (SSA), as well as by

credit card (MasterCard, Visa, Discover, American Express, or Diner's Club).

§ 402.95 Release of records.

(a) *Records previously released.* If we have released a record, or a part of a record, to others in the past, we will ordinarily release it to the requester, as well. However, we will not release it to a requester if a statute forbids this disclosure; an exemption applies that was not previously applicable; or if the previous release was unauthorized.

(b) *Withholding records.* Section 552(b) of the FOIA explains the nine exemptions under which we may withhold records requested under the FOIA. Within §§ 402.115 through 402.150, we describe the FOIA exemptions and explain how we apply them to disclosure determinations. In some cases, more than one exemption may apply to the same document. Section 552(b) of the FOIA, while providing nine exemptions from mandatory disclosure, does not itself provide any assurance of confidentiality by the agency.

(c) *FOIA library.* If the record(s) requested are already publicly available, either in our electronic FOIA library or elsewhere online, such as at www.ssa.gov, we will direct the requester to the publicly available record(s).

(d) *Poor copy.* If we cannot make a legible copy of a record to be released, we do not attempt to reconstruct it. Instead, we furnish the best copy possible and note its poor quality in our reply.

§ 402.100 FOIA Public Liaison and the Office of Government Information Services.

We notify requesters of their right to seek dispute resolution from the FOIA Public Liaison or the Office of Government Information Services (OGIS) within our fee notices, responses to determinations identified in § 402.50(a), and responses to appeals.

(a) *FOIA Public Liaison.* If requesters have questions about the response to their request or wish to seek dispute resolutions services within SSA, the requester may contact the FOIA Public Liaison via email to FOIA.Public.Liaison@ssa.gov.

(b) *OGIS.* OGIS is an entity outside of SSA that offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. OGIS' contact information will be provided in any decision letter issued by the FOIA Officer and Executive Director for OPD.

§ 402.105 Appeals of the FOIA Officer's determination.

(a) *Appeal requirements.* If a requester disagrees with the FOIA Officer's determination in response to items specified in § 402.50(a), the requester may appeal the decision. The appeal must meet the following requirements:

(1) Be submitted in writing via the avenues identified in § 402.35(a);

(2) Be received, or in the case of electronic submissions, transmitted within 90 calendar days from the date of the determination the requester is appealing; and

(3) Explain what the requester is appealing and include additional information to support the appeal. The appeal should clearly identify the agency determination that is being appealed and the assigned request's tracking number. To facilitate handling when submitted via mail or fax, the requester should mark the appeal letter, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Acknowledgement.* If we receive an appeal that will take longer than 10 working days to process, we will provide an acknowledgment. The acknowledgement is provided via email or, when the requester does not provide an email address, via U.S. postal mail. The acknowledgement email or letter restates the FOIA appeal and provides the requester with the appeal's tracking number.

(c) *Processing timeframe.* FOIA appeals are categorized as either simple or complex, based on the designation of the initial request.

(1) *Simple.* Generally, we make a determination about release of the requested record(s) within 20-working days.

(2) *Complex.* Appeals of complex requests cannot be completed within 20-working days. During OPD's processing of the appeal, OPD will need to consult with appropriate SSA component(s), including legal counsel; therefore, we generally require more than 20-working days to issue a final decision on the appeal.

(d) *Final decision.* The Chief FOIA Officer delegated to the Executive Director for OPD the authority to make decisions on appeals of the FOIA Officer's determinations.

(1) The final decision is provided in writing to the requester via email or, in the absence of the requester's email address, via U.S. postal mail.

(2) The final decision letter will explain the basis of the decision (for example, the reasons why an exemption applies).

(e) *Disagreement with final decision.* If a requester disagrees with the final decision issued by the Executive Director for OPD, they may seek assistance from OGIS, as described in § 402.100. Requesters may also ask a U.S. District Court to review our final decision. See 5 U.S.C. 552(a)(4)(B).

§ 402.110 U.S. District Court action.

If the Executive Director for OPD or the Executive Director for OPD's designee, upon review, affirms the denial of the FOIA Officer's determination of items specified in § 402.50(a), requesters may ask a U.S. District Court to review that denial. See 5 U.S.C. 552(a)(4)(B).

§ 402.115 The FOIA Exemption 1: National defense and foreign policy.

Exemption 1 protects from disclosure information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order.

§ 402.120 The FOIA Exemption 2: Internal personnel rules and practices.

Exemption 2 authorizes our agency to withhold records that are related solely to the internal personnel rules and practices of an agency. For example, we may withhold personnel rules and practices dealing with employee relations or human resources.

§ 402.125 The FOIA Exemption 3: Records exempted by other statutes.

(a) *Required record release.* Exemption 3 authorizes our agency to withhold records if another statute specifically allows or requires us to withhold them. We may use another statute to justify withholding only if it prohibits disclosure or if it sets forth criteria to guide our decision on releasing or identifies particular types of material to be withheld.

(b) *Examples.* (1) We often use this exemption to withhold information regarding a worker's earnings which is tax return information under section 6103 of the Internal Revenue Code.

(2) We also use this exemption to withhold death information about decedents:

(i) When the date of death is within three calendar years from the current date, the requested information about the decedent is protected under section 203 of the Bipartisan Budget Act of 2013 (Pub. L. 113–67).

(ii) When the agency's source of death is the state, the requested information is protected under section 205(r) of the Social Security Act.

§ 402.130 The FOIA Exemption 4: Trade secrets and confidential commercial or financial information.

Submitters may designate information as trade secrets and confidential commercial or financial information at the time of submission or within a reasonable time thereafter. Submitters must use good faith efforts to designate, by appropriate markings, any portion of its submission that it considers to be protected from disclosure under the FOIA exemptions. These designations expire ten years after the due date of the submission unless the submitter requests a longer designation period.

(a) *Steps of submitters notice*—(1) *The submitter's notice.* When trade secrets or confidential commercial or financial information is requested under the FOIA, SSA will provide written submitter's notice if we have a reason to believe that information in the records could reasonably be disclosed under the FOIA. The submitter's notice will describe and include a copy of the trade secret or commercial or financial information requested or portions of records containing the information. In cases involving many submitters, SSA may post or publish a submitter's notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure instead of sending individual notifications. The submitter's notice requirements of this section do not apply if:

(i) SSA determines the information is fully exempt under the FOIA, and therefore will not be disclosed;

(ii) The information has been previously published or made generally available; or

(iii) Disclosure of the information is required by statute other than the FOIA.

(2) *Submitter's opportunity to object to disclosure.* (i) Unless SSA grants an extension, the submitter must respond to the notice within five working days of SSA issuing the submitter's notice or the information may be released in accordance with these regulations and the FOIA. A submitter who fails to respond within five working days will be considered to have no objection to the disclosure of the information. SSA is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(ii) If a submitter objects to disclosure, the submitter should provide SSA with a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for non-

disclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(iii) SSA will consider a submitter's timely made objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(3) *Notice of intent to disclose.* Whenever SSA decides to disclose information over the objection of a submitter, SSA provides the following to the submitter:

(i) A Release Over Objection letter explaining the reasons why each of the submitter's disclosure objections did not meet the requirements for withholding under the FOIA.

(ii) A copy of the information as SSA intends to release it.

(iii) A statement of our intent to disclose the information five working days from the date on the Release Over Objection letter unless the submitter files an action in a U.S. District Court to prevent the release.

(b) *Notice of FOIA lawsuit.* When a submitter's notice is issued for a request that is the subject of a lawsuit, SSA notifies the submitter of the lawsuit within the notice.

(c) *Requester notification.* To the extent SSA expects substantial delays in the processing of FOIA requests due to the agency's communications with the submitter, we will notify the requester in writing via email, or when the requester's email is not provided, via U.S. postal mail.

§ 402.135 The FOIA Exemption 5: Internal documents.

This exemption covers inter-agency or intra-agency government documents that fall within an evidentiary privilege recognized in civil discovery. Such internal government communications may include an agency's communications with an outside consultant or other outside person, with a court, or with Congress, when those communications are for a purpose similar to the purpose of privileged intra-agency communications. Some of the most-commonly applicable privileges are described in the following paragraphs:

(a) *Deliberative process privilege.* This privilege protects the decision-making processes of government agencies. Information is protected under this privilege if it is predecisional and deliberative. The purpose of the privilege is to prevent injury to the quality of the agency decision-making process by encouraging open and frank internal discussions, by avoiding premature disclosure of decisions not

yet adopted, and by avoiding the public confusion that might result from disclosing reasons that were not in fact the ultimate grounds for an agency's decision. Purely factual material in a deliberative document is within this privilege only if it is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated, if it would reveal the nature of the deliberative portions, or if its disclosure would in some other way make possible an intrusion into the decision-making process. We will release purely factual material in a deliberative document unless that material is otherwise exempt. The privilege continues to protect predecisional documents even after a decision is made; however, we will release predecisional deliberative communications that were created 25 years or more before the date on which the records are requested.

(b) *Attorney work product privilege.* This privilege protects records prepared by or for an attorney in anticipation of or for litigation. It includes documents prepared for purposes of administrative and court proceedings. This privilege extends to information directly prepared by an attorney, as well as materials prepared by non-attorneys working for an attorney.

(c) *Attorney-client communication privilege.* This privilege protects confidential communications between an attorney and the attorney's client where legal advice is sought or provided.

§ 402.140 The FOIA Exemption 6: Clearly unwarranted invasion of personal privacy.

We may withhold records about individuals if disclosure would constitute a clearly unwarranted invasion of their personal privacy.

(a) *Balancing test.* When we decide whether to release records that contain personal or private information about someone else, we weigh the foreseeable harm of invading a person's privacy against the public interest in disclosure. When we determine whether disclosure would be in the public interest, we will consider whether disclosure of the requested information would shed light on how a Government agency performs its statutory duties.

(b) *Agency employees.* To protect the safety of agency employees, we will not disclose information when the information sought is contact information and/or duty stations of one or more Federal employees if the disclosure would place employee(s) at risk of injury or other harm.

(c) *Examples.* We generally withhold the personally identifiable information

of individuals if we do not have the consent (consistent with § 401.100 of this chapter) of the number holder, including but not limited to the number holder's home address, age, Social Security number, claims file, and other personal information. If the information requested concerns agency employees, we will determine disclosure on a case-by-case basis. For example, our redaction of management officials' information may be treated differently depending on how the balancing test applies in a given circumstance.

§ 402.145 The FOIA Exemption 7: Law enforcement.

Exemption 7 authorizes our agency to withhold certain records that the government has compiled for law enforcement purposes. The records may apply to actual or potential violations of either criminal or civil laws or regulations. We can withhold these records only to the extent that releasing them would cause harm in at least one of the following situations:

(a) *Enforcement proceedings.* Pursuant to the FOIA Exemption 7(A) (5 U.S.C. 552(b)(7)(a)), we may withhold information whose release could reasonably be expected to interfere with prospective or ongoing law enforcement proceedings. Investigations of fraud and mismanagement, employee misconduct, and civil rights violations may fall into this category. In certain cases—such as when a fraud investigation is likely—we may refuse to confirm or deny the existence of records that relate to the violations in order not to disclose that an investigation is in progress, or may be conducted.

(b) *Fair trial or impartial adjudication.* Under the FOIA Exemption 7(B) (5 U.S.C. 552(b)(7)(b)), we may withhold records whose release would deprive a person of a fair trial or an impartial adjudication because of prejudicial publicity.

(c) *Personal privacy.* Under the FOIA Exemption 7(C) (5 U.S.C. 552(b)(7)(c)), we may withhold the personally identifiable information of individuals when the disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. When a name surfaces in an investigation, that person is likely to be vulnerable to innuendo, rumor, harassment, and retaliation.

(d) *Confidential sources and information.* Pursuant to the FOIA Exemption 7(D) (5 U.S.C. 552(b)(7)(d)), we may withhold the identity of confidential sources, as well as the records obtained from the confidential sources in criminal investigations or by an agency conducting a lawful national

security investigation. A confidential source may be an individual; a State, local, or foreign government agency; or any private organization. The exemption applies whether the source provides information under an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred; however, inferred confidentiality is determined in a case-by-case analysis. Also protected from mandatory disclosure is any information which, if disclosed, could reasonably be expected to jeopardize the system of confidentiality that assures a flow of information from sources to investigatory agencies.

(e) *Techniques and procedures.* Under the FOIA Exemption 7(E) (5 U.S.C. 552(b)(7)(e)), we may withhold records that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. In some cases, it is not possible to describe even in general terms those techniques without disclosing the very material to be withheld.

(f) *Life and physical safety.* Under the FOIA Exemption 7(F) (5 U.S.C. 552(b)(7)(f)), we may withhold records whose disclosure could reasonably be expected to endanger the life or physical safety of any individual. This protection extends to threats and harassment, as well as to physical violence.

§ 402.150 The FOIA Exemptions 8 and 9: Records on financial institutions; records on wells.

Exemption 8 permits us to withhold records about regulation or supervision of financial institutions. Exemption 9 permits the withholding of geological and geophysical information and data, including maps, concerning wells.

§ 402.155 Records available for public inspection.

(a) Under the FOIA, SSA is required to make available for public inspection in an electronic format:

- (1) Final opinions made in the adjudication of cases;
- (2) An agency's statements and interpretations of policy that have been adopted but are not published in the **Federal Register**;
- (3) Administrative staff manuals and instructions that affect the public; and
- (4) Copies of records, regardless of form or format, that an agency determines will likely become the subject of subsequent requests, as well as records that have been requested and

released three or more times, unless said materials are published and copies are offered to sale.

(b) SSA will not use or cite instructional manuals issued to our employees, general statements of policy, and other materials which are used in processing claims as a precedent for an action against a person unless we have indexed the record and published it or made it available, or unless the person has timely notice of the record.

(c) Records that SSA makes available for public inspection in an electronic format may be accessed through www.ssa.gov free of charge. Such records include:

- (1) Compilation of Social Security Laws and Regulations;
- (2) SSA regulations under the retirement, survivors, disability, and supplemental security income programs, *i.e.*, 20 CFR parts 401, 402, 404, 416, and 422;
- (3) Social Security Handbook;
- (4) Social Security Rulings and Acquiescence Rulings;
- (5) SSA's Public Programs Operations Manual System;
- (6) SSA's Organizational Structure;
- (7) State and Local Coverage Handbook for State Social Security Administrators; and
- (8) SSA's Public Hearings, Appeals, and Litigation Law Manual.

§ 402.160 Where records are published.

(a) *Methods of publication.* Materials we are required to publish pursuant to the provisions of 5 U.S.C. 552(a)(1) and (a)(2), we publish in one of the following ways:

(1) By publication in the **Federal Register** of Social Security Administration regulations, and by their subsequent inclusion in the Code of Federal Regulations;

(2) By publication in the **Federal Register** of appropriate general notices;

(3) By other forms of publication, when incorporated by reference in the Code of Federal Regulations with the approval of the Director of the Federal Register;

(4) By publication in the "Social Security Rulings" of indexes of precedential social security orders and opinions issued in the adjudication of claims, statements of policy and interpretations that have been adopted but have not been published in the **Federal Register**; and

(5) By posting in the FOIA library.

(b) *Publication of rulings.* Although not required pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we publish the following rulings in the **Federal Register** and by other forms of publication:

(1) We publish Social Security Rulings in the **Federal Register** under the authority of the Commissioner of Social Security. They are binding on all components of SSA. These rulings represent precedent final opinions and orders and statements of policy and interpretations that we have adopted.

(2) We publish Social Security Acquiescence Rulings in the **Federal Register** under the authority of the Commissioner of Social Security. They are binding on all components of SSA, except with respect to claims subject to the relitigation procedures established in 20 CFR 404.985(c) and 416.1485(c). For a description of Social Security Acquiescence Rulings, see 20 CFR 404.985(b) and 416.1485(b).

§ 402.165 Publications for sale through the Government Publishing Office.

The public may purchase publications containing information pertaining to the program, organization, functions, and procedures of SSA from the electronic U.S. Government Bookstore maintained by the Government Publishing Office. The publications for sale include but are not limited to:

- (a) Title 20, parts 400 through 499, of the Code of Federal Regulations;
- (b) **Federal Register** issues; and
- (c) Compilation of the Social Security Laws.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 10019]

RIN 1545–BR31

Definition of the Term “Coverage Month” for Computing the Premium Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that amend the definition of “coverage month” and amend certain other rules in existing income tax regulations regarding the computation of an individual taxpayer’s premium tax credit. The coverage month amendment generally provides that, in computing a premium tax credit, a month may be a coverage month for an individual if the amount of the premium paid, including by advance payments of the premium tax credit, for the month for the

individual’s coverage is sufficient to avoid termination of the individual’s coverage for that month. The final regulations also amend the existing regulations relating to the amount of enrollment premiums used in computing the taxpayer’s monthly premium tax credit if a portion of the monthly enrollment premium for a coverage month is unpaid. Finally, the final regulations clarify when an individual is considered to be not eligible for coverage under a State’s Basic Health Program. The final regulations affect taxpayers who enroll themselves, or enroll a family member, in individual health insurance coverage through a Health Insurance Exchange and may be allowed a premium tax credit for the coverage.

DATES:

Effective date: These final regulations are effective on December 18, 2024.

Applicability date: These final regulations apply to taxable years beginning on or after January 1, 2025.

FOR FURTHER INFORMATION CONTACT:

Clara Raymond at (202) 317–4718 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Authority

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 36B of the Internal Revenue Code (Code).¹ Section 36B(h) provides an express delegation of authority for the Secretary of the Treasury or her delegate (Secretary) to prescribe such regulations as may be necessary to carry out section 36B, including regulations that provide for the coordination of the premium tax credit (PTC) allowed under 36B with the program for advance payments of the PTC (APTC) under section 1412 of the Affordable Care Act.² The final regulations are also issued under the express delegation of authority under section 7805(a), which authorizes the Secretary to “prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”

¹ Unless otherwise indicated, references to “section” or “§” are to sections of the Code or the Treasury regulations issued thereunder.

² The Affordable Care Act (or ACA) refers to the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010).

Background

I. Section 36B Rules Relating to Coverage Months and Monthly PTC Amount

Section 36B provides a PTC for applicable taxpayers who meet certain eligibility requirements, including that a member of the taxpayer’s family enrolls in a qualified health plan (QHP) through a Health Insurance Exchange (Exchange) for one or more “coverage months.”

Section 1.36B–3(c)(1) provides that a month is a coverage month for an individual if (i) as of the first day of the month, the individual is enrolled in a QHP through an Exchange; (ii) the taxpayer pays the taxpayer’s share of the premium for the individual’s coverage under the plan for the month by the unextended due date for filing the taxpayer’s income tax return for that taxable year, or the full premium for the month is paid by APTC; and (iii) the individual is not eligible for the full calendar month for minimum essential coverage (within the meaning of § 1.36B–2(c)) other than coverage described in section 5000A(f)(1)(C) of the Code (relating to coverage in the individual market).

Section 1.36B–3(d)(1) provides that the PTC (also called the premium assistance amount) for a coverage month is the lesser of (i) the premiums for the month, reduced by any amounts that were refunded, for one or more QHPs in which a taxpayer or a member of the taxpayer’s family enrolls (enrollment premiums); or (ii) the excess of the adjusted monthly premium for the applicable benchmark plan over $\frac{1}{12}$ of the product of a taxpayer’s household income and the applicable percentage for the taxable year. The term “family” is defined in § 1.36B–1(d), and the applicable percentage is defined in § 1.36B–3(g).

Section 1.36B–2(c)(2)(i) provides that, for purposes of determining whether a given month is a coverage month for an individual, an individual generally is considered eligible for government-sponsored minimum essential coverage if the individual meets the criteria for coverage under a government-sponsored program described in section 5000A(f)(1)(A) as of the first day of the first full month the individual may receive benefits under the program.

Section 1.36B–2(c)(2)(v) provides that an individual is treated as not eligible for Medicaid, CHIP, or a similar program for a period of coverage under a QHP if, when the individual enrolls in the QHP, an Exchange determines or considers (within the meaning of 45 CFR 155.302(b)) the individual to be not eligible for Medicaid or CHIP.

Section 36B(f)(3) and § 1.36B–5 require Exchanges to report to QHP enrollees and the IRS certain information, including monthly enrollment premiums, needed to compute the PTC allowed for the enrollee. This information is reported to enrollees on IRS Form 1095–A, *Health Insurance Marketplace Statement*. The Centers for Medicare & Medicaid Services (CMS), part of the Department of Health and Human Services (HHS), is responsible for the Form 1095–A reporting for Exchanges that use the Federal eligibility and enrollment platform (Federally-facilitated Exchanges, or FFEs, and State-based Exchanges on the Federal platform, or SBE–FPs). State Exchanges with their own platforms (State Exchanges) are responsible for the Form 1095–A reporting for individuals who enroll in a QHP through their State Exchange.

II. HHS Rules Relating to Coverage When Premiums Are Unpaid

HHS regulations at 45 CFR 156.270(d) implement section 1412(c)(2)(B)(iv)(II) of the Affordable Care Act to require issuers of QHPs to allow a “grace period” for enrollees for whom the APTC is paid but who fail to timely pay their share of the premium for the coverage. In general, a QHP issuer must provide a grace period of 3 consecutive months for such an enrollee before the issuer may terminate the enrollee’s coverage. During the first month of the grace period, the QHP issuer must pay all appropriate claims for services rendered, and, during the second and third months of the grace period, the QHP issuer may pend claims.

HHS regulations at 45 CFR 155.400(g) allow issuers to implement a premium payment threshold policy under which issuers can consider enrollees to have paid all amounts due if the enrollees pay an amount sufficient to maintain a percentage of total premium paid out of the total premium owed equal to or greater than a level prescribed by the issuer, provided that the level and the policy are applied in a uniform manner to all enrollees. If an enrollee satisfies these conditions, the issuer may provide coverage even though the full enrollment premium is not paid.

In certain States, issuers also may provide coverage without payment of the full enrollment premium if a State department of insurance prohibits an issuer from terminating QHP coverage during a declared emergency.

III. Proposed Regulations

On September 17, 2024, the Department of the Treasury (Treasury Department) and the IRS published a

notice of proposed rulemaking (REG–116787–23) in the **Federal Register** (89 FR 75984) under section 36B (proposed regulations). The proposed regulations would have changed the definition of “coverage month” in § 1.36B–3(c)(1) for some scenarios for which the full premium for the month is unpaid by the unextended due date of the taxpayer’s return for the year of coverage, provided the amount of the premium paid for the month, including by APTC, is sufficient to avoid termination of the individual’s coverage for that month. The proposed regulations would have provided that a month for which the enrollment premium is not fully paid may be a coverage month in the following scenarios: (i) the first month of a grace period described in 45 CFR 156.270(d); (ii) a month for which a premium payment threshold under 45 CFR 155.400(g) has been met and for which month the issuer of the individual’s qualified health plan provides coverage; and (iii) a month for which a State department of insurance has, during a declared emergency, issued an order prohibiting the issuer of the individual’s qualified health plan from terminating the individual’s coverage for the month irrespective of whether the full premium for the month is paid.

The proposed amendment to the definition of “coverage month” would have required a conforming change to the calculation of the monthly PTC amount under § 1.36B–3(d)(1)(i) so that the premium for a month to be considered in determining the monthly PTC for an individual’s coverage would be reduced by any portion of the premium that is unpaid as of the unextended due date for filing the taxpayer’s income tax return for the taxable year that includes the month.

Finally, the proposed regulations would have clarified § 1.36B–2(c)(2)(v) to provide that an individual is treated as not eligible for Medicaid, CHIP, or a similar program such as a State’s Basic Health Program (BHP), for a period of coverage under a QHP if, when the individual enrolls in the QHP, an Exchange conducts an eligibility determination or, if applicable, eligibility assessment (within the meaning of 45 CFR 155.302(b)) for Medicaid, CHIP, or a similar program and determines or assesses the individual to be not eligible for coverage under the program.

The Treasury Department and the IRS received nine public comments in response to the notice of proposed rulemaking. Copies of the comments are available for public inspection at <https://www.regulations.gov> or upon request. A public hearing on the

proposed regulations was scheduled for December 13, 2024. There were no requests to speak at the scheduled public hearing. Consequently, the public hearing was cancelled. After considering all the comments received, the Treasury Department and the IRS adopt the proposed regulations without modifications.

Summary of Comments and Explanation of Revisions

I. Overview

All nine public comments on the proposed regulations were in support of the rules in the proposed regulations. One commenter requested that the final regulations include detailed requirements, expectations, and examples relating to reporting by Exchanges of enrollment premiums and second lowest cost silver plan (SLCSP) premiums on Form 1095–A for a month for which a taxpayer’s share of the enrollment premium is not paid in full (non-payment month) that may be a coverage month. Another commenter requested that all non-payment months for which coverage is provided be considered coverage months. Finally, several commenters requested flexibility for Exchanges to comply with the new coverage month rule. The comments are addressed in more detail in Parts II through IV of this Summary of Comments and Explanation of Revisions.

II. Additional Guidance for Reporting on Form 1095–A

As discussed in Part I of the Background section of this preamble, section 36B(f)(3) and § 1.36B–5 require Exchanges to report to QHP enrollees and the IRS certain information needed to compute the PTC allowed for the enrollee. This information is reported to enrollees on IRS Form 1095–A. The enrollee’s monthly enrollment premiums are reported in column A of Part III of Form 1095–A and the enrollee’s monthly second lowest cost silver plan (SLCSP) premiums are reported in column B of the form.

The current instructions for Form 1095–A require Exchanges to report \$0 in column A of Form 1095–A as the enrollment premium for a non-payment month. The instructions also require Exchanges to report \$0 for a non-payment month in column B of Form 1095–A as the amount of the taxpayer’s SLCSP premium for the month. Reporting \$0 as the monthly amount in either column A or column B signals to the taxpayer and the IRS that this is not a coverage month and, thus, no PTC is allowed for the month.

One commenter requested that the final regulations include detailed requirements, expectations, and examples relating to how Exchanges should report enrollment premiums and SLSP premiums on Form 1095-A for non-payment months that may be coverage months. The commenter asked that the examples demonstrate how Exchanges should report multiple grace periods in a calendar year, mid-month changes, and partial payments.

The commenter's request for detailed guidance on how Exchanges should report amounts on Form 1095-A is best addressed in the Instructions for Form 1095-A, rather than in regulatory text. The IRS intends to revise the 2025 Instructions for Form 1095-A to reflect the coverage month changes in these final regulations. Specifically, the revised instructions will require Exchanges to report in column A of Part III of Form 1095-A the full enrollment premium for any month that is a coverage month if such month is (i) the first month of a grace period described in 45 CFR 156.270(d) for the plan enrollees; (ii) a month for which a premium payment threshold under 45 CFR 155.400(g) has been met and for which month the issuer of the individual's qualified health plan provides coverage; or (iii) a month for which a State department of insurance has, during a declared emergency, issued an order prohibiting the issuer of the individual's qualified health plan from terminating the individual's coverage for the month (the three scenarios described in § 1.36B-3(c)(4)). The instructions will continue to provide that Exchanges must report \$0 in column A for any other months for which the full enrollment premium for the month is not paid, and that the amount reported in column A should be reduced by any enrollment premium refunds or credits.

Similarly, the instructions for column B of Part III of Form 1095-A will be amended to provide that Exchanges should not report \$0 as the SLSP premium for any months for which the full enrollment premium is not paid, if the month is a coverage month under one of the three scenarios described in § 1.36B-3(c)(4). Instead, Exchanges should report the SLSP premium that would apply if the enrollment premium had been paid in full.

With regard to the commenter's request for examples demonstrating how to report amounts on Form 1095-A under the final regulations, the Treasury Department and the IRS understand that State Exchanges may need additional guidance as they proceed with implementation of these final

regulations. The Treasury Department and the IRS welcome additional input and will continue to work with State Exchanges to ensure that the Instructions for Form 1095-A adequately address how Exchanges should report non-payment months as coverage months under one of the three scenarios described in § 1.36B-3(c)(4).

III. Additional Scenarios for Which Non-Payment Months May Be Coverage Months

The proposed regulations included a request for comments on whether the final regulations should include scenarios in addition to those provided in the proposed regulations regarding non-payment months that may be coverage months. One commenter suggested that the final regulations should permit all non-payment months to be coverage months as long as the amount of the premium paid for the month, including by APTC, is sufficient to avoid termination of the individual's coverage for that month.

In drafting the proposed regulations, the Treasury Department and the IRS considered but rejected a rule that would allow all non-payment months to be coverage months if the amount of the premium paid for the month, including by APTC, is sufficient to avoid termination of the individual's coverage for the month. As stated in the preamble to the proposed regulations, a main reason for amending the coverage month definition is to promote reporting consistency among Exchanges regarding the reporting of enrollment premiums for non-payment months. The Treasury Department and the IRS worked closely with HHS staff to identify the three scenarios described in § 1.36B-3(c)(4) as scenarios for which there is inconsistent reporting among Exchanges. In addition, the Treasury Department and the IRS have determined that an open-ended rule that could be interpreted differently by different Exchanges, based on their particular State law or practices, would not achieve more consistent reporting among Exchanges. Exchanges, as well as taxpayers and the IRS, need clarity on the definition of a coverage month, and that definition needs to apply uniformly to all taxpayers under the Federal tax law. Consequently, the Treasury Department and the IRS do not adopt this comment, and the change to the coverage month rule in the final regulations applies only for the three scenarios described in § 1.36B-3(c)(4).

IV. Applicability Date of Final Regulations

The proposed regulations provided that the changes under §§ 1.36B-2 and

1.36B-3 were proposed to apply for taxable years beginning on or after the first date of the calendar year that begins after the date these regulations are published as final regulations in the **Federal Register**. Several commenters noted that State Exchanges will need to make extensive changes to their platform architecture to report for non-payment months that are coverage months under one of the three scenarios described in § 1.36B-3(c)(4) and, thus, requested that the final regulations provide adequate time for states to make the necessary changes to ensure accurate reporting. One commenter stated that a 9-12-month period is generally needed to implement IT changes. Another commenter requested that the final rule include detailed scenarios addressing the applicability date. One commenter supported the proposed applicability date of the next calendar year following the date of publication.

Consistent with the proposed applicability date, the rules in these final regulations apply to taxable years beginning on or after January 1, 2025. Thus, a taxpayer may be allowed a PTC for 2025 for a non-payment month that is a coverage month as described in these final regulations. However, the Treasury Department and the IRS understand that Exchanges need time to implement their reporting for the coverage month rule in the final regulations, and some Forms 1095-A filed by State Exchanges for the 2025 coverage year may not reflect that non-payment months described in § 1.36B-3(c)(4) are coverage months for which a PTC is allowed. Exchanges should do the best they can to timely implement the coverage month rule in these final regulations. Exchanges are reminded that, because section 36B(f)(3) imposes the requirement on Exchanges to report QHP enrollment information to the IRS and to Enrollees on Form 1095-A, Form 1095-A is not an information return within the meaning of section 6721, and there is no penalty imposed on an Exchange for filing a Form 1095-A that does not include all of the information required to be shown on the return or that includes incorrect information. The Treasury Department and the IRS will continue to consult with State Exchanges to assist with their implementation of the coverage month rule under these final regulations.

Finally, the proposed regulations included various applicability dates to incorporate existing applicability dates for prior amendments to the regulations under section 36B, but all of the amendments under §§ 1.36B-2 and 1.36B-3 in the proposed regulations

were proposed to apply on the same date. Those amendments to proposed §§ 1.36B–2 and 1.36B–3, as finalized in these regulations, all apply to taxable years beginning on or after January 1, 2025. Thus, the Treasury Department and the IRS do not believe detailed scenarios are needed to address the final regulation's applicability date as requested by one of the commenters.

V. Conforming Change to the PTC Calculation and Clarification of Eligibility

As noted in Part III of the Background section of this preamble, the proposed regulations addressed two items in addition to the change to the coverage month definition. First, the proposed regulations included a proposed change that would have conformed the calculation of the monthly PTC amount under § 1.36B–3(d)(1)(i) with the proposed rule allowing certain non-payment months to be coverage months. Under the proposed rule, taxpayers would have reduced the amount of the enrollment premiums used to compute their monthly PTC by any portion of the premium that is unpaid as of the unextended due date of the taxpayer's income tax return for the taxable year that includes the month. Second, the proposed regulations would have clarified § 1.36B–2(c)(2)(v) to provide that an individual is treated as not eligible for Medicaid, CHIP, or a similar program such as a State BHP, for a period of coverage under a QHP if, when the individual enrolls in the QHP, an Exchange conducts an eligibility determination or, if applicable, eligibility assessment (within the meaning of 45 CFR 155.302(b)) for Medicaid, CHIP, or a similar program and determines or assesses the individual to be not eligible for coverage under the program. Because no negative comments or suggested changes were received with respect to these two items, this Treasury decision adopts these amendments without change.

VI. Severability

If any provision in this rulemaking is held to be invalid or unenforceable facially, or as applied to any person or circumstance, it shall be severable from the remainder of this rulemaking, and shall not affect the remainder thereof, or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury

Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

These final regulations do not impose any additional information collection requirements in the form of reporting, recordkeeping requirements, or third-party disclosure statements. Taxpayers who claim PTC on their income tax returns are required to file Form 8962, *Premium Tax Credit (PTC)*, which is the sole collection of information requirement imposed on individuals by section 36B and the regulations under section 36B. The rules in these final regulations will require the IRS to revise the instructions for Form 8962. For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)), the reporting burden associated with the collection of information for Form 8962 will be reflected in the PRA submission associated with income tax returns under the OMB control number 1545–0074. To the extent there is a change in burden because of these final regulations, the change in burden will be reflected in the updated burden estimates for Form 8962.

In addition, Exchanges are required to report to QHP enrollees on Form 1095–A certain information the enrollees need to compute the PTC allowed for the enrollee and to reconcile the PTC with any APTC paid for their coverage. Exchanges must also report this information to the IRS. The rules in these final regulations will require the IRS to revise the instructions for recipients of Form 1095–A and the instructions for Exchanges completing Form 1095–A. For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)), the reporting burden associated with the collection of information for Form 1095–A will be reflected in the PRA submission associated with Form 1095–A under the OMB control number 1545–2232. To the extent there is a change in burden because of these final regulations, the change in burden will be reflected in the updated burden estimates for Form 1095–A.

III. Regulatory Flexibility Act

The Treasury Department and the IRS hereby certify that these final regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on

the fact that the majority of the effect of the final regulations falls on individual taxpayers, and entities will experience only small changes.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This final rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

E.O. 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the E.O. This rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the E.O.

VI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal author of these final regulations is Clara L. Raymond of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury

Department and the IRS participated in the development of the regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by:

- 1. Removing the entry for § 1.36B–0;
- 2. Adding entries in numerical order for §§ 1.36B–1 through 1.36B–3;
- 3. Revising the entries for §§ 1.36B–4 and 1.36B–5; and
- 4. Adding an entry in numerical order for § 1.36B–6.

The additions and revisions read as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.36B–1 also issued under 26 U.S.C. 36B(h).

Section 1.36B–2 also issued under 26 U.S.C. 36B(h).

Section 1.36B–3 also issued under 26 U.S.C. 36B(h).

Section 1.36B–4 also issued under 26 U.S.C. 36B(h).

Section 1.36B–5 also issued under 26 U.S.C. 36B(h).

Section 1.36B–6 also issued under 26 U.S.C. 36B(h).

* * * * *

■ **Par. 2.** Section 1.36B–0 is amended by:

- 1. Redesignating the entries for § 1.36B–3(c)(4) and § 1.36B–3(c)(5) as the entries for § 1.36B–3(c)(5) and § 1.36B–3(c)(6), respectively; and
- 2. Adding a new entry for § 1.36B–3(c)(4).

The addition reads as follows:

§ 1.36B–0 Table of contents.

* * * * *

§ 1.36B–3 *Computing the premium assistance credit amount.*

* * * * *

(c) * * *

(4) Scenarios for payments sufficient to avoid coverage termination.

* * * * *

■ **Par. 3.** Section 1.36B–2 is amended by:

- 1. Revising the first sentence in paragraph (c)(2)(v);
- 2. Revising paragraph (e)(1); and
- 3. Adding paragraph (e)(6).

The revisions and addition read as follows:

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(c) * * *

(2) * * *

(v) * * * An individual is treated as not eligible for Medicaid, CHIP, or a similar program such as a Basic Health Program, for a period of coverage under a qualified health plan if, when the individual enrolls in the qualified health plan, an Exchange conducts an eligibility determination or, if applicable, eligibility assessment (within the meaning of 45 CFR 155.302(b)) for Medicaid, CHIP, or a similar program and determines or assesses the individual to be not eligible for coverage under the program. * * *

* * * * *

(e) * * *

(1) Except as provided in paragraphs (e)(2) through (6) of this section, this section applies to taxable years ending after December 31, 2013.

* * * * *

(6) The first sentence of paragraph (c)(2)(v) of this section applies to taxable years beginning on or after January 1, 2025. The first sentence of paragraph (c)(2)(v) of this section, as contained in 26 CFR part 1 edition revised as of April 1, 2024, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2025.

■ **Par. 4.** Section 1.36B–3 is amended by:

- 1. Revising paragraph (c)(1)(ii);
- 2. Redesignating paragraphs (c)(4) and (5) as paragraphs (c)(5) and (6), respectively;
- 3. Adding new paragraph (c)(4); and
- 4. Revising paragraphs (d)(1)(i) and (n).

The revisions and addition read as follows:

§ 1.36B–3 Computing the premium assistance credit amount.

* * * * *

(c) * * *

(1) * * *

(ii) The taxpayer pays the taxpayer's share of the premium for the individual's coverage under the plan for the month by the unextended due date for filing the taxpayer's income tax return for that taxable year, the full premium for the month is paid by advance credit payments, or the amount of the premium paid (including by advance credit payments) for the month is sufficient to avoid termination of the individual's coverage for that month under one of the scenarios described in paragraph (c)(4) of this section; and

(4) *Scenarios for payments sufficient to avoid coverage termination.* The

scenarios under which the amount of the premium paid (including by advance credit payments) for the month is sufficient to avoid termination of an individual's coverage for that month under paragraph (c)(1)(ii) of this section are the following:

(i) The first month of a grace period described in 45 CFR 156.270(d) for the individual.

(ii) A month for which a premium payment threshold under 45 CFR 155.400(g) has been met and for which month the issuer of the individual's qualified health plan provides coverage.

(iii) A month for which a State department of insurance has, during a declared emergency, issued an order prohibiting the issuer of the individual's qualified health plan from terminating the individual's coverage for the month irrespective of whether the full premium for the month is paid.

* * * * *

(d) * * *

(1) * * *

(i) The enrollment premiums, which are the premiums for the month for one or more qualified health plans in which a taxpayer or a member of the taxpayer's family enrolls, reduced by any amounts—

(A) Refunded in the same taxable year as the premium liability is incurred; or

(B) Unpaid as of the unextended due date for filing the taxpayer's income tax return for the taxable year that includes the month; or

* * * * *

(n) *Applicability dates.* (1) Except as provided in paragraphs (n)(2) through (4) of this section, this section applies to taxable years ending after December 31, 2013.

(2) Paragraphs (d)(1)(i) and (2) of this section apply to taxable years beginning after December 31, 2016. Paragraph (f) of this section applies to taxable years beginning after December 31, 2018. Paragraphs (d)(1) and (2) of § 1.36B–3, as contained in 26 CFR part 1 edition revised as of April 1, 2016, apply to taxable years ending after December 31, 2013, and beginning before January 1, 2017. Paragraph (f) of § 1.36B–3, as contained in 26 CFR part 1 edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2019.

(3) Paragraphs (c)(4) through (6) of this section apply to taxable years beginning on or after January 1, 2025. Paragraph (c)(4) of this section, as contained in 26 CFR part 1 edition revised as of April 1, 2024, applies to taxable years beginning after December

31, 2016, and beginning before January 1, 2025. Paragraph (c)(5) of this section, as contained in 26 CFR part 1 edition revised as of April 1, 2024, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2025.

(4) Paragraph (d)(1)(i) of this section applies to taxable years beginning on or after January 1, 2025. Paragraph (d)(1)(i) of § 1.36B–3, as contained in 26 CFR part 1 edition revised as of April 1, 2016, applies to taxable years ending after December 31, 2013, and beginning before January 1, 2017. Paragraph (d)(1)(i) of § 1.36B–3, as contained in 26 CFR part 1 edition revised as of April 1, 2022, applies to taxable years beginning after December 31, 2016, and beginning before January 1, 2023. Paragraph (d)(1)(i) of § 1.36B–3, as contained in 26 CFR part 1 edition revised as of April 1, 2024, applies to taxable years beginning after December 31, 2022, and beginning before January 1, 2025.

Douglas W. O'Donnell,
Deputy Commissioner.

Approved: December 5, 2024.

Aviva R. Aron-Dine,
Deputy Assistant Secretary of the Treasury
(Tax Policy).

[FR Doc. 2024–29651 Filed 12–17–24; 8:45 am]

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 5

[Docket No. TTB–2022–0007; T.D. TTB–199;
Re: Notice No. 213]

RIN 1513–AC88

Addition of American Single Malt Whisky to the Standards of Identity for Distilled Spirits

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: This final rule amends the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations that set forth the standards of identity for distilled spirits to include “American single malt whisky” as a type of whisky that is produced in the United States and meets certain criteria. TTB proposed the new standard of identity in response to petitions and comments submitted by several distillers and the American Single Malt Whisky Commission. TTB is finalizing the amendments to the regulations to establish the standard of

identity with some changes to reflect comments received.

DATES: This final rule is effective January 19, 2025.

FOR FURTHER INFORMATION CONTACT: Selina M. Ferguson, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; telephone 202–453–1039.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers regulations regarding the labeling of distilled spirits, which include those setting forth “standards of identity.” The authority to establish these standards is based on section 105(e) of the Federal Alcohol Administration Act (FAA Act),¹ codified in the United States Code at 27 U.S.C. 205(e). That section authorizes the Secretary of the Treasury (the Secretary) to prescribe regulations relating to the “packaging, marking, branding, and labeling” of alcohol beverage containers “as will prohibit deception of the consumer with respect to such products” and “as will provide consumers with adequate information as to the identity and quality of the products.” Section 105(e) of the FAA Act also generally requires bottlers and importers of alcohol beverages to obtain approval of the product labels through certificates of label approval (COLAs) prior to bottling or importing alcohol beverages for sale in interstate commerce.

TTB administers these FAA Act provisions pursuant to section 1111(d) of the Homeland Security Act of 2002, as codified at 6 U.S.C. 531(d). In addition, the Secretary has delegated certain administrative and enforcement authorities to TTB through Treasury Department Order 120–01.

Part 5 of title 27 of the Code of Federal Regulations (27 CFR part 5) sets forth the regulations implementing those provisions of section 105(e) of the FAA Act as they pertain to distilled spirits.

Classes and Types of Spirits

The TTB regulations establish standards of identity for distilled spirits products and categorize these products according to various classes and types. See 27 CFR part 5, subpart I. As used in 27 CFR 5.141(a), the term “class”

refers to a general category of spirits. Subpart I sets forth the various classes of distilled spirits and their characteristics. Examples of classes of distilled spirits include “whisky,” “rum,” “gin,” and “brandy.” As used in § 5.141(a), the term “type” refers to a subcategory within a class of spirits. These types generally have additional or more specific characteristics than the class. For example, “Cognac” is a type within the class of brandy, specifically grape brandy distilled exclusively in the Cognac region of France and meeting the laws and regulations of the French government for designation as Cognac. See 27 CFR 5.145(c)(2).

The TTB labeling regulations at 27 CFR 5.63(a)(2) require that the class and type of distilled spirits appear on the product’s label. These regulations provide that the class and type must be stated in conformity with 27 CFR part 5, subpart I, of the TTB regulations.

Current Standards of Identity, Classification of Malt Whisky, and Treatment of Products Labeled as “American Single Malt Whisky”

Current TTB regulations at 27 CFR 5.143(a) set forth the standard of identity for the class whisky. In § 5.143, paragraphs (c)(2) through (18) categorize the specific types of whisky, such as “Bourbon whisky” and “malt whisky.” The current regulations provide standards for identifying whisky as “malt whisky,” at paragraph (c)(2), and “whisky distilled from malt mash,” at paragraph (c)(7), but do not further specify standards for “single malt whisky.” Malt whisky is described as whisky produced at not more than 160° proof from a fermented mash of not less than 51 percent malted barley and stored at not more than 125° proof in charred new oak barrels. Such whisky stored in charred new oak barrels for a period of 2 years or more may optionally be further designated as “straight” malt whisky. See 27 CFR 5.143(c)(5). A “whisky distilled from malt mash” is whisky produced in the United States at not more than 160° proof from a fermented mash of not less than 51 percent malted barley and stored in used oak barrels.

With respect to geographical designators such as “American,” § 5.154(a)(3) provides that geographical names that are not names for distinctive types of distilled spirits, and that have not become generic, may not be used unless the product is produced in the particular place or region indicated in the name. Accordingly, a product currently designated as “American whisky” must be produced in the United States. Additionally, §§ 5.143(b)

¹ Aug. 29, 1935, ch. 814, title I, sec. 101 *et seq.*, formerly sec. 1 *et seq.*, 49 Stat. 977; renumbered title I, sec. 101 *et seq.*, and amended Public Law 100–690, title VIII, Nov. 18, 1988, 102 Stat. 4517.

and 5.154(b)(1) provide that a product designated as “malt whisky” or “American malt whisky” must be produced in the United States.

Products may currently bear the designation “American Single Malt Whisky,” and TTB has approved COLAs with that term, without any additional parameters other than those described above.

American Single Malt Whisky Petitions and Related Comments

In October 2017, TTB received three petitions with similar content from XO Alambic, Remy Cointreau, and Westland Distillery. Each of these petitioners noted that they were filing their petition on behalf of, or with, the American Single Malt Whiskey Commission (ASMWC), an association of at least seventy-five producers of whisky in the United States. In their petitions, the distillers requested the establishment of a standard of identity to define the “American single malt whisky” category for producers and consumers alike. They noted that the American whisky category has been growing over the past decade and continues to expand, and that recognition of American single malt whisky is at an all-time high, with U.S. distillers winning international competitions with products in these categories. They stated that establishment of a standard of identity would benefit consumers, as it would provide a definition for the product, establish trust in the category, clarify label declarations, and equip consumers with the necessary information to make informed decisions so they can have confidence in the products they are choosing to buy in a similar way that Scotch whisky standards provide such information to American consumers. They also believe establishment of a standard of identity would strengthen the U.S. economy by increasing tax revenue related to the sale of American single malt whiskey, and by creating jobs related to producing, distributing, and selling such a product and the ingredients used in this product.

In their petitions, the distillers requested the establishment of a standard of identity for American single malt whisky, defined as a type of whisky that is mashed, matured, and distilled at a single United States distillery, distilled to a proof not exceeding 160° proof from a fermented mash of 100 percent malted barley, stored in oak containers not exceeding a capacity of 700 liters, and bottled at not less than 80° proof.

In 2018, TTB published in the **Federal Register** a notice of proposed

rulemaking (Notice No. 176, 83 FR 60562) proposing to amend its regulations governing the labeling and advertising of wine, distilled spirits, and malt beverages. Although TTB did not include a proposal for an American single malt whisky standard of identity in Notice No. 176, TTB received over 200 comments in support of such a standard. One of these comments was from the ASMWC, who proposed a slightly different standard of identity from the one submitted in the three 2017 petitions. ASMWC’s comment to Notice No. 176 proposed that American single malt whisky should be distilled, mashed, and matured in the United States, but only distillation should be required to take place at a single United States distillery. All other aspects of the standard remained the same as those previously proposed in the petitions from XO Alambic, Remy Cointreau, and Westland Distillery. ASMWC’s comment stated that this standard of identity was supported by more than 130 producers of single malt whisky. In this document, this ASMWC proposal is referred to as the “2018 ASMWC petition.”

Notice of Proposed Rulemaking

On July 29, 2022, TTB published in the **Federal Register** Notice No. 213 (87 FR 45727), “Proposed Addition of American Single Malt Whisky to the Standards of Identity for Distilled Spirits,” which provided notice and the opportunity to comment on the proposed addition of a standard of identity for American single malt whisky to the TTB regulations. Notice No. 213 generally incorporated the standard of identity proposed in the petitions submitted to TTB and comments received on Notice No. 176. Specifically, TTB proposed to define American single malt whisky as a type of whisky that is mashed, distilled, and aged in the United States; is distilled entirely at one U.S. distillery; is distilled to a proof of 160° or less; is distilled from a fermented mash of 100 percent malted barley; is stored in oak barrels (used, uncharred new, or charred new) not exceeding 700 liters; and is bottled at not less than 80° proof.

Comments Received

The comment period for Notice No. 213 closed on September 27, 2022. TTB received 158 comments in response to Notice No. 213. Commenters included 16 U.S. and foreign trade associations, 44 industry members and related companies, and 98 individual members of the public (many of these individuals are part of the distilled spirits industry but submitted their comments only

under their own name). Of the comments received, 73 were submitted separately to TTB but had identical or nearly identical content and are labeled as mass comments as posted on the rulemaking docket. These mass comments stated support for the creation of a standard of identity for American single malt whisky in line with the ASMWC petition.

The vast majority of the comments received supported establishing a standard of identity for American single malt whisky. In addition to the mass comments, 41 commenters expressed support for establishing the standard of identity as proposed in the NPRM, while twenty-five commenters supported establishing a standard of identity for American single malt whisky but with modifications to the proposed criteria. Three commenters did not support establishing a standard of identity. Those in support stated that establishing a standard of identity for American single malt whisky is beneficial for producers and consumers. Specifically, commenters stated that it will increase opportunities for American producers, allow for more innovation in this product category, and create trust in this category for consumers. Those opposed to establishing the proposed standard of identity for American single malt whisky generally did so in response to the proposed criteria and stated that the definition was too narrow, should allow grains other than barley, or that the definition was not restrictive enough. These comments are addressed in the discussion for each criterion below.

Discussion of Comments

Below, TTB summarizes and responds to the comments received relating to the proposed criteria for American single malt whisky. TTB notes that many commenters compared the criteria for American single malt whisky to other whiskies frequently described as “single malt,” such as Scotch whisky or Irish whisky. While recognizing the well-established reputation of such whiskies, TTB is also taking into consideration how best to reflect input from commenters that identified processes unique to the U.S. industry. In certain instances, TTB finds reason not to merely adopt the criteria applied elsewhere, but to recognize practices that may vary from those criteria, particularly where adhering to longstanding U.S. practices that would have shaped U.S. consumer expectations in identifying a U.S. product.

Mashed, Distilled, and Aged in the United States, and Distilled Entirely at One U.S. Distillery

The proposed standard set forth in Notice No. 213 included a criterion that the whisky must be mashed (which would include fermentation of the mash), distilled, and aged in the United States, and it must be distilled entirely at one U.S. distillery. No commenters opposed requiring mashing, distillation, and aging to occur in the United States. Commenters also broadly supported further requiring distillation to occur at a single United States distillery but differed as to whether mashing and (to a lesser extent) aging should also be required to occur at a single distillery. While the 2017 petitions for the American single malt whisky standard would have required mashing, distilling, and aging to take place at a single U.S. distillery, the standard proposed in Notice No. 213 reflected the later 2018 ASMWC petition in allowing mashing and aging to take place at U.S. facilities other than the place of distillation.

Distillation

All commenters discussing the requirement that distillation occur at a single U.S. distillery supported such a requirement. In its comment supporting the proposed criterion, the ASMWC stated that the term “single” in “single malt whisky” has been understood globally for generations to mean that the whisky was distilled at a single distillery. Two associated online whisky enthusiast communities that submitted a joint comment—the Whiskey Lodge and Reddit community “/r/AmericanSMW” (Whiskey Lodge)—stated that the requirement to distill at a single distillery was “[g]reat” and the “[b]are minimum for ‘single malt.’” The American Craft Spirits Association (ACSA) explained, “[o]ther than the distillation taking place at a single distillery, the rest of the production process should take place in the United States for the whiskey to be called American Single Malt Whiskey.” Similarly, the Distilled Spirits Counsel of the United States (DISCUS), the Kentucky Distillers Association, the Irish Whisky Association, the Japan Spirits and Liqueurs Makers Association, the National Association of Beverage Importers (NABI), the Scotch Whisky Association, SpiritsEUROPE, Sazerac, and Grand Teton Distillery all expressed support for requiring distillation in a single U.S. distillery.

Mashing and Fermentation

Thirteen commenters also supported a standard more restrictive than the one proposed in Notice No. 213, requiring that mashing and fermentation in addition to distillation take place at a single distillery. These commenters included Sazerac, the Kentucky Distillers’ Association, DISCUS, the Scotch Whisky Association, the Irish Whisky Association, SpiritsEUROPE, the Japan Spirits & Liqueurs Makers Association, and NABI. The Irish Whisky Association and Scotch Whisky Association stated that not requiring mashing, fermentation, and distillation to take place at the same distillery would be inconsistent with international practice and would undermine and devalue the “single malt whisky” category. DISCUS contended that requiring the mashing to take place at the same facility as the distillation would align with consumer understanding and place American single malt whisky on equal footing as other products in the global market, while allowing mashing to occur elsewhere would lose the connection between the use of the term “single malt” and its place of production. NABI added that without a requirement for mashing and distillation to occur at a single facility, “a significant link is lost in the connection of the single malt whiskies representing the single efforts and quality controls of the same distillery.”

Some commenters expressed that malting and fermentation should not be required to occur at the same single distillery required for distillation. Copperworks Distilling Co. and the ASMWC noted that many American whisky producers purchase their mash from domestic breweries, and allowing American single malt whisky to be produced with mash made at domestic facilities other than the distillery producing the final product recognizes this practice. The ASMWC noted that, while United Kingdom regulations require mashing and fermentation to happen at the same facility, no such requirement applies in European Union regulations nor in regulations of many other single malt whisky producing regions.

Aging

Only a small number of commenters directly discussed location requirements for aging. Those that did (ACSA, NABI, Sazerac, and others) generally supported requiring aging to occur in the United States, but no commenter specifically expressed the view that it should also be required to take place at a single U.S.

distillery. One individual commenter suggested requiring disclosure on the label if the whisky is distilled at one distillery but aged or bottled at a different distillery.

Definition of Distillery

The American Distilled Spirits Alliance (ADSA) requested that TTB clarify the definition of “distillery” in the context of distillation occurring at “one U.S. distillery,” suggesting two possible approaches. First, ADSA suggested the term could apply to the “DSP” which TTB understands to mean the distilled spirits plant under the IRC and TTB regulations, reflected in the permit under those provisions. ADSA stated that an alternative option may be to follow the criteria for use of the term “bottled-in-bond,” which are set forth at 27 CFR 5.88 and require that a distilled spirit labeled as “bottled-in-bond” comply with certain standards, including that the spirits are distilled by the same distiller and, relevant here, at the same distillery.

TTB Response

TTB agrees with the consensus view of the commenters that the standard of identity should require that American Single Malt Whisky be mashed, fermented, distilled, and aged in the United States and that distillation take place at a single U.S. distillery. However, TTB is not incorporating the additional restrictions requiring mashing and fermentation to occur at a single distillery. TTB notes that these additional restrictions were requested by some commenters and opposed by others, and that such restrictions were not proposed in the 2018 ASMWC petition or in Notice No. 213.

As noted in the comments, TTB understands that it is common for U.S. distillers to partner with breweries to produce their mash and believes that the criterion should take into account and reflect the processes that have evolved in the American context as they reflect the expectations of American consumers and businesses for such domestic products. Moreover, this practice allows for innovation in this category by continuing partnerships with breweries. TTB believes this decision will not devalue the single malt whisky category more broadly, as some commenters suggest, because it is reasonable to expect that consumers will continue to have different expectations for products labeled as “American single malt whisky” compared with products labeled as single malt whisky from different countries with different standards.

Regarding the concept of a single distillery or references to the “same distillery,” TTB is amending the regulatory text to clarify that this term will be administered similarly to the “same distillery” requirement for the bottled-in-bond designation at 27 CFR 5.88(a)(2), which generally means the area identified as the location of the bonded area on a distilled spirits plant’s TTB permit or registration.

TTB is not incorporating the requirement suggested by one commenter that the label disclose where aging and bottling occur if different than the distillery where distillation occurred. As noted above, no commenters expressed a view that the American single malt whisky standard of identity should require aging or bottling to take place at the same distillery as distillation. Accordingly, TTB does not believe the fact that aging or bottling occurs at a different distillery is sufficiently critical to the consumer to require that it be disclosed on the label. TTB notes that the information may be provided voluntarily.

Distilled to a Proof of 160° or Less

In Notice No. 210, the proposal included a criterion that, to meet the standard of identity for American single malt whisky, the alcohol content of the liquor must not exceed 160° proof during distillation consistent with petitions TTB had received. It is also consistent with the current standards for many whisky type standards, including “malt whisky” and “whisky distilled from malt mash.”

Five commenters opposed a maximum 160° distilling proof, including Loon Liquors LLC, Brother Justus Whisky Co., and Little Round Still. Loon Liquors LLC stated that consumer expectations have been shaped by single malt whiskies distilled in Scotland and elsewhere, which allow distillation at less than 190° proof, and limiting distillation proof to 160° could confuse consumers. Further, the commenter states that distilling at high proof (between 160° and 190° proof) provides for precision in creating their signature flavor profiles, and limiting proof to no higher than 160° proof prevents American distillers from innovating and competing with distilleries in other countries that do not have such a limitation. Brother Justus Whisky Co. similarly pointed out that other international single malt whisky standards allow distillation at up to 190° proof and stated that a lower limit would stifle innovation and market access by smaller producers. Little Round Still stated that American single malt whisky should have the same

distillation proof limit as single malt whiskies elsewhere, that is, less than 190° proof.

However, the majority of commenters specifically discussing this criterion supported it. For example, the ASMWC supports a distillation proof not exceeding 160° proof, stating that this is an important provision designed to ensure the flavor and character of the grain remains after distillation. The ASMWC points out that, while the Scotch whisky regulations for single malt allow for distillation of up to 190° proof, they also require the use of pot stills, which according to ASMWC, are intended to ensure that more grain flavor is retained in the final distillate. ASMWC asserts that the same result is achieved by providing a lower maximum distillation strength of up to 160° proof. The Scotch Whisky Association similarly expressed support for the 160° proof distillation limit for American single malt whisky, stating it is consistent with single malt whiskies produced elsewhere. Other commenters, such as the Whiskey Lodge expressed support for a distillation proof not exceeding 160° noting that the limit was in line with other American whiskies.

TTB Response

With this final rule, TTB is incorporating a distillation proof of 160° or less for American single malt whisky, consistent with the proposal.

As the Whiskey Lodge suggested above, the proposed criterion is consistent with the current standard for “malt whisky” under TTB regulations, as well as most other types of whisky. As with other criteria, one goal in setting forth a standard of identity for American single malt whisky is to recognize the importance of existing standards for single malt whiskies internationally while also reflecting unique aspects distinctive to American production. Except for light whisky and certain blended whiskies, all subcategories (*i.e.*, types) of domestically-produced whisky recognized in the standards of identity have a maximum distillation proof of 160°. See 27 CFR 5.143(c). As noted by some commenters, this maximum has deep historical roots. President Taft, in a presidential memorandum, noted the distinction between whisky made from distilling a product at a proof of from 140° to 160° [proof] known as ‘high wines,’” and that made from what was then referred to as “neutral spirits” distilled at a proof “varying from 160° to 188°.”² This delineation was carried

² William Howard Taft, Decision on the Meaning of the Term “Whisky” Under the Pure Food Act and

forward following the repeal of prohibition into some of the earliest standards of identity for whisky published by TTB’s predecessor agency, the Federal Alcohol Control Administration, which differentiated between “neutral whisky . . . distilled at more than 160° proof and less than 190° proof” and “straight whisky . . . distilled at not exceeding 160° proof.”³ This distinction has persisted in regulations issued under the FAA Act since then. See 27 CFR 5.21(b) (1938 ed.). Maintaining this standard for American single malt whisky therefore reflects the American style of production that consumers and businesses have operated under since before prohibition.

Additionally, international standards allowing for certain single malt whiskies to be distilled up to 190° proof exist within the context of other standards. The ASMWC points out in its comment that, while for example Scotch whisky standards allow for distillation up to 190° proof, those standards also require the use of pot stills. TTB also notes the ASMWC’s assertion that the 160° distillation proof maximum accomplishes the same goal as the Scotch whisky pot still requirement in retaining the grain flavor in the distillate, which may be significant to consumers.

Distilled From a Fermented Mash of 100 Percent Malted Barley

In Notice No. 213, the proposal included a criterion that, to meet the standard of identity for American single malt whisky, the product must be produced from a fermented mash of only malted barley.

A majority of the commenters specifically addressing this issue expressed support for this criterion. The ASMWC (which the mass comments generally support) stated that the industry and consumers understand that “malt” specified on its own refers to malted barley exclusively, and that this meaning is consistent with longstanding TTB regulations. The Scotch Whisky Association noted “[t]he use of malted barley only in ‘Single Malt Whisky’ is tightly bound up in its reputation as a whisky category globally.” Canyon Diablo Distillery explained, “using less than 100% malted barley and mixing in

the Proper Regulations for Branding Various Kinds of Whisky Under the Internal Revenue Act, (1909) (published online by Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/367051>).

³ United States, Federal Alcohol Control Administration, *Regulations relating to false advertising and misbranding of distilled spirits*, United States Govt. Printing Office (1935).

addition[al] different grains changes the character of the whisky and should change its identity,” and the American Distilled Spirits Alliance added, “[f]or [American single malt whisky] to maintain the characteristics consumers expect with the term “single malt,” it must be made from 100% malted barley.”

However, not all commenters agreed with the criterion as proposed and suggested different alternatives. Some commenters expressed that the term “malt” should not be limited to malted barley, but instead reflect a broader view of the term since other grains, such as rye and wheat, can also be malted. For example, Chattanooga Whiskey suggested that only 51 percent malted barley be required in order to reflect a broader understanding of the term malt and allow for innovation explaining that, “nearly every grain can now be malted, in our modern era . . . [m]any [mistakenly] believe that malt is always barley, and that barley is the only grain that contains the requisite enzymes.” Similarly, Bainbridge Organic Distillers stated that this aspect of the definition limited single malt whisky to the concept as it is understood within the United Kingdom, and that prohibiting American distillers from using the term “single malt” when distilling other malted grains would limit innovation.

Other commenters suggested adopting additional standards of identity that would specify the different grains. Canyon Diablo noted on this point that, “[w]hile other grains can be malted and used they should have a different standard of identity and classification and be labeled as such.” Similarly, the ADSA commented that, “While some distillers will argue for the use of alternative grains as innovative or uniquely American, the use of a commonly accepted term—single malt—in naming of the product category requires preserving the base characteristics, which the consumer has already come to expect.” “Single malt” they explained is “an indicator of 100% malted barley” and “an example of such a characteristic, because it forms the base flavor profile for the product.” They concluded that, “[s]ome commenters may propose for the allowance of using rye or wheat, and that’s fine if they are also asking for the creation of an additional category. . . .” Sazerac suggested that allowances for the use of other grains could be incorporated into the terms of the proposed standard for American Single Malt Whisky, providing the example of “a single malt rye made with 100 percent rye.”

TTB Response

TTB agrees with the commenters that state that the term “malt” on its own refers to malted barley exclusively. This meaning is well established and reflects current regulations at 27 CFR 5.143(c)(2) providing that “malt whisky” refers to whisky made from at least 51 percent “malted barley,” while whiskies made with 51 percent of other malted grains must name the grain. Changing this approach would require a more significant change beyond the scope of this rulemaking. Moreover, TTB agrees with the ADSA and other similar comments that allowing the use of other grains in addition to barley in “American single malt whisky” may cause consumer confusion.

Although some commenters suggested that including other types of grain would foster innovation, TTB notes that whisky producers would still be able to innovate with other grains as long as the final product is appropriately labeled. For example, rye malt whisky (with a fermented mash of not less than 51 percent malted rye grain) would be allowed, provided it met the other relevant requirements.

TTB would consider any future petitions from interested parties for the creation of additional standards of identity for other products made primarily or entirely from other malted grains, but TTB is not finalizing any such standards in the context of this rulemaking without an opportunity for public notice and comment to better understand consumer expectations and industry practices surrounding such products.

Stored in Oak Barrels Not Exceeding a Capacity of 700 Liters

The proposed standard set forth in Notice No. 213 included a criterion that American single malt whisky be stored in oak barrels no larger than 700 liters during aging. Twenty commenters specifically expressed support for the 700-liter limit. In explaining their support for this criterion, commenters such as the Scotch Whisky Association, ASMWC, and an individual commenter indicated that it is necessary for the appropriate level of interaction between the whisky and wood of the barrel, and that the limitation would ensure larger barrels that would dilute the effect of the wood contact are not used.

Nine commenters did not support the 700-liter size limit, including Sazerac, the Kentucky Distillers Association, and several individual commenters. Commenters generally highlighted that this limit is not in place for other types of whisky. One commenter, Brandy

Library Lounge, LLC, also stated any limit would be more appropriately expressed in gallons for an American product. Also, one commenter stated a more restrictive limit might be needed but did not specify such a limit. Sazerac suggested a 60-gallon limit instead of a 700-liter limit, stating that a 53-gallon barrel is the industry standard. Two other commenters, an individual commenter and Canyon Diablo Distillery, generally opposed barrels size limitations but similarly suggested that, if such a limitation is imposed, a size closer to the industry standard 53-gallon barrel would be more appropriate.

TTB Response

In this final rule, TTB is finalizing the proposed 700-liter size limit on barrels used for storage of American single malt whisky during aging. TTB is persuaded by the significant majority of commenters in favor of this criterion, in particular by those who raised the point that establishing a barrel size maximum would indicate characteristics related to interaction between the product and the wood in connection with any statements regarding aging. At the same time, TTB acknowledges the concerns raised by certain commenters about establishing a standard not required for or perhaps followed in the production of other whisky types. By establishing a 700-liter size limit, TTB believes consumers will have greater certainty of the degree to which the age of the product represents interaction with the barrel, but producers will still have flexibility to use most barrels typically used for the production of American whiskies. TTB is not finalizing a more restrictive standard, such as the 60-gallon limit suggested by one commenter, because TTB believes it would prevent the use of some barrels commonly used in American whisky production.

In response to commenters who asked for the criterion to be expressed in gallons instead of liters, TTB will consider issuing public guidance clarifying the gallon equivalent to the 700-liter maximum included in the final rule.

The Use of Used, Uncharred New, or Charred New Oak Barrels

The proposed standard set forth in Notice No. 213 included a criterion that allows producers to use oak barrels that are used, uncharred new, or charred new for the storage of American single malt whisky during aging. Twenty-two commenters specifically stated support for allowing the use of used, uncharred new, or charred new oak barrels. These commenters stated that this would allow for creativity, innovation, and

variety in the finished products. Commenters also stated that allowing used barrels would help address a potential low supply of new oak barrels.

One commenter, Canyon Diablo Distillery, expressed the view that the use of non-American wood barrels or used barrels that contained non-American whisky would result in a non-American product. Two commenters suggested allowing storage in non-oak wood casks. Additionally, one commenter opposed the use of used barrels, suggesting that American single malt whisky should be stored only in new oak barrels to be consistent with the definition of malt whisky.

TTB Response

TTB is incorporating this criterion as proposed and will allow American single malt whisky to be stored for aging in oak barrels that are used, uncharred new, or charred new.

Currently, TTB regulations state that one criterion of all whisky is storage in oak barrels. This criterion is already widely accepted in the industry. Allowing storage in barrels made from wood other than oak would be a significant departure from all other types of whisky and could lead to consumer confusion about the characteristics of American single malt whisky. Additionally, finalizing a type standard that contradicts the class standard would have a broader impact than the proposal TTB initially notified. As such, the finalized standard of identity allows for storage only in oak barrels.

While some commenters opposed allowing used oak barrels for storage, TTB believes that allowing American single malt whisky to be stored in used oak barrels recognizes the realities of American whisky-making. As cited by commenters who supported this criterion as proposed, allowing used barrels will help alleviate the possible shortage of oak barrels and is consistent with single malt whiskies produced elsewhere. Moreover, different whisky types permit the use of different types of oak barrels, for example, light whisky and corn whisky can be aged in used or uncharred new oak barrels (27 CFR 5.143(c)(3) and (5)), while bourbon can only be aged in charred new oak barrels (27 CFR 5.143(c)(2)). Allowing multiple barrel types is consistent with those standards.

Finally, TTB believes that storage in a barrel that is not made of American wood, or that previously contained non-American whisky, does not make whisky produced in the United States “non-American.” Since mashing, distilling, and aging all occur in the

United States, the product is an American product regardless of the source of the wood for the barrel.

Bottled at Not Less Than 80° Proof

The proposed standard set forth in Notice No. 213 included a criterion requiring American single malt whisky to be bottled with an alcohol by volume content of not less than 40 percent (or 80° proof). TTB did not specifically include this criterion as part of the proposed American single malt whisky standard of identity in § 5.143(c)(15), as it flows directly from the general definition of the class “whisky” under current regulations. TTB received six comments supporting this criterion and is merely noting for clarity that American single malt whisky must be bottled at not less than 80° proof, consistent with the class requirements.

Use of Geographical Designations Other Than American

The proposal set forth in Notice No. 213 is unique among American whiskies in that the geographical designation “American” is expressly included in the type designation. This is different, for example, from the type designation “bourbon whisky” that must be made in the United States, but does not include the “American” reference in the type designation. The petition that provided the basis for Notice No. 213, and consequently the proposal in that notice, did not set forth a standard of identity for “single malt whisky” but rather a standard for a specific product to be identified as “American single malt whisky.” As a result, commenters requested clarification of the rules for including State and other geographic designations for such a standard.

The ADSA asked that TTB clarify whether the regulations for American single malt whisky would “preclude the usage of the name of the specific U.S. State or U.S. City of production in lieu of ‘American,’” further proposing that “[s]o long as the product being made complies with the Class and Type for [American single malt whisky] it should be allowed to use a furthering descriptor.” ADSA provides the example of an industry member making a product in Montana that would comply with the American single malt whisky standard of identity, and asserts that they should be allowed to either include Montana as a geographic descriptor or to replace the word “American” with “Montana” and use the term “Montana single malt whisky” because the “clear implication” is that the product is not only an American single malt whisky but one from Montana. ADSA further states that at no

time should such a product be allowed to be labeled with the State or similar descriptor without the term

“American,” if it does not meet the American single malt whisky criteria.

Whiskey Lodge similarly suggested that if a State or any designation more specific than “American” appeared in the designation, TTB allow the term “American” to not appear, for example, “Texas single malt [w]hiskey” and “Rocky Mountain single malt whiskey.” Relatedly, an individual commenter suggested that TTB also add American single malt whisky standards of identity for particular regions within the United States noting, “A malt whiskey from the Pacific Northwest is very different from a whiskey made in the southern states and very different from a whiskey made in the Midwest.”

TTB Response

The standard of identity TTB proposed in Notice No. 213 generally incorporated the proposal it had received from ASMWC, and TTB stated in that notice that, as proposed, the amendment to the regulations would affect any COLA that uses the term “American single malt whisky” as a designation, as products with those labels would be required to meet any new standard of identity. The proposal did not contemplate applying the standards more broadly to products labeled as “single malt whisky” with other place names. Additionally, the ASMWC stated in its comment that it was not aware of more than a handful of whiskies bottled, labeled, and sold as “American single malt whisky” that would not meet the requirements for the proposed American single malt whisky standard of identity, and so conveyed its understanding that the proposal was limited in scope to such products. Applying the criteria of the standard of identity beyond use of the term “American single malt whisky” would significantly expand the scope of what was originally proposed, potentially affecting labels for any malt whisky domestically produced and currently labeled with “single malt whisky,” not just those labeled using the term “American single malt whisky.” TTB would not be able to finalize such an expanded application without considering the effect on all stakeholders and providing additional notice and opportunity to comment. As a result, TTB is finalizing the standard of identity with the scope that was proposed, and only labels bearing the term “American single malt whisky” would be held to the criteria for that standard. Products produced in the United States that do not bear the full

term would not be required to meet the criteria for use of the term “American single malt whisky.” TTB would consider proposing such a broader scope should it receive a petition to do so.

Comments on TTB’s Request for Information

In addition to the above criteria for American single malt whisky, TTB posed eight questions in Notice No. 213 that relate to the addition of American single malt whisky as a type of whisky and its implementation. The comment summary above includes responses to comments regarding two of the eight questions, related to size restrictions for barrels used to store American single malt whisky and the use of used and new oak barrels in the production of American single malt whisky. Below is a summary of the comments and TTB’s responses on the remaining six questions.

Use of Coloring, Flavoring or Blending Materials

TTB solicited feedback on whether to allow the use of coloring, flavoring, or blending materials in the production of American single malt whisky. The majority of commenters opposed their use, and thirty-eight commenters noted that doing so could be misleading for consumers. Many commenters were concerned that the use of additives would undermine this category of spirits, which is currently considered prestigious.

However, while many commenters expressed a general opposition to the use of coloring, flavoring, or blending materials in American single malt whisky, several of those in opposition made an exception for the use of caramel color. For example, DISCUS generally opposed allowing coloring, flavoring, or blending materials but expressed openness to the use of caramel color if disclosed on the label. Similarly, the ASMWC suggested prohibiting all coloring, flavoring, or blending materials but recognized that the addition of caramel color is “customarily employed” in the production of American single malt whisky and other single malt whiskies. The Irish Whisky Association and Scotch Whisky Association both expressed support for the addition of caramel coloring, consistent with the respective standards of their country’s single malt whiskies.

Overall, 18 commenters supported some allowance for coloring materials, with the majority of those supporting only the use of caramel coloring. In general, commenters who supported the

use of coloring materials also stated that there should be a requirement to disclose the use of coloring materials on the label. Additionally, two commenters stated they may possibly support coloring, flavoring, or blending materials if they were more clearly defined. No commenters specifically supported allowing the use of flavoring materials in American single malt whisky.

TTB Response

In response to comments received, TTB is finalizing a standard of identity for American single malt whisky that allows the use of caramel coloring, provided that the use of such coloring material is disclosed on the label. Allowing caramel coloring aligns American single malt whisky with many other types of whisky, including other single malt whiskies produced internationally. Prohibiting all other coloring, flavoring, and blending materials would narrow the allowed additives as supported by commenters. While TTB’s current regulations at 27 CFR 5.72(c) generally do not require a statement of any type when caramel coloring is used in the types of whiskies that allow such coloring material (if used at not more than 2.5 percent by volume of the finished product), TTB agrees with commenters that any added caramel coloring should be disclosed on the label of American single malt whisky to ensure transparency regarding the product’s readily-observable characteristics.

Use of the Designation “Straight”

Notice No. 213 included a question on whether to allow the designation “straight” to be used with American single malt whisky. Under current regulations, the “straight” designation generally refers to an aging requirement of at least two years, which is the period of time the whisky has been stored in an oak barrel of the type otherwise required for the underlying standard of identity. For example, “bourbon whisky” may only be stored in charred new oak barrels, and “straight bourbon whisky” must be stored in a charred new oak barrel for a minimum of two years.⁴ See 27 CFR 5.143(c)(2) and (5).

Ten commenters were in support of allowing the designation “straight” to be used with American single malt whisky, including ACSA, ADSA, Whiskey Lodge, and several individual

commenters and distilleries. These commenters were in general agreement that the term “straight” should be allowed as long as the whisky has been aged for at least two years.

Eight commenters opposed the use of the designation “straight” with American single malt whisky, including the National Association of Beverage Importers, Scotch Whisky Association, Irish Whisky Association, spiritsEUROPE, and several individual commenters and distilleries. These commenters indicated that the term “straight” would cause confusion in the global marketplace because the term is unique to American whisky. In general, these commenters suggested a minimum age requirement or including the product’s age on the label instead of using the term “straight.” One commenter, New Riff Distilling LLC, stated the term “straight” should only be allowed to indicate the use of new charred oak barrels.

TTB Response

TTB will allow the use of the designation “straight” with American single malt whisky as long as the two-year aging requirement is met. Allowing for this designation would be consistent with other product designations for whisky under TTB’s regulations, where the “straight” whisky must be stored for two years in the type of barrel associated with the underlying type of whisky. In other words, for American single malt whisky to be designated as “straight American single malt whisky,” the whisky must be stored for a minimum of two years in used, uncharred new, or charred new oak barrels. While commenters in opposition to the use of the term “straight” suggested that the term is not well-understood in the global market because it is only used on American whiskies, TTB agrees with an individual commenter in support who suggests that “straight” is a term that is unique to American whiskies, so it is therefore appropriate for use with American single malt whisky as an additional distinguishing factor.

TTB is incorporating a new paragraph (c)(16) in table 1 of 27 CFR 5.143 to account for “straight American single malt whisky” as described above. TTB is not incorporating any other minimum age requirement(s) in the American single malt whisky standard of identity. Commenters, including NABI, the Scotch Whisky Association, Sazerac, Japan Spirits and Liqueurs Makers Associations, spiritsEUROPE, the Irish Whisky Association, NIST on behalf of the UK, and the Kentucky Distillers’ Association, suggested that American

⁴ Similarly, “corn whisky” bearing an age statement must have been stored in used or uncharred new oak barrels, and “straight corn whisky” must have been stored in used or uncharred new oak barrels for a minimum of two years. See 27 CFR 5.143(c)(3) and (6).

single malt whisky should have a minimum age requirement ranging from two to four years. However, TTB believes this would unduly hinder innovation and notes that no other types within the class “whisky” have a minimum age requirement (other than the age requirement associated with the “straight” designator). Further, because TTB’s regulations generally require that whiskies aged less than four years bear an age statement (see 27 CFR 5.74(b)), TTB believes there is sufficient transparency within the class regarding age.

“Blended” American Single Malt Whisky

TTB requested and received input on whether to allow for mixtures of American single malt whisky to be labeled as “blended American single malt whisky,” similar to how TTB regulations allow for blended Scotch whisky and blended Canadian whisky to be labeled, respectively, “blended Scotch whisky” and “blended Canadian whisky.” Eight commenters support the use of the term “blended American single malt whisky.” These commenters, which include individuals and distilleries, noted that producers and consumers desire products composed of whisky from more than one distillery.

Thirteen commenters oppose use of the term “blended American single malt whisky”, asserting use of the term “blended” may cause consumer confusion because the term “blended” is typically not associated with the term “single.” These commenters included ACSA, DISCUS, Kentucky Distillers Association, Scotch Whisky Association, Irish Whisky Association, spiritsEUROPE, Japan Spirits and Liqueurs Makers Association, and individual commenters and distilleries. Some commenters (for example, ACSA, DISCUS) suggested modifying the name of this product category to replace the term “single” with “blended,” such as “American Blended Malt Whisky.”

TTB Response

TTB’s finalized regulations for the American single malt whisky standard of identity do not allow blends of whiskies from multiple distilleries that would otherwise meet the American single malt whisky criteria to be labeled “blended American single malt whisky.” TTB agrees with the commenters in opposition that blending whiskies from multiple distilleries is fundamentally contradictory to the meaning of “single” in the American single malt whisky standard of identity, even if the “blended” modifier is included. As such, producers blending

whiskies from different distilleries may not classify them as American single malt whisky. With respect to commenters’ suggestion to modify the name of the standard of identity to “American Blended Malt Whisky” for blends, TTB notes that a blend of whiskies produced in the United States and meeting the current standard of identity for “malt whisky” could already be labeled “American Blended Malt Whisky.”

Impact on Trademark Owners and Producers of Malt Whisky

In Notice No. 213, TTB sought comments on the impact that adding a standard of identity for American single malt whisky may have on owners of U.S. trademarks and current producers of malt whisky. In general, commenters who support establishing this standard of identity stated that the definition of American single malt whisky in the standard of identity would be beneficial to producers and trademark owners, as it would lend credibility to their operations, bring potential for increased recognition globally, and foster innovation. They assert that it would help ensure a level playing field for producers of American single malt whisky and maintain the premium reputation of the category. Additionally, the ASMWC stated they are not aware of more than a handful of whiskies bottled, labeled, and sold as “American single malt whisky” that would not meet the requirements for the proposed American single malt whisky standard of identity.

One commenter suggested that current producers who may face an economic hardship due to the new standard of identity should be able to continue to use their current products or processes. Another commenter asserted that its labels and trademarks would be negatively impacted by the rulemaking unless the standard of identity is modified to allow distillation at up to 190° proof. The commenter further stated that, along with adversely impacting their business, requiring American single malt whisky distillers to limit their distillation proof to 160° or less would inhibit market access and create a competitive disadvantage for American single malt whisky distillers vis-à-vis those producing outside of the United States, would be anti-competitive, and would exclude innovative whiskies.

TTB Response

As illustrated above, most commenters emphasized how establishing a standard of identity for American single malt whisky would

benefit U.S. producers. However, as also noted above, one commenter specifically stated that they, and the industry, would be negatively affected by the proposed standard of identity. Given that the current standard for production proof of malt whisky is consistent with the production proof of the standard of identity proposed for American single malt whisky, TTB is not aware of any widespread expectation in the industry that products meeting only the class standard of identity “whisky,” along with the other proposed criteria, would or should qualify for an American single malt whisky standard of identity. As discussed in the explanation of the maximum distillation proof criterion, the standards of identity for malt whisky and most other American whisky types within the general class (all except for light whisky and certain blended whiskies) allow distillation only up to a maximum of 160° proof.

In the event that there are current producers with approved labels that designate a product as “American single malt whisky,” producers may continue to use those labels but only on products that comply with the new requirements of TTB’s regulations in 27 CFR part 5, subject to the transition period discussed below in this document. Producers of products that do not comply with the new standard of identity could continue to produce such products but would need to obtain approval of new labels indicating the applicable class and/or type.

Use-Up of Previously Approved Labels

Commenters also provided feedback on whether, after establishment of the “American single malt whisky” standard of identity, TTB should allow producers to use up previously approved labels that do not comply with this standard, and for how long TTB should allow the use of these previously-approved labels before such labels would be revoked by operation of regulation. Commenters provided a wide range of answers, stating that after the establishment of the American single malt whisky standard of identity, producers should be afforded anywhere from 60 days to 20 years to use up previously approved labels that do not comply with this standard. One commenter recommended that TTB allow producers to revise their current label instead of requiring the application for a new one. Additionally, another commenter implied that if obtaining a new label would pose an economic hardship, that TTB allow the continued use of already approved

labels on products not meeting the criteria.

TTB Response

TTB is providing a five-year transition period, as discussed below in this document. This amount of time should allow any affected industry members to make label changes in conjunction with any routine label updates or change their processes to ensure their product conforms to the new standard of identity described in this rule.

Competition in the Alcohol Beverage Market

Finally, commenters provided feedback on how the addition of a standard of identity for American single malt whisky would affect competition in the alcohol beverage market (see “Effect on Currently-Approved Labels”). Commenters generally provided feedback that the addition of this standard of identity would increase the competitiveness of American distillers and level the playing field among producers of American single malt whisky. As noted above, one commenter asserted that a standard that requires a distillation proof of 160° is anti-competitive.

TTB Response

TTB notes positively the feedback from commenters that the addition of this standard of identity would increase the competitiveness of American distillers and level the playing field among producers of American single malt whisky. TTB addresses these comments as well as the comment on the maximum distillation proof of 160° further below in the sections “Effect on Currently-Approved Labels” and “Impact on Trademark Owners and Producers of Malt Whisky.”

TTB Determination

After careful consideration of the petitions received in response to this issue in Notice No. 176 and the comments received in response to Notice No. 213, TTB is finalizing a standard of identity for “American single malt whisky,” with two changes from the standard proposed in Notice No. 213. As originally proposed, TTB is defining American single malt whisky as a type of whisky that is mashed, distilled, and aged in the United States; is distilled entirely at one U.S. distillery; is distilled to a proof of 160 or less; is distilled from a fermented mash of 100 percent malted barley; is stored in oak barrels (used, uncharred new, or charred new) with a maximum capacity of 700 liters; and is bottled at not less than 80° proof.

In the first change from the proposal in Notice No. 213, TTB is providing for the use of the designation “straight” with American single malt whisky that is aged for two years. The second change allows for the use of caramel coloring as long as it is disclosed on the label.

This new standard of identity will be added to 27 CFR 5.143. TTB is also revising certain other sections in part 5 to include cross references to American single malt whisky.

Effect on Currently-Approved Labels

TTB will allow a five-year transition period, as this amount of time should allow any affected industry members to make label changes in conjunction with any routine label updates, to use up existing labels, or to change their processes to ensure their product conforms to the new standard of identity. A label with the designation “American single malt whisky” may be used for whisky that does not meet the new standard of identity if it is bottled within five years from the effective date of this final rule, provided that such label was approved before the effective date of this final rule and the whisky conforms to the standards set forth in 27 CFR 5.143 in effect prior to this final rule. All products bottled after this five-year transition period bearing an “American single malt whisky” designation must meet the standards for such designation. TTB may act to revoke COLAs covering non-compliant products and/or take other enforcement action against bottlers using such COLAs.

Regulatory Analysis and Notices

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (5 U.S.C. chapter 6), TTB certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule amends the standards of identity for whisky in TTB’s regulations at 27 CFR 5.143(c) and makes conforming edits in other sections of part 5. It does not impose or otherwise cause any new reporting, recordkeeping, or other administrative requirements. TTB does not believe this rulemaking will affect a significant number of existing labels for distilled spirits products but is providing a five-year transition period to mitigate the effects on any affected industry member. (TTB specifically solicited comments on potential impacts on current producers and received only one comment from a producer indicating that their label(s) would be

affected by the proposed regulations.) Therefore, no regulatory flexibility analysis is required.

Paperwork Reduction Act

The collection of information in this rule has been previously approved by the Office of Management and Budget (OMB) under the title “Labeling and Advertising Requirements Under the Federal Alcohol Administration Act,” and assigned control number 1513–0087. This regulation would not result in a substantive or material change in the previously approved collection action, since the nature of the mandatory information that must appear on labels affixed to the container remains unchanged. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid control number.

Executive Order 12866

This final rule is not a significant regulatory action as defined in Executive Order 12866, as amended. Therefore, a regulatory assessment is not required.

List of Subjects in 27 CFR Part 5

Advertising, Alcohol and alcoholic beverages, Consumer protection, Labeling, Liquors, Packaging and containers, and Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons discussed in the preamble, TTB amends 27 CFR part 5 as follows:

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

- 1. The authority citation for part 5 continues to read as follows:

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205 and 207.

Subpart A—General Provisions

- 2. Amend § 5.1 by revising the term “Age” to read as follows:

§ 5.1 Definitions.

* * * * *

Age. The length of time during which, after distillation and before bottling, the distilled spirits have been stored in oak barrels. “Age” for bourbon whisky, rye whisky, wheat whisky, malt whisky, or rye malt whisky, and straight whiskies other than straight corn whisky and straight American single malt whisky, means the period the whisky has been stored in charred new oak barrels.

* * * * *

Subpart E—Mandatory Label Information

■ 3. Amend § 5.66 by revising paragraphs (f)(1) introductory text and (f)(1)(i) to read as follows:

§ 5.66 Name and address for domestically bottled distilled spirits that were wholly made in the United States.

* * * * *

(f) * * *

(1) The State of distillation, which is the State in which original distillation takes place, must appear on the label of any type of whisky defined in § 5.143(c)(2) through (7), (15), and (16), which is distilled in the United States. The State of distillation may appear on any label and must be shown in at least one of the following ways:

(i) By including a “distilled by” (or “distilled and bottled by” or any other phrase including the word “distilled”) statement as part of the mandatory name and address statement, followed by a single location;

* * * * *

■ 4. Amend § 5.72 by adding a sentence at the end of paragraph (c) to read as follows:

§ 5.72 Coloring materials.

* * * * *

(c) * * * Provided, if any amount of caramel color is used in American single malt whisky, or in straight American single malt whisky, a statement specifying the use of caramel color must appear on the label.

* * * * *

■ 5. Amend § 5.74 by revising paragraphs (a)(1) and (b)(4) to read as follows:

§ 5.74 Statements of age, storage, and percentage.

(a) * * *

(1) As defined in § 5.1, age is the length of time during which, after distillation and before bottling, the distilled spirits have been stored in oak barrels. For bourbon whisky, rye whisky, wheat whisky, malt whisky, or rye malt whisky, and straight whiskies other than straight corn whisky and straight American single malt whisky, aging must occur in charred new oak barrels.

* * * * *

(b) * * *

(4) In the case of whisky made in the United States and stored in reused oak barrels, other than corn whisky, light whisky, American single malt whisky, and straight American single malt whisky, in lieu of the words “___ years old” specified in paragraphs (b)(1) and (2) of this section, the period of storage in the reused oak barrels must appear on the label as follows: “stored ___ years in reused cooperage.”

* * * * *

Subpart I—Standards of Identity for Distilled Spirits

■ 6. Amend § 5.143 by:

■ a. Redesignating paragraphs (c)(16) through (18) in table 2 as paragraphs (c)(17) through (19);

■ b. Adding paragraphs (c)(15) and (16) to table 1; and

■ c. Adding paragraph (d).

The additions read as follows:

§ 5.143 Whisky.

* * * * *

(c) * * *

TABLE 1 TO PARAGRAPH (c)—TYPES OF WHISKY AND PRODUCTION, STORAGE, AND PROCESSING STANDARDS

Type	Source	Distillation proof	Storage	Neutral spirits permitted	Allowable coloring, flavoring, blending materials permitted
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
(15) American single malt whisky.	Fermented mash of 100 percent malted barley, produced in the United States.	160 or less, distilled at the same distillery in the United States.	Used, charred new, or uncharred new oak barrels; 700-liter maximum capacity; stored only in the United States.	No	No, except for caramel coloring and only if disclosed on the label.
(16) Straight American single malt whisky.	Fermented mash of 100 percent malted barley, produced in the United States.	160 or less, distilled at the same distillery in the United States.	Used, charred new, or uncharred new oak barrels for a minimum of 2 years; 700-liter maximum capacity; stored only in the United States.	No	No, except for caramel coloring and only if disclosed on the label.

* * * * *

(d) *Transition period.* A label with the designation “American single malt whisky” or “straight American single malt whisky” may be used on distilled spirits bottled before January 19, 2030, if the distilled spirits conform to the applicable standards set forth in this part in effect prior to January 19, 2025.

Signed: December 12, 2024.

Mary G. Ryan,
Administrator.

Approved: December 12, 2024.

Aviva R. Aron-Dine,
Deputy Assistant Secretary for Tax Policy.
[FR Doc. 2024–29938 Filed 12–13–24; 4:15 pm]
BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY**Bureau of the Fiscal Service****31 CFR Part 323**

[FISCAL–2023–0002]

RIN 1530–AA28

Disclosure of Records

AGENCY: Bureau of the Fiscal Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Bureau of the Fiscal Service (Fiscal Service) within the

Department of the Treasury (Treasury) is issuing regulations to implement statutory requirements under the SECURE 2.0 Act of 2022 that require Treasury to provide certain U.S. savings bond information to States. A State receiving the information with respect to an applicable savings bond may use the information to locate the owner of the bond pursuant to Treasury's regulations and the State's own standards and requirements under abandoned property rules and regulations of the State. Under the SECURE 2.0 Act of 2022, Treasury is required to issue regulations or guidance to protect the privacy of savings bond owners, prevent fraud, and ensure that information disclosed to a State is used solely to locate savings bond owners.

DATES: This rule is effective December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Marcia Goodnight, Retail Securities Services, at RetailSecurityServicesComments@fiscal.treasury.gov; or Lela Anderson, Attorney-Advisor, at 304-480-8692.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Department of the Treasury has issued savings bonds since 1935 on the credit of the United States to raise funds for Federal programs and operations. Article 8, Section 8, Clause 2 of the Constitution authorizes the Federal Government to "borrow money on the credit of the United States." Under this grant of power, "Congress authorized the Secretary of the Treasury, with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe." *Free v. Bland*, 369 U.S. 663, 667 (1962) (citing the predecessor to 31 U.S.C. 3105). Congress provided that the proceeds of savings bonds may be used by the Federal Government for any expenditures authorized by law. *See* 31 U.S.C. 3105(a).

Congress expressly authorized the Secretary of the Treasury to establish the terms and conditions that govern the savings bond program. 31 U.S.C. 3105(c). Treasury's implementing regulations set forth "a contract between the United States and savings bond purchasers," giving "purchasers confidence that the United States will honor its debts when a purchaser surrenders a savings bond for payment" and protecting "the public fisc by ensuring that Treasury does not face multiple claims for payment on a single savings bond." 80 FR 80258 (Dec. 24,

2015). In general, savings bonds are not transferrable and are payable only to the registered owner, except as described in Treasury regulations detailing when payment will be made to a person or entity that is not the registered owner. *See* 31 CFR 315.15, 353.15, and 360.15.

To redeem a paper savings bond, the registered owner or a successor specified in the regulations must surrender the physical bond. *See* 31 CFR 353.35. Although there are exceptions to this surrender requirement, the exceptions are "carefully drawn to protect the owner's rights and to protect Treasury against competing claims." 80 FR 80258. For example, if a claimant cannot surrender the bond, the claimant must provide satisfactory evidence of the loss, theft, or destruction of the bond, or a satisfactory explanation of the mutilation or defacement, as well as sufficient information to identify the bond by serial number. *See, e.g.,* 31 CFR parts 315 and 353, subpart F. Pursuant to express statutory authority, Treasury regulations allow owners to keep their bonds indefinitely and to surrender them for payment at any time after the bonds mature. *See* 31 U.S.C. 3105(b) and 31 CFR parts 315 and 353, subpart H.

Litigation Over State Escheat Claims

Many State escheat laws allow States to take custody of unclaimed or abandoned property. Treasury discussed the effect of escheat on the rights of savings bond owners in a 1952 bulletin to the Federal Reserve Banks addressing a State claim to the custody of four savings bonds in the State's possession, which had belonged to a ward of the State who died without heirs. In this context, where the State had possession of the bonds it sought to redeem, Treasury stated that it will not recognize a State claim to the custody of savings bonds, but will recognize an escheat judgment that confers title on a State because "in escheat the state is 'the ultimate heir.'" 80 FR 80258 (quoting Public Debt Bulletin No. 111, Subject: State Statutes Concerning Abandoned Property (Feb. 27, 1952) at 3). It was unnecessary for the 1952 bulletin to provide further detail about State escheat claims because in that case the State did not claim title over the bonds. *Id.*

Treasury addressed a new, broader custody escheat claim in 2004 and 2006, when several States attempted to claim the proceeds of all matured, unredeemed bonds registered to residents in their State. Unlike the claim addressed by the 1952 bulletin, these States did not possess the bonds they

sought to redeem, which presumably were still held by their owners. Treasury informed the States that they "must possess the bonds they seek to redeem." 80 FR 20259 & n.3 (citing 2004 and 2006 letters to various States). In the ensuing litigation, the U.S. Court of Appeals for the Third Circuit concluded that the State unclaimed property statutes conflicted with Federal law. *See New Jersey v. U.S. Dep't of the Treasury*, 684 F.3d 382, 407-09 (3d Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013). The States' "efforts to impose the status of 'abandoned' or 'unclaimed' on the Federal Government's obligations" could not be reconciled with the fact that the bond proceeds are not 'abandoned' or 'unclaimed' under Federal law because the owners of the bonds may redeem them at any time after they mature." *Id.* at 409.

Subsequent litigation was prompted by certain States enacting title escheat laws specifically for savings bonds that the States deemed to be "unclaimed" or "abandoned." In 2000 and 2015, respectively, Kansas and Arkansas enacted statutes providing that a U.S. savings bond is presumed to be abandoned if it has not been redeemed by a certain time and further providing that such bonds escheat to the State a certain time after the bonds are presumed abandoned. *See* 80 FR 80259. Pursuant to those laws, Kansas and Arkansas initiated escheat proceedings to claim title to bonds in their possession, as well as to a broad class of bonds the States did not possess. With respect to the bonds not in their possession, Kansas and Arkansas published statements in local newspapers of their intention to claim title to bonds of a particular description. Although bond owners were not parties to the escheat proceeding, and may never have learned that the State was attempting to claim title over their bonds, they were obligated to respond to the escheat proceeding in order to protect their ownership of the bonds. *Id.* After obtaining *ex parte* escheat judgments, Kansas and Arkansas sought to redeem the savings bonds not in their possession. Treasury denied those requests.

The U.S. Court of Appeals for the Federal Circuit upheld Treasury's decision for two independent reasons. First, the Court of Appeals held that "federal law preempts the States' escheat laws." *LaTurner v. United States*, 933 F.3d 1354, 1357 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 239 (2020). The court explained that, whereas "Treasury regulations impose no time limit on the redemption of savings bonds," the State laws provide

that, “if bond holders do not redeem their bonds promptly enough (as decided by the States), they lose ownership and the bonds will transfer to the state.” *Id.* at 1361. The court determined that, because “federal law takes precedence,” *id.* (quoting *Murphy v. National Collegiate Athletic Ass’n*, 584 U.S. 453, 477 (2018)), “the bonds belong to the original bond owners, not the States, and thus the States cannot redeem the bonds,” *id.* at 1357.

Second, the Court of Appeals held that, “even if the States owned the bonds, they could not obtain any greater rights than the original bond owners,” and Treasury’s regulations make clear that “a bond owner must provide the serial number to redeem” the specific bonds at issue. *LaTurner*, 933 F.3d at 1357. The court observed that “the States do not have the physical bonds or the bond serial numbers.” *Id.* The court therefore determined that, “even if the bonds here are considered lost,” *id.* at 1364, “Treasury properly denied [the States’] request for redemption,” *id.* at 1357. The court also concluded that the States could not “circumvent the [regulatory] requirement” to “provide the serial number” of the bonds by asking “the government to disclose the bond serial numbers as a matter of discovery.” *Id.* at 1366. The Court of Appeals denied the States’ petitions for rehearing *en banc*, and the Supreme Court denied the States’ petitions for writs of certiorari. *LaTurner v. United States*, 141 S. Ct. 239 (2020); *Lea v. United States*, 141 S. Ct. 240 (2020).

While that litigation was ongoing, Treasury amended its regulations in 2015 through notice-and-comment rulemaking to clarify that it “will not recognize an escheat judgment that purports to vest a State with title to a bond that the State does not possess.” 31 CFR 315.88(a); *see also* 31 CFR 315.20(b) (“Escheat proceedings will not be recognized under this subpart.”), 80 FR 80264–65. In a separate suit filed in Federal district court, Kansas and four other States challenged the amended regulations as an allegedly unjustified departure from Treasury’s past practice. The district court rejected that challenge, concluding that the regulations clarified rather than changed Treasury’s practice. *See Estes v. U.S. Dep’t of the Treasury*, 219 F. Supp. 3d 17, 22 (D.D.C. 2016). The States appealed but voluntarily dismissed the appeal. *See Order, LaTurner v. U.S. Dep’t of the Treasury*, No. 17–5015 (D.C. Cir. Nov. 21, 2017).

Thus, under 31 U.S.C. 3105 and Treasury’s implementing regulations, U.S. savings bond owners are entitled to redeem their bonds at any time after

maturity without penalty; the United States honors those debts in perpetuity. *See* 31 CFR 353.35. State laws that treat matured but not yet redeemed U.S. savings bonds that are not in a State’s possession as “abandoned” property subject to escheatment undermine the rights of registered owners or their heirs to redeem matured bonds whenever they choose through the simple act of turning in the physical bonds to a designated payor such as a local bank. Treasury’s existing regulations preempt any State law that deems U.S. savings bonds “abandoned” because they are not yet redeemed or otherwise interferes with the Federal-law rights of the registered owners or their heirs to redeem them.

SECURE 2.0 Act of 2022

Against that backdrop, Congress considered legislation to amend 31 U.S.C. 3105. As discussed further below, Congress declined to enact a 2021 legislative proposal that would have allowed States to escheat matured, unredeemed savings bonds that are not in their possession. Instead, Congress enacted the SECURE 2.0 Act of 2022¹ (Secure 2.0 Act), which was signed into law on December 29, 2022.

The Secure 2.0 Act added subsection (f) to 31 U.S.C. 3105, requiring Treasury to share certain U.S. savings bond information with States for the purpose of locating savings bond owners. Under new subsection (f), Treasury “shall provide each State, in digital or other electronic form, with information describing any applicable savings bond which has an applicable address that is within such State, including (i) the name and applicable address of the registered owner; and (ii) the name and applicable address of any registered co-owner or beneficiary.”² “Applicable address” is defined as the registered address for the registered owner (or co-owner or beneficiary) of the savings bond or the last-known address for the registered owner (or co-owner or beneficiary) available to the Secretary.³ “Applicable savings bond” is defined as a savings bond (1) which is more than three years past its final maturity date, (2) is in paper form, or is in paperless or electronic form and there is no designated bank account or routing information or the designated bank account or routing information is incorrect; and (3) has not been redeemed.⁴

¹ Public Law 117–328 (Dec. 29, 2022), Division T; 31 U.S.C. 3105(f).

² 31 U.S.C. 3105(f)(1)(A).

³ 31 U.S.C. 3105(f)(1)(C).

⁴ 31 U.S.C. 3105(f)(6).

The new subsection (f) expressly limits the purpose for which a State may use the information shared by Treasury to locating the registered savings bond owner. The statute provides: “Any State that receives information described in paragraph (1)(A) with respect to an applicable savings bond may use such information to locate the owner of such bond pursuant to the same standards and requirements as are applicable under” State abandoned property rules and any regulations or guidance promulgated by Treasury pursuant to the Secure 2.0 Act. 31 U.S.C. 3105(f)(4). The Secure 2.0 Act does not override the Treasury regulations described above, which do not allow States to escheat savings bonds that are not in their possession.

The Secure 2.0 Act directs Treasury to prescribe regulations or guidance as may be necessary to carry out the purposes of subsection (f), including rules to protect the privacy of the owners of applicable savings bonds, prevent fraud, and ensure that any information provided to a State is used solely for the purposes of the new subsection (f).⁵ Under the Secure 2.0 Act, regulations or guidance issued by Treasury must not have the effect of prohibiting, restricting, or otherwise preventing a State from obtaining the information described above, except as deemed necessary to protect privacy or prevent fraud or misuse of savings bond information.⁶

II. Public Comments and Fiscal Service’s Responses

On October 31, 2023, Fiscal Service published a notice of proposed rulemaking (NPRM) to carry out the purposes of the Secure 2.0 Act.⁷ Fiscal Service received 14 substantive comment letters in response to the NPRM. Twelve comments were from State treasurers’ offices or their legal representatives, one was a joint comment from the National Association of Unclaimed Property Administrators (NAUPA) and the National Association of State Treasurers (NAST), and one comment was from a private individual. The comments largely fell into four general categories: (1) the restriction on using shared information about savings bonds to escheat those bonds, (2) the lack of Congressional appropriations for States to use in attempting to locate savings bond owners, (3) the lack of a claims servicing role for the States after locating savings bond owners, and (4) the prohibition on publicly releasing

⁵ 31 U.S.C. 3105(f)(2)(A).

⁶ 31 U.S.C. 3105(f)(2)(B).

⁷ 88 FR 74386.

savings bond information without the express consent of Treasury. There were also comments on certain other topics, which we also address below.

Restriction on Using Shared Information to Escheat Bonds

Eight commenters objected to the proposed regulation's restriction on using the information shared by Treasury under the Secure 2.0 Act to escheat the applicable savings bonds. According to those commenters, escheat would be more efficient and cost effective to unite the bond owners with their property than the process outlined in the proposed regulation. One commenter also asserted that (1) the regulations exceed Treasury's statutory authority by prohibiting escheat, (2) denying escheatment to the States is arbitrary and capricious, and (3) prohibiting escheatment using information obtained under the Secure 2.0 Act is a departure from Treasury's existing possession escheat policy.

These objections disregard the express limitations that the Secure 2.0 Act imposes on a State's use of the information shared pursuant to the Secure 2.0 Act. As described above, the Secure 2.0 Act only authorizes a State to use the shared information for the purpose of locating the bond owners. Under the Secure 2.0 Act, "any State that receives information [from Treasury] with respect to an applicable savings bond may use such information to locate the owner of such bond."⁸ The statute also requires Treasury to prescribe regulations or guidance as may be necessary to "ensure that any information provided to a State under [new subsection (f)] shall be used solely to carry out the purposes of" that subsection.⁹ By restricting the use of information provided to a State under these regulations, Treasury is implementing the statute in accordance with its express terms.

Further, the Secure 2.0 Act does not override existing Treasury regulations that prohibit a State from escheating a bond that the State does not have in its possession. Under regulations that predate the Secure 2.0 Act, a matured U.S. savings bond does not expire and may be redeemed by the registered owner (or heir) at any time. As the Federal Circuit explained in *LaTurner*, those Federal regulations preempt inconsistent State law.

To the extent that commenters suggest that the Secure 2.0 Act was intended to override the *LaTurner* decision and Treasury's regulations by allowing

States to escheat matured, unredeemed savings bonds that are not in their possession, Treasury disagrees. In 2021, proposed legislation that would have had that effect was introduced in Congress but never passed.¹⁰ The 2021 proposed legislation's language specifically would have allowed not only for the transfer of applicable savings bond information to the States but would have allowed the States to obtain title to the applicable savings bond through a valid judgment of escheatment. The 2021 proposed legislation stated that "[n]otwithstanding any other Federal law, the ownership of an applicable savings bond may be transferred pursuant to a valid judgment of escheatment vesting a State with title to the bond," and that "[n]othing in this section, or in any regulation promulgated by the Secretary to implement this section, may be construed to preempt State law providing for, or governing the escheatment of, applicable savings bonds."¹¹ The 2021 proposed legislation further stated that "[t]he Secretary may not prescribe any regulation which prevents or prohibits a State from obtaining title to an applicable savings bond or redeeming such bond" under the act.¹² However, the 2021 proposed legislation failed to move past the House Ways and Means Committee and the Senate Finance Committee. Instead, when a version of the proposed legislation reemerged in 2022 as part of the Secure 2.0 Act, the title-escheat language had been removed along with the language prohibiting Treasury from promulgating regulations that would preempt State law on escheatment.

Because U.S. savings bonds do not expire and Treasury has imposed no time limit for savings bond owners to redeem them, savings bond information shared with States under the Secure 2.0 Act does not pertain to savings bonds that are abandoned or lost, but simply unredeemed. The restriction in this final rule on using information shared under the Secure 2.0 Act to escheat savings bonds serves to protect the bond owner's rights and to prevent future double payments from Treasury when the rightful owner presents the savings bond for redemption. As Treasury has previously explained, "[t]he potential for competing claims exposes Treasury to the risk of double-payment and costly litigation, as well as threatens the vested

rights of bond owners." 80 FR 80259. Under State escheatment laws, a State could attempt to claim savings bonds that are still in the possession of registered owners, who can submit them for payment at any time. A State could also attempt to claim bonds that are in the possession of another State, where both States have a claim to title under their own State laws. Allowing States to escheat unredeemed savings bonds that are not in the States' possession would be contrary to existing Treasury regulations, as well as the agreement made between Treasury and a bond owner when the bond is purchased.

In providing that States may use the information shared by Treasury to "locate the owner" of savings bonds pursuant to the States' abandoned property rules and Treasury regulations and guidance, the Secure 2.0 Act leaves in place the balance Treasury has struck to protect bond owners' rights and the public fisc. As discussed above, the Secure 2.0 Act did not override the *LaTurner* decision or override existing Treasury regulations by allowing States to escheat matured, unredeemed savings bonds that are not in their possession.

Although several commenters expressed a concern that the proposed regulation could interfere with States' ability to redeem bonds that are in their possession, the Secure 2.0 Act and this final rule address only bonds that are not in a State's physical possession. Where a State has the physical bond, the State has the serial number and other information needed to ask Treasury—under existing regulations unchanged here—to redeem that bond. For similar reasons, prohibiting title escheat using information obtained under the Secure 2.0 Act is not a departure from Treasury's possession escheat policy, which has long recognized that States may be able to redeem bonds that are in their physical possession under circumstances that provide evidence that the bonds were, in fact, abandoned property.¹³ Under existing Treasury regulations, States may request payment on an escheat judgment purporting to vest a State with title to a matured savings bond in the State's possession.¹⁴ Those existing regulations are not affected by this final rule. This final rule continues to support Treasury's policy requiring States to be in possession of any savings bond they are purporting to escheat. States may still pursue title escheat for savings bonds in their possession, as they would be using the information found on the savings bond itself to complete the escheatment

¹⁰ See Unclaimed Savings Bond Act of 2021, H.R. 4085, 117th Congress; S. 2854, 117th Congress.

¹¹ *Id.* 3105(f)(1).

¹² *Id.* 3105(f)(4)(B).

¹³ See 80 FR 80260–61.

¹⁴ 31 CFR 353.88.

⁸ 31 U.S.C. 3105(f)(4).

⁹ 31 U.S.C. 3105(f)(2)(A).

process, rather than using any information provided to them by Treasury under the Secure 2.0 Act.

Lack of Congressional Appropriations To Support States' Locator Services

Some commenters expressed concern about the lack of Federal funding available to assist the States in locating savings bond owners. For example, one commenter suggested that a lack of funds will “hinder the resources States have available to provide enhanced outreach efforts beyond currently established efforts.” Another noted that “certain challenges are created for participating States by not actually receiving the funds that are associated with the bond records,” leaving the States to bear the financial burden of locator services.

However, the Secure 2.0 Act does not grant funding to assist the States in providing optional locator services. The Secure 2.0 Act only directs Treasury to make applicable savings bond information available to the States for the purpose of locating the owner or owner's representatives. In prior litigation and in their comments on the NPRM, multiple States have claimed that they “have both the dedicated resources and the solemn responsibility to locate the missing property owners and reunite them with their property,” *Arkansas Brief* at 6–7, *LaTurner v. United States*, 933 F.3d 1354 (Fed. Cir. 2019) (No. 18–1509), ECF No. 37, and have proclaimed that their ultimate goal is to “help the original owners learn of, and be paid on, th[eir] bonds,” *Kansas Brief* at 14, *LaTurner v. United States*, 933 F.3d 1354 (Fed. Cir. 2019) (No. 18–1509), ECF No. 36. States are free to use their resources for such efforts, but nothing in the Secure 2.0 Act requires the States to undertake these administrative efforts to locate bond owners if a State chooses not to do so.

Lack of a Claims-Servicing Role

A number of commenters expressed a concern regarding the lack of a “claims servicing” role for States in the proposed regulations. These comments appear to propose that States—not Treasury—should accept State-specific property claim forms and require that savings bond owners redeem their bonds through the State's unclaimed property procedures rather than Treasury's savings bond redemption procedures. Commenters raised concerns about the efficiency and effectiveness of the overall Secure 2.0 Act framework, stating that a streamlined process to locate and pay bond owners is essential. These commenters indicated that Treasury

should rely upon the States' experience in reuniting their respective citizens with unclaimed funds, rather than asking States to refer savings bond owners to Treasury for redemption. Another commenter noted that a State's role in the program is unclear if the States do not provide the proceeds of the savings bonds to their owners.

However, the Secure 2.0 Act does not contemplate overriding the longstanding Federal regulations, procedures, and agreements under which individuals redeem their U.S. savings bonds for payment by the Federal Government. Under existing Treasury regulations, there is a well-established framework for savings bond owners to redeem their bonds.¹⁵ Any savings bond owner may redeem a savings bond directly from Fiscal Service, whether they have physical possession of the bond or need to declare the bond lost, stolen, or destroyed. Fiscal Service also has dedicated customer service staff trained to process complex redemption requests, which may include decedents' estates, trusts, and attorneys-in-fact. All necessary forms for redemption are available to the public through the *TreasuryDirect.gov* website.

Additionally, any bond owner who has physical possession of a Series EE or Series I savings bond, which is in a single owner, co-ownership, or beneficiary ownership registration, is permitted to redeem the savings bond at any financial institution designated by Treasury as a paying agent. These two methods of redemption, through Fiscal Service and through designated paying agents, promote efficient, consistent, and reliable pathways to redemption for savings bond owners. Under this final rule, Treasury will continue to process redemptions through established methods.

Restriction on Public Release of Savings Bond Information

Twelve commenters expressed concern over the NPRM's proposed restriction of a State's public release of the applicable savings bond information without Treasury's express consent. Commenters stated that this restriction would place an increased administrative burden on State agencies by preventing them from using their current reunification methods to reunite bond owners with their bonds. The Secure 2.0 Act requires Treasury to issue regulations or guidance as may be necessary to “protect the privacy of the owners of applicable savings bonds” and to “prevent fraud.”¹⁶ In order to

balance the competing interests, rather than adopting a blanket prohibition on public release of relevant information, the NPRM and the final rules permit the public release of information by States if they first obtain Treasury's consent. In determining whether to grant such consent, Treasury will consider the risks to savings bond owners' privacy and the risk of fraud. In recent years, as printing technologies have advanced, it has become easier for criminals to create fraudulent paper savings bonds using publicly available information. Since 2021, there have been over \$40 million in redemptions of counterfeit savings bonds. Fiscal Service has responded by taking certain steps that have reduced the opportunities for fraud. By reducing publicly available information and taking other precautionary steps, Treasury has significantly reduced the number of counterfeit savings bonds presented for redemption. Based on its experience addressing fraud, Fiscal Service believes that making records of matured, unredeemed savings bonds available to the public creates substantial risks of fraud.

A few commenters stated that they believe that some savings bond information is already publicly available; however, savings bond records are not currently available to the public. Moreover, savings bond information is subject to the Privacy Act of 1974, which generally prohibits the release of such information to the public. Fiscal Service further protects this information in its Privacy Act regulations,¹⁷ as well its Privacy Act System of Records Notice Treasury/Fiscal Service .014—United States Securities and Access.¹⁸ Consistent with Treasury's obligation to protect savings bond owners' personal information, the Treasury Hunt website restricts the disclosure of savings bond information and only suggests that a requestor contact Fiscal Service to inquire further about their Treasury securities; it does not provide any specific information regarding any securities that may be held. Only after Fiscal Service verifies the requestor's identity will it release any information to the owner as permitted under the law and its regulations.

Miscellaneous Comments

Treasury received comments regarding what information will be made available to the States under the final rule. One commenter requested

¹⁷ 31 CFR 323.2.

¹⁸ 85 FR 11776, (Feb. 27, 2020). Fiscal Service intends to modify this System of Records Notice to assist in implementing the Secure 2.0 Act.

¹⁵ 31 CFR 353.39, 31 CFR 360.39.

¹⁶ 31 U.S.C. 3105(f)(2).

additional information on whether Social Security numbers, savings bond denominations, and serial numbers will be released to the States. Another commenter suggested that the release of savings bond serial numbers is mandatory under the Secure 2.0 Act.

Under the Secure 2.0 Act, Treasury is required to provide each State, in digital or other electronic form, with information describing the name and applicable address of a registered owner, co-owner, or beneficiary of an applicable savings bond with an applicable address within that State.¹⁹ Accordingly, Treasury will release the name and applicable address of such registered owners, co-owners, and beneficiaries to the States, pursuant to the statute.

The final rule does not include provisions for releasing Social Security numbers, saving bond denominations, or bond serial numbers. Based on Treasury's experience, the serial number and Social Security number are the two items of information most likely to facilitate fraud. Further, the Secure 2.0 Act provides that the information Treasury shares "may include the serial number of any applicable savings bond," not that serial numbers must be shared.²⁰ In addition, in Treasury's long experience administering the savings bond program, bond denominations have marginal or no utility in locating bond owners. Denominations and bond serial numbers are important in the redemption of a savings bond, but do not offer Treasury or a participating State information regarding the location or identity of the savings bond owner.

One commenter submitted questions regarding the contracting and enforcement of information sharing with the States. At this time, Fiscal Service is working to develop a technical solution for sharing the mandated information with the States. Any mandatory security requirements for accessing the information will be included in the information-sharing contracts with the States. Fiscal Service intends to work closely with the States to ensure compliance with our security requirements, monitoring the use of the information in accordance with the information-sharing contract.

III. Summary of Final Rule Amendments

Overview

Fiscal Service is adding these Secure 2.0 Act regulations to 31 CFR part 323, which includes regulations adopted

under the Freedom of Information Act (FOIA) regarding the disclosure of records.²¹ Fiscal Service is maintaining the current FOIA regulations found in part 323 by moving the existing provisions in §§ 323.1 through 323.5 into a new subpart A. A new subpart B contains the regulations to implement the Secure 2.0 Act requirements to provide information and records containing applicable savings bond information to States. Subpart B includes definitions necessary to implement the regulations, requirements for a State to receive applicable savings bond information, conditions regarding the use of the information, and liability terms. Separating the regulations implementing the two different statutory authorities, FOIA and the Secure 2.0 Act, by subpart is intended to assist the public in identifying the two separate authorities under which an individual or a State may request information.

Treasury believes the new disclosure of applicable savings bond information requirements is closely associated with the purpose of FOIA and its existing disclosure regulations. While the Secure 2.0 Act only allows for disclosure of certain information to States, rather than to the public at large, a savings bond owner could look to a single regulation, part 323, to determine the various ways in which their savings bond information could be disclosed.

Subpart A, § 323.1

As noted above, subpart A as amended contains regulations that implement FOIA for Fiscal Service, previously found at part 323. Accordingly, the final rule makes a technical modification to the first sentence of § 323.1 to identify "this subpart" rather than "this part."

Subpart B

Following are summaries of the provisions in the new subpart B, all of which are being added in this final rule.

Purpose of the Regulations, § 323.10

This section briefly describes the purpose of the new regulatory provisions, namely to implement the Secure 2.0 Act.

Rules Governing Sharing of Applicable Savings Bond Information With States, § 323.11

Section 323.11 includes the definitions and terms necessary to provide States the information required by the Secure 2.0 Act. In addition, the

amendments add new provisions to help protect the privacy of the owners of applicable savings bonds, prevent fraud, and ensure that shared information is used only for permissible purposes under the Secure 2.0 Act.

Definitions, § 323.11(a)

The Secure 2.0 Act requires Treasury to provide, in digital or other electronic form, each State with information describing any "applicable savings bond" that has an "applicable address" within such State. The statute requires this information to include the name and applicable address for each registered owner, co-owner, or beneficiary. "Applicable address" is defined in the statute as the registered address for the registered owner, co-owner, or beneficiary of the savings bond or the last-known address for the foregoing if it is available to Treasury.²² The final rule defines "last-known address" to mean an address available to Fiscal Service after a reasonable search of its records.

While the level of effort dedicated to the search could be expressed in various degrees, a "reasonable" search balances the goals of efficiency and effectiveness. An exhaustive search, for example, would be unduly costly and burdensome on Fiscal Service, given the breadth of our systems of records, and unlikely to significantly change the results of the search. "Record" is broadly defined to include any data or documentation containing or composed of information describing relevant applicable savings bonds, including the applicable addresses of the owners. This definition allows Fiscal Service to protect savings bond owners from unauthorized disclosure of their information, as any information received from Treasury will remain a record subsequent to disclosure.

The term "State" is also broadly defined in the final rule to mean U.S. territories, possessions, and the District of Columbia, as well as the 50 States. This definition is consistent with available registered addresses over the lifetime of the savings bond program.

Requests for Records

Section 323.11(b) provides that each State may request applicable savings bond records from Fiscal Service. Upon request, the State must enter into an information-sharing agreement with Fiscal Service to receive the requested records. Fiscal Service expects that this agreement will require a State to make representations regarding protecting the savings bond records from unauthorized

¹⁹ 31 U.S.C. 3105(f)(1)(A).

²⁰ See 31 U.S.C. 3105(f)(1)(B).

²¹ 31 CFR part 323.

²² 31 U.S.C. 3105(f)(1)(C).

disclosure, including security requirements for receiving and storing the records. These security requirements are appropriate to minimize the risk of fraud or misuse or misappropriation of information.

Use of Records

Section 323.11(c) specifies how the records or information contained therein may be used by States, in compliance with the Secure 2.0 Act. As stated at 31 U.S.C. 3105(f), Treasury's regulations are required to ensure that applicable savings bond information provided to a State will be used solely to carry out the purpose of locating the owner of the savings bond.²³ In accordance with this statutory requirement, the regulation provides that the applicable savings bond information cannot be used to escheat savings bond ownership to a State. The purpose of the Secure 2.0 Act is for Treasury to provide information regarding applicable savings bonds to States to assist in locating the owner of the bonds. The Secure 2.0 Act does not allow States to use the provided records and information to escheat the bonds, which would conflict with the rights of savings bond owners to redeem matured savings bonds whenever they choose.

Under the regulation, in order to protect the savings bond owner's privacy, any applicable savings bond information provided to States cannot be released to the public or any third party without Treasury's express written approval. This requirement is also expected to be incorporated into the information-sharing agreement described above. The requirement to obtain such approval from Treasury is also intended to ensure that the release of savings bond records or the information therein does not subject Fiscal Service customers to fraud risk. In recent years, Fiscal Service has taken steps that have reduced the opportunities for fraud, and making records of matured, unredeemed savings bonds available to the public would create an unacceptable risk of fraud. Fiscal Service will continue to monitor savings bond fraud and consider implementing further risk-mitigation strategies, which may eventually allow for certain savings bond records to be distributed publicly.

Liability

Under § 323.11(d), Treasury will not be responsible for any loss, liability, cost, or expense that results from a State's receipt, use, or distribution of records regarding applicable savings

bonds or any information contained therein. Any misuse of savings bond records or information provided to a State under the regulations could result in fraudulent activity, breach of privacy for a savings bond owner, and financial loss for bond owners. Under the regulations, a State that receives information under the regulations bears the responsibility for, and indemnifies Treasury against, any loss or other costs associated with the State's receipt, use, distribution of, or failure to adequately protect, any records or information.

Severability, § 323.12

This provision clarifies Treasury's intent with respect to the severability of provisions of this rule. In the event any section, subsection, clause, paragraph, or phrase of this subpart is deemed invalid or unconstitutional by a court of competent jurisdiction, all remaining provisions shall continue in effect.

IV. Procedural Requirements

A. Executive Order 12866

This rule is not a significant regulatory action as defined in E.O. 12866, dated September 30, 1993, as amended, and is not a major rule under 5 U.S.C. 804.

B. Administrative Procedure Act (APA)

Because this rule relates to United States securities, which are contracts between Treasury and the owner of the security, this rule falls within the contract exception to the APA, 5 U.S.C. 553(a)(2). Treasury voluntarily sought public comment to assist the agency in assessing the impact of the rule.

C. Regulatory Flexibility Act

This rule relates to matters of public contract and procedures for United States securities. Since a notice of proposed rulemaking is not required, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, do not apply. In any event, Treasury certifies that this rule, which implements the Secure 2.0 Act's requirements that Treasury provide certain U.S. savings bond information to States, will not have a significant economic impact on a substantial number of small entities.²⁴

D. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects in 31 CFR Part 323

Archives and records, Freedom of information, Privacy, Savings bonds.

Accordingly, for the reasons set forth in the preamble, Treasury amends 31 CFR part 323, as follows:

PART 323—DISCLOSURE OF RECORDS

- 1. The authority citation for part 323 continues to read as follows:

Authority: 80 Stat. 379; sec. 3, 60 Stat. 238, as amended; 5 U.S.C. 301, 552.

- 2. Add subpart A to read as follows:

Subpart A—Freedom of Information Act

§§ 323.1 through 323.5 [Designated as Subpart A]

- 3. Designate §§ 323.1 through 323.5 as subpart A.
- 4. Revise the first sentence of § 323.1 to read as follows:

§ 323.1 Purpose of regulations.

The regulations of this subpart are issued to implement 5 U.S.C. 552(a)–(2) and (3). * * *

- 5. Add subpart B to read as follows:

Subpart B—SECURE 2.0 Act of 2022

Sec.

323.10 Purpose of this subpart.

323.11 Rules governing sharing of applicable savings bond information with States.

323.12 Severability.

Authority: 31 U.S.C. 3105(f).

Subpart B—SECURE 2.0 Act of 2022

§ 323.10 Purpose of this subpart.

The regulations of this subpart are issued to implement section 122 of the SECURE 2.0 Act of 2022, 31 U.S.C. 3105(f). The requirements of 31 U.S.C. 3105(f) are additionally met through the publication of a new Routine Use in the applicable Fiscal Service System of Record Notice.

§ 323.11 Rules governing sharing of applicable savings bond information with States.

(a) *Definitions.* For purposes of this section:

Applicable address has the meaning set forth in 31 U.S.C. 3105(f)(1)(C).

Applicable savings bond has the meaning set forth in 31 U.S.C. 3105(f)(6).

Last known address means the full street address, if available, found after a reasonable search of Fiscal Service records.

Name means the full registered name of the owner, co-owner, or beneficiary of

²³ 31 U.S.C. 3105(f)(2).

²⁴ 5 U.S.C. 605(b).

an applicable savings bond, as it appears on the savings bond inscription.

Record means data or documentation, whether in paper, digital, or other electronic form, containing or composed of information describing any applicable savings bond which has an applicable address within a State, including the name and registered address or last known address of the registered owner, co-owner, or beneficiary, as further defined in 31 U.S.C. 3105(f)(1).

Registered address means the address included in the savings bond inscription.

State means the fifty States, the District of Columbia, American Samoa, the Federated States of Micronesia, Guam, the United States Virgin Islands, the Marshall Islands, the Commonwealth of the Northern Mariana Islands, Palau, and the Commonwealth of Puerto Rico.

(b) **Requests for records.** Records will be made available to States in compliance with 31 U.S.C. 3105(f) and this subpart, upon request by a State to Fiscal Service. Prior to receiving access to records, each State, through an authorized State representative, must enter into an information-sharing agreement with Fiscal Service using a form that will be provided by Fiscal Service. Such agreements may contain, among other things, requirements that Treasury deems necessary or appropriate to ensure the security of the information.

(c) **Use of records.** Any records or any information made available to a State under this subpart:

(1) Must be used only for the purpose of locating the owner of an applicable savings bond;

(2) Must not be used to escheat savings bond ownership to a State; and

(3) Must not be released by a State to the public or any third party, unless explicitly approved in writing, in advance, by Treasury.

(d) **Liability.** Treasury is not liable for any loss, liability, cost, or expense that may result from a State's receipt, use, or distribution of records or any information contained therein. A State receiving records under this subpart shall indemnify Treasury for any loss, liability, cost, or expense associated with the State's receipt, use, or distribution of, or failure to adequately protect, records or any information contained therein.

§ 323.12 Severability.

The provisions of this subpart are severable, and if any section, subsection, clause, paragraph, or phrase of this subpart shall be adjudged to be invalid or unconstitutional by any court

of competent jurisdiction, the judgment shall not affect, impair, or invalidate the remainder of this subpart, but shall be confined in its operation to the section, subsection, clause, paragraph, or phrase directly involved in the controversy in which such judgment shall have been rendered, and the remainder of this subpart shall continue to be in force and effect.

By the Department of the Treasury.

David Lebryk,

Fiscal Assistant Secretary.

[FR Doc. 2024–29988 Filed 12–17–24; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General Licenses 53A, 55C, 113, and 114

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of web general licenses.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing four general licenses (GLs) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GLs 53A, 55C, 113, and 114, each of which was previously made available on OFAC's website.

DATES: GLs 53A, 55C, 113, and 114 were issued on November 21, 2024. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

FOR FURTHER INFORMATION CONTACT:

OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Compliance, 202–622–2490 or <https://ofac.treasury.gov/contact-ofac>.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website: <https://ofac.treasury.gov/>.

Background

On November 21, 2024, OFAC issued GLs 53A, 55C, 113, and 114 to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. Each GL was made available on OFAC's website

(<https://ofac.treasury.gov>) when it was issued. GL 53A replaced and superseded GL 53. GL 55C replaced and superseded GL 55B. GL 55C has an expiration date of June 28, 2025; GLs 113 and 114 each have an expiration date of December 20, 2024. The text of these GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations 31 CFR Part 587

GENERAL LICENSE NO. 53A

Authorizing Transactions for Diplomatic Missions of the Russian Federation Involving Gazprombank Joint Stock Company or Prohibited by Directive 4 Under Executive Order 14024

(a) Except as provided in paragraph (c) of this general license, U.S. persons are authorized to engage in all transactions ordinarily incident and necessary to the official business of diplomatic or consular missions of the Government of the Russian Federation (“Russian missions”) that are prohibited by Executive Order (E.O.) 14024 and involve Gazprombank Joint Stock Company (Gazprombank), or any entity in which Gazprombank owns, directly or indirectly, a 50 percent or greater interest, or are prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation*.

(b) Except as provided in paragraph (c) of this general license, U.S. persons are authorized to engage in all transactions ordinarily incident and necessary to the compensation of employees of Russian missions, including payment of salaries and reimbursement of expenses, that are prohibited by E.O. 14024 and involve Gazprombank, or any entity in which Gazprombank owns, directly or indirectly, a 50 percent or greater interest, or are prohibited by Directive 4 under E.O. 14024.

(c) This general license does not authorize:

(1) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions*;

(2) Any debit to an account on the books of a U.S. financial institution of the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation; or

(3) Any transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR), including transactions involving any person blocked pursuant to the RuHSR, other than blocked persons described in paragraph (a) of this general license, unless separately authorized.

(c) Effective November 21, 2024, General License No. 53, dated November 10, 2022, is replaced and superseded in its entirety by this General License No. 53A.

Lisa M. Palluconi,
Acting Director, Office of Foreign Assets Control

Dated: November 21, 2024

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations 31 CFR Part 587 GENERAL LICENSE NO. 55C

Authorizing Certain Services Related to Sakhalin-2

(a) Except as provided in paragraph (c) of this general license, all transactions prohibited by the determination of November 21, 2022 made pursuant to section 1(a)(ii) of Executive Order (E.O.) 14071 (“Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin”) related to the maritime transport of crude oil originating from the Sakhalin-2 project (“Sakhalin-2 byproduct”) are authorized through 12:01 a.m. eastern daylight time, June 28, 2025, provided that the Sakhalin-2 byproduct is solely for importation into Japan.

(b) Except as provided in paragraph (c) of this general license, all transactions prohibited by E.O. 14024 involving Gazprombank Joint Stock Company (Gazprombank) or any entity in which Gazprombank owns, directly or indirectly, a 50 percent or greater interest, that are related to the Sakhalin-2 project, including such transactions involving Sakhalin Energy LLC, are authorized through 12:01 a.m. eastern daylight time, June 28, 2025.

(c) This general license does not authorize:

(1) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions*;

(2) Any transactions prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the*

Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation; or

(3) Any transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR), including transactions involving any person blocked pursuant to the RuHSR, other than the blocked persons described in paragraph (b), unless separately authorized.

(d) Effective November 21, 2024, General License No. 55B, dated June 26, 2024, is replaced and superseded in its entirety by this General License No. 55C.

Lisa M. Palluconi,
Acting Director, Office of Foreign Assets Control

Dated: November 21, 2024

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations 31 CFR Part 587 GENERAL LICENSE NO. 113

Authorizing the Wind Down of Transactions Involving Certain Financial Institutions Blocked on November 21, 2024

(a) Except as provided in paragraph (b) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 that are ordinarily incident and necessary to the wind down of transactions involving the blocked persons listed in the Annex to this general license, and any entity in which those blocked persons own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest, are authorized through 12:01 a.m. eastern standard time, December 20, 2024, provided that any payment to a blocked person is made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR).

(b) This general license does not authorize:

(1) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions*;

(2) Any debit to an account on the books of a U.S. financial institution of the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation; or

(3) Any transactions otherwise prohibited by the RuHSR, including transactions involving any person

blocked pursuant to the RuHSR other than the blocked persons described in paragraph (a) of this general license, unless separately authorized.

Lisa M. Palluconi,
Acting Director, Office of Foreign Assets Control

Dated: November 21, 2024

Annex—Blocked Persons Described in Paragraph (a) of General License 113

List of Blocked Persons Described in Paragraph (a) of General License 113 as of November 21, 2024:

- (a) Aktsionernoe Obshchestvo Bank Agroros
- (b) Bank Iturup LLC
- (c) BBR Bank Joint Stock Company
- (d) BCS Bank AO
- (e) Bratsky Narodny Bank JSC
- (f) Centroccredit Bank
- (g) Commercial Bank Energotransbank Joint Stock Company
- (h) Commercial Bank Khlynov Joint Stock Company
- (i) Commercial Bank Kremlyovskiy
- (j) Commercial Joint Stock Bank Viking
- (k) Corporate Finance Bank LLC
- (l) Fora Bank Joint Stock Commercial Bank
- (m) Garant Invest Bank Joint Stock
- (n) Gazprombank Joint Stock Company
- (o) Interstate Bank
- (p) Joint Stock Commercial Bank National Reserve Bank Joint Stock Company
- (q) Joint Stock Commercial Bank Slavia Joint Stock Company
- (r) Joint Stock Commercial Mortgage Bank Akibank Public Joint Stock Company
- (s) Joint Stock Company Auto Finance Bank
- (t) Joint Stock Company Bank Accept
- (u) Joint Stock Company Bank Dom RF
- (v) Joint Stock Company Bank Finservice
- (w) Joint Stock Company Bank United Capital
- (x) Joint Stock Company Coalmetbank
- (y) Joint Stock Company Commercial Bank Ural FD
- (z) Joint Stock Company Guta Bank
- (aa) Joint Stock Company NS Bank
- (bb) Joint Stock Company Public Trust Bank
- (cc) Joint Stock Company Royal Credit Bank
- (dd) Joint Stock Company Severgazbank
- (ee) Joint Stock Investment Commercial Bank Eniseisk United Bank
- (ff) JSC Exi Bank
- (gg) JSCB Energobank
- (hh) Kamsky Commercial Bank
- (ii) Limited Liability Company Bank Orange
- (jj) Limited Liability Company Bank Round

(kk) Limited Liability Company Krona Bank
 (ll) National Standard Bank Joint Stock Company
 (mm) New Moscow Bank
 (nn) NK Bank Joint Stock Company
 (oo) Primorsky Territorial Commercial Bank Society with Limited Liability
 (pp) Public Joint Stock Commercial Bank Derzhava
 (qq) Public Joint Stock Company Bank Alexandrovsky
 (rr) Public Joint Stock Company Bank Sinara
 (ss) Public Joint Stock Company Finstar Bank
 (tt) Public Joint Stock Company Metcombank
 (uu) Public Joint Stock Company National Bank Trust
 (vv) Public Joint Stock Social Commercial Bank of Primorye Primsotsbank
 (ww) Rossita Bank
 (xx) Russian Public Joint Stock Commercial Roads Bank
 (yy) Russian Universal Bank
 (zz) Vitabank PJSC
 (aaa) Waybank JSC

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations 31 CFR Part 587

GENERAL LICENSE NO. 114

Authorizing Certain Transactions Related to Debt or Equity of, or Derivative Contracts Involving, Certain Entities Blocked on November 21, 2024

(a) Except as provided in paragraphs (d) and (e) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 that are ordinarily incident and necessary to the divestment or transfer, of debt or equity issued or guaranteed by the following blocked entities (“Covered Debt or Equity”) to a non-U.S. person are authorized through 12:01 a.m. eastern standard time, December 20, 2024:

(1) Gazprombank Joint Stock Company;

(2) Interstate Bank; or

(3) Any entity in which one or more of the above persons own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest.

(b) Except as provided in paragraph (e) of this general license, all transactions prohibited by E.O. 14024 that are ordinarily incident and necessary to facilitating, clearing, and settling trades of Covered Debt or Equity that were placed prior to 4:00 p.m. eastern standard time, November 21,

2024 are authorized through 12:01 a.m. eastern standard time, December 20, 2024.

(c) Except as provided in paragraph (e) of this general license, all transactions prohibited by E.O. 14024 that are ordinarily incident and necessary to the wind down of derivative contracts entered into prior to 4:00 p.m. eastern standard time, November 21, 2024 that (i) include a blocked person described in paragraph (a) of this general license as a counterparty or (ii) are linked to Covered Debt or Equity are authorized through 12:01 a.m. eastern standard time, December 20, 2024, provided that any payments to a blocked person are made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR).

(d) Paragraph (a) of this general license does not authorize:

(1) U.S. persons to sell, or to facilitate the sale of, Covered Debt or Equity to, directly or indirectly, any person whose property and interests in property are blocked; or

(2) U.S. persons to purchase or invest in, or to facilitate the purchase of or investment in, directly or indirectly, Covered Debt or Equity, other than purchases of or investments in Covered Debt or Equity ordinarily incident and necessary to the divestment or transfer of Covered Debt or Equity as described in paragraph (a) of this general license.

(e) This general license does not authorize:

(1) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions*;

(2) Any transactions prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation*; or

(3) Any transactions otherwise prohibited by the RuHSR, including transactions involving any person blocked pursuant to the RuHSR other than the blocked persons described in paragraph (a) of this general license, unless separately authorized.

Lisa M. Palluconi,
Acting Director, Office of Foreign Assets Control

Dated: November 21, 2024

Lisa M. Palluconi,
Acting Director, Office of Foreign Assets Control.

[FR Doc. 2024–29676 Filed 12–17–24; 8:45 am]

BILLING CODE 4810–AL–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2024–0005; FRL–11919–02–R9]

Partial Approval and Disapproval of Air Quality Implementation Plans; Arizona; Regional Haze State Implementation Plan for the Second Implementation Period and Prong 4 (Visibility) for the 2015 Ozone and 2012 Particulate Matter Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving the regional haze state implementation plan (SIP) revision submitted by Arizona on August 15, 2022 (“2022 Arizona Regional Haze Plan”), under the Clean Air Act (CAA) and the EPA’s Regional Haze Rule (RHR) for the program’s second implementation period. Arizona’s SIP submission was developed to address the requirement that states must periodically revise their long-term strategies for making reasonable progress towards the national goal of preventing any future, and remedying any existing, anthropogenic impairment of visibility, including regional haze, in mandatory Class I Federal areas. The SIP submission also addresses other applicable requirements for the second implementation period of the regional haze program. Within this action, the EPA is also disapproving the visibility transport prong of Arizona’s infrastructure SIP submittals for the 2012 annual fine particulate matter (PM_{2.5}) and 2015 ozone National Ambient Air Quality Standards (NAAQS). The EPA is taking this action pursuant to CAA sections 110 and 169A.

DATES: This rule is effective on January 17, 2025.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2024–0005. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly

available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Michael Dorantes, Geographic Strategies & Modeling Section (AIR-2-2), Planning & Analysis Branch, Air and Radiation Division, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; phone: (415) 972-3934; email: dorantes.michael@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “we,” “us” and “our” refer to the EPA.

Table of Contents

- I. Background
 - A. Regional Haze Plan for the Second Implementation Period
 - B. Prong 4 (Visibility) of the 2012 PM_{2.5} NAAQS and 2015 Ozone NAAQS Infrastructure SIPs
- II. Public Comments and EPA Responses
 - A. Comment Letter From Tri-State
 - B. Comment Letter From ADEQ
 - C. Comment Letter From the Chamber and AMC
 - D. Comment Letter From TEP
 - E. Comment Letter From SRP
 - F. Community Sign-On Letter
 - G. Comment Letter From NPCA et al.
- III. Final Action
- IV. Statutory and Executive Order Reviews

I. Background

A. Regional Haze Plan for the Second Implementation Period

On August 15, 2022,¹ the Arizona Department of Environmental Quality (ADEQ) submitted the 2022 Arizona Regional Haze Plan. ADEQ supplemented its SIP revision on

August 25, 2023, with nonpoint source rules (“2023 Arizona Regional Haze Rules Supplement”).² ADEQ made these SIP submissions to address requirements of the CAA’s regional haze program pursuant to CAA sections 169A and 169B and 40 CFR 51.308.

On May 31, 2024, the EPA published a notice of proposed rulemaking proposing partial approval and partial disapproval of the 2022 Arizona Regional Haze Plan SIP submission as partially satisfying the regional haze requirements for the second implementation period contained in the CAA and 40 CFR 51.308.³ We did not propose to act on the 2023 Arizona Regional Haze Rules Supplement.

The EPA is now approving the elements of the 2022 Arizona Regional Haze Plan related to requirements contained in 40 CFR 51.308(f)(1), (f)(4)–(6), and (g)(1)–(5). The EPA is disapproving the elements of the 2022 Arizona Regional Haze Plan related to requirements contained in 40 CFR 51.308(f)(2), (f)(3), and (i)(2)–(4). Our proposed action and our responses to comments in section II of this document contain more information on the basis for this rulemaking and on our evaluation of the submittal.

B. Prong 4 (Visibility) of the 2012 PM_{2.5} NAAQS and 2015 Ozone NAAQS Infrastructure SIPs

Arizona submitted its infrastructure SIP submission for the 2012 PM_{2.5} NAAQS on December 11, 2015 (“2015 PM_{2.5} I-SIP submittal”).⁴ Arizona also submitted its infrastructure SIP submission for the 2015 ozone NAAQS on September 24, 2018 (“2018 Ozone I-SIP submittal”).⁵

Our May 31, 2024 proposed rulemaking action proposed to disapprove the prong 4 portions of Arizona’s 2018 Ozone I-SIP submittal and 2015 PM_{2.5} I-SIP submittal. The EPA is now disapproving the Prong 4 elements of Arizona’s 2018 Ozone I-SIP submittal and 2015 PM_{2.5} I-SIP submittal. Our proposed action contains more information on the basis for this

rulemaking and on our evaluation of the submittals.

II. Public Comments and EPA Responses

The EPA’s May 31, 2024 proposed rulemaking action provided a 30-day public comment period that would have ended on July 1, 2024. We received four comments requesting an extension of the comment period. On June 26, 2024,⁶ the EPA extended the comment period for the proposed rulemaking action by 14 days in response to requests from commenters. This action extended the close of the comment period to July 15, 2024.

The EPA received an additional ten unique comments, including one anonymous comment,⁷ two comments from private individuals,⁸ and comment letters from Tri-State Generation and Transmission Association, Inc. (“Tri-State”),⁹ ADEQ,¹⁰ the Arizona Chamber of Commerce and Industry and the Arizona Manufacturers Council (“the Chamber and AMC”),¹¹ Tucson Electric Power (TEP),¹² the Salt River Agricultural Improvement and Power District (SRP),¹³ 12 community organizations (“Community Sign-on Letter”),¹⁴ and Earthjustice on behalf of the National Parks Conservation Association, Sierra Club, and the Coalition to Protect America’s National Parks (“NPCA et al.”).¹⁵ The anonymous comment and the comments from the private individuals were unrelated to our proposed rulemaking. These three comments do not require a response. We respond to the issues raised in the seven remaining comment

⁶ 89 FR 53372.

⁷ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0014>.

⁸ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0015> and <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0019>.

⁹ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0016>.

¹⁰ ADEQ submitted its comment letter twice. The letter is available at both <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0017> and <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0018>.

¹¹ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0020>.

¹² Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0021>.

¹³ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0023>.

¹⁴ Available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0022>.

¹⁵ The comment letter and all Exhibits except for Exhibits 24 and 60 are available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0024>. Exhibits 24 and 60, including an emailed copy of the NPCA et al.’s comment letter, are available at <https://www.regulations.gov/comment/EPA-R09-OAR-2024-0005-0025>.

¹ Letter dated August 15, 2022, from Daniel Czecholinski, Director, Arizona Department of Environmental Quality Air Quality Division, to Martha Guzman, Regional Administrator, EPA Region IX (submitted electronically August 15, 2022). On August 16, 2022, the EPA determined that the SIP submittal met the completeness criteria outlined in 40 CFR part 51, Appendix V. Letter dated August 16, 2022, from Elizabeth Adams, Director, Air and Radiation Division, EPA Region IX, to Daniel Czecholinski, Director, Arizona Department of Environmental Quality Air Quality Division.

² Letter dated August 21, 2023, from Daniel Czecholinski, Director, Arizona Department of Environmental Quality Air Quality Division, to Martha Guzman, Regional Administrator, EPA Region IX (submitted electronically August 25, 2023).

³ 89 FR 47398.

⁴ Letter dated December 11, 2015, from Eric Massey, Director, Air Quality Division, ADEQ, to Jared Blumenfeld, Regional Administrator, EPA Region IX.

⁵ Letter dated September 24, 2018, from Timothy S. Franquist, Director, Air Quality Division, ADEQ, to Michael Stoker, Regional Administrator, EPA Region IX (submitted electronically September 24, 2018).

letters received on our proposed rulemaking in this action.

A. Comment Letter From Tri-State

Sections I (“Introduction”), II (“Background Information on Tri-State”), and III (“Tri-State Supports the Provisions of the Arizona Department of Environmental Quality’s State Implementation Plan Submittal for which EPA has Proposed Approval”) of Tri-State’s comment letter either provide background information or are supportive of the EPA’s proposal and therefore do not require a response in our final action. We respond to sections IV (“The Partial Disapproval is Overly Vague and Should Be Reproposed with a Fulsome and Specific Explanation of What EPA Finds Inconsistent with the Clean Air Act and the Implementing Regulations”), V (“Additional Emission Reductions Are Inappropriate for Springerville Unit 3”), and VI (“EPA’s Reliance on the July 8, 2021, Clarifications Memorandum Is Inappropriate Because It Was Issued Only Days Prior to the Regional Haze State Implementation Plans Being Due”) of Tri-State’s comment letter below.

Comment A.1. Tri-State comments that the proposed rule, specifically the partial disapproval, is overly vague and does not lend itself to the general public being able to adequately understand what the EPA finds objectionable regarding the SIP submission. Tri-State asserts that the EPA made broad statements about divergences from the Control Cost Manual and inadequacies in four-factor analyses and that “it [is] impossible to understand with certainty the sources to which these overly broad statements apply.” The commenter also notes that the proposed rulemaking action only gives limited examples of what the EPA is referring to and asserts that the EPA needs to clearly provide where it has issues with the SIP revision as it was submitted not just examples of what it is concerned about. Specifically, Tri-State states that the proposed rulemaking action makes general comments about ADEQ conducting analyses for well-controlled sources to further reduce emissions but makes no reference to which sources that the EPA finds to be lacking in this area. Tri-State also comments that the vagueness of the proposal is not consistent with the cooperative nature of the CAA in the EPA working with states.

Response A.1. We do not agree that the proposal was overly vague or that the basis for our proposed partial disapproval was unclear. The proposal provided a detailed summary of the 2022 Arizona Regional Haze Plan and the EPA’s evaluation of the Plan with

regard to each of the applicable requirements of the CAA and the RHR. With respect to the EPA’s partial disapproval specifically, the proposal laid out multiple reasons for the EPA’s determination that the long-term strategy did not fully meet the requirements of 40 CFR 51.308(f)(2), related to source selection, four-factor analyses (specifically, controlled emissions rates and deviations from the Control Cost Manual), and control determinations (specifically, the application of cost thresholds, the use of visibility as a factor to avoid controls, and the mass-based emissions caps at Springerville Generating Station (SGS)).¹⁶ In each instance, we provided at least one example of a unit to which this reason applied.¹⁷ We also explained why the disapproval of the long-term strategy also necessitated disapproval of the RPG and FLM consultation elements.¹⁸

We disagree with the commenter’s suggestion that it was necessary for the EPA to specify the extent to which each of the flaws identified by the EPA applied to each unit considered by ADEQ. The EPA’s role in reviewing SIPs is to determine whether they meet all of the applicable CAA requirements.¹⁹ In evaluating whether a SIP revision (or a portion thereof) meets all of the applicable requirements, the EPA is not required to separately evaluate and discuss each of the thousands of pieces of information, analyses and determinations comprising the SIP submission. Rather, the EPA may focus on those specific elements of the SIP revision that form the basis for our determination that certain applicable requirements are met and certain applicable requirements are not met. Therefore, in this instance, it was reasonable for the EPA to summarize our evaluation and cite to examples of where the State’s documentation, analyses, and determinations did not meet CAA requirements, rather than separately evaluating and discussing every such instance throughout the SIP revision.

For example, regarding source selection, our proposal stated that:

ADEQ did not provide an adequate justification for screening out certain sources and units from conducting a four-factor

analysis on the basis that they are ‘effectively controlled’ as part of its source selection process. Specifically, in some cases, ADEQ did not identify the controls for each pollutant at each unit or process, the associated limits, or where the controls/limits currently exist in the Arizona SIP. In other cases, ADEQ listed the controls, but did not clearly explain why it is reasonable to assume, without conducting a four-factor analysis, that no additional controls would be reasonable.

We then provided examples of specific sources to which these concerns applied. In addition, table 3 of the proposal listed all of the units that ADEQ screened out as “effectively controlled” and includes the entirety of ADEQ’s rationale for each unit.²⁰ This table clearly shows that for many of the units, ADEQ did not list controls for one or more of the three relevant pollutants (NO_x, SO₂, and PM). Moreover, even for those units where ADEQ did list this information, it did not explain why it is reasonable to assume, without conducting a four-factor analysis, that no additional controls would be reasonable. Furthermore, our proposed rulemaking action clearly stated that ADEQ did not adequately explain whether *any* of the existing controls for facilities evaluated within the SIP submittal were necessary for reasonable progress and therefore a part of the state’s long-term strategy. Therefore, it was not necessary to specifically identify each source that was deficient in this respect because the deficiency applied to every source determined to be effectively controlled.

Finally, regarding the cooperative nature of the CAA, we note that the EPA worked extensively with ADEQ during SIP development. EPA and ADEQ staff met on a monthly basis beginning in 2019 and continuing through 2021 to discuss the development of the Plan. The EPA also provided informal written feedback on various elements of the Plan between 2019 and 2022. In these communications, the EPA identified many of the flaws that are the basis for the partial disapproval, so ADEQ was aware of the EPA’s concerns prior to the EPA’s proposal.

In conclusion, based on the findings discussed in our proposal and elsewhere in this document, we find that the long-term strategy in the 2022 Arizona Regional Haze Plan does not meet the requirements of 51.308(f)(2) and we are disapproving the Plan with respect to this requirement. Therefore, pursuant to CAA section 110(c), the EPA will be required to develop a new

¹⁶ 89 FR 47398, 47428–47432.

¹⁷ Id.

¹⁸ Id. at 47432–47433 and 47435–47436.

¹⁹ See CAA section 110(k)(3) (“the Administrator shall approve [a SIP] submittal as a whole if it meets all of the applicable requirements of [the CAA]. If a portion of the plan revision meets all the applicable requirements of [the CAA], the Administrator may approve the plan revision in part and disapprove the plan revision in part”).

²⁰ Consistent with their labeling in the Plan, Appendix C.1, Table 147, these rationales appear under the heading of “Comments.”

long-term strategy as part of a FIP, unless the EPA approves a subsequent SIP submission that fully meets these requirements. That long-term strategy would necessarily include updated source selection, four factor analyses, and control determinations that address the deficiencies we identified in the Plan. We are available to work with ADEQ following this final action to develop a SIP revision, including these elements.

Comment A.2. Tri-State asserted that additional emissions reductions are “inappropriate” for Springerville Generating Station (SGS) Unit 3. Tri-State made a few arguments in support of this contention.

First, Tri-State noted that ADEQ evaluated the currently installed NO_x emissions controls against technically feasible emissions controls and concluded that the current NO_x emissions controls constitutes best available control technology (BACT) for coal-fired electric generating units (EGUs). For SO₂, Tri-State indicated that ADEQ’s analysis for SGS Unit 3 clearly demonstrates that Unit 3’s emissions ranged from 0.069 to 0.090 lb/MMBtu on an annual basis and has continuously complied with the Mercury and Air Toxics Standard (MATS) SO₂ emissions standard of 0.20 lb/MMBtu, and therefore does not warrant further emissions controls. Tri-State also noted language in the EPA’s “Guidance on Regional Haze State Implementation Plans for the Second Implementation Period” (“2019 Guidance”)²¹ that describes scenarios in which the EPA believes it may be reasonable for a state not to select a particular source for further analysis for EGUs that have add-on flue gas desulfurization (FGD) and that meets the applicable alternative SO₂ emissions limit of the MATS rule for power plants.

Second, Tri-State noted the visibility improvement at the Mount Baldy Wilderness Area in the first planning period, and that Arizona will have four additional 10-year planning periods to achieve the 1.3 deciview improvement needed to achieve natural conditions.

Finally, Tri-State stated that its intent is to retire SGS Unit 3 by September 15, 2031, and requested that the EPA include in the final rule a provision to allow sources to work with their state regulatory agencies to adopt an

enforceable commitment to retire a unit, such as through a permit condition, to allow the source to forego any further emissions control or reduction requirements if a unit is retiring within ten years of the Regional Haze SIP approval.

Response A.2. We partially agree with this comment. First, with respect to NO_x emissions at SGS Unit 3, ADEQ noted in the Plan “[t]he current controls ([low-NO_x burners (LNB), overfire air (OFA) with selective catalytic reduction (SCR)] represent the most effective NO_x control technologies for coal fired EGUs and are estimated to achieve 85–95% removal efficiency.”²² We agree that the existing LNB, OFA and SCR constitute effective controls for NO_x at SGS Unit 3. As described in our proposal and in response B.1 of this document, existing effective controls are generally necessary to make reasonable progress and must be included in the SIP, unless the state provides a weight-of-evidence demonstration to justify that the existing effective controls are not necessary to make reasonable progress. Because the Arizona SIP does not include a NO_x emissions limit corresponding to these controls for SGS Unit 3, the State should have provided such demonstration. Specifically, the State should have considered whether SGS Unit 3 is subject to an enforceable NO_x emissions limit that ensures its NO_x emissions rate will not increase. Without proper justification that emissions of visibility impairing pollutants will not increase, it is unclear how reasonable progress is being made within the State’s long-term strategy for the second planning period.²³

Similarly, with respect to SO₂ emissions at SGS Unit 3, we agree that, as described in the 2019 Guidance, an add-on FGD meeting the applicable alternative SO₂ emissions standard under MATS may constitute an effective control for SO₂. However, as noted in the previous paragraph, existing effective controls are generally necessary to make reasonable progress and must be included in the SIP, unless the state provides a weight-of-evidence demonstration to justify that the existing effective controls are not necessary to make reasonable progress. Because the Arizona SIP does not include a SO₂ emissions limit corresponding to the existing SO₂ controls at SGS Unit 3, the State should have provided such a demonstration, including consideration

of whether SGS Unit 3 is subject to an enforceable SO₂ emissions limit that ensures its SO₂ emissions rate will not increase.

Second, regarding the Mount Baldy Wilderness Area, although we commend the efforts in Arizona that contributed to the noted visibility improvement at the Mount Baldy Wilderness Area in the first planning period, previous and ongoing measures are not automatically sufficient to ensure ongoing reasonable progress. The regional haze requirements of CAA sections 169A and 169B and 40 CFR 51.308 need to be satisfied.²⁴ In particular, the increment of progress that is “reasonable progress” for a given implementation period is determined through the four statutory factors.²⁵ While progress made in the first implementation period, ongoing emissions trends, and anticipated changes in emissions may inform a state’s regional haze planning process, these circumstances alone do not satisfy a state’s obligation to determine and include in its SIP the measures that are necessary to make reasonable progress in the second planning period. We also note that, while Mount Baldy is the closest Class I area to SGS and therefore has the highest Q/d (emissions in tons per year divided by distance to an affected Class I area in kilometers) value (339) with respect to SGS,²⁶ this does not mean that Mount Baldy is the only Class I area affected by emissions from SGS. ADEQ did not specifically identify all the Class I areas that may be affected by emissions from each of the sources it evaluated. Nonetheless, given that SGS had a 2018 Q of 17,044 tons per year (tpy)²⁷ and is located within 300 km of 15 different Class I areas,²⁸ it is likely to contribute to visibility impairment at a number of Class I areas.

Finally, with respect to Tri-State’s request regarding enforceable shutdowns, we note that the EPA’s role in acting on SIP submittals is to evaluate whether they meet applicable CAA

²⁴ See 64 FR 35714 (July 1, 1999), 35721–35722 for additional explanation as to the EPA’s determination that emissions from *all States* reasonably contribute to visibility impairment and thus are subject to the regional haze regulations. Additionally, in the 2017 RHR, the EPA “reiterat[ed] that the CAA requires States to consider the four statutory factors . . . in each implementation period to determine the rate of progress towards natural visibility conditions that is reasonable for each Class I area.” 82 FR 3078 (January 10, 2017), 3080.

²⁵ 40 CFR 51.308(f)(2)(i).

²⁶ Plan Appendix C, p. 21, Table 1. Q is calculated as the total 2018 annual facility-wide NO_x, SO₂, and PM₁₀ emissions in tpy, excluding processes determined by ADEQ to be effectively controlled.

²⁷ Id.

²⁸ 79 FR 9318, 9360, Table 50 (February 18, 2014).

²¹ Guidance on Regional Haze State Implementation Plans for the Second Implementation Period. <https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period>. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019).

²² 2022 Arizona Regional Haze Plan, p. 219.

²³ See CAA 169A(a)(1) “Congress hereby declares as a national goal *the prevention of any future, and the remedying of any existing, impairment of visibility in [Class I areas.]*” (emphasis added).

requirement, not to establish new requirements. Tri-State may choose to work with ADEQ to establish enforceable shutdowns as part of a subsequent SIP revision. However, we note that even if there were an enforceable shutdown in 2031, this would not automatically preclude the unit from consideration under a four-factor analysis.²⁹

Comment A.3. Tri-State comments that it was unreasonable for the EPA to use the July 8, 2021 “Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period” (“2021 Clarifications Memo”) as a basis for disapproval of the 2022 Arizona Regional Haze Plan. Tri-State indicated that although ADEQ submitted its plan over a year late on August 22, 2022, ADEQ was over three years into the process of developing the plan, working with the Western Regional Air Partnership, the EPA, other states, Federal Land Managers (FLMs) and members of the public, was nearly complete and ready to go through the Arizona rulemaking process when the EPA published the 2021 Clarifications Memo. Tri-State also noted that the rulemaking process can take over a year due to various tasks required.

Response A.3. The EPA disagrees that it used the 2021 Clarifications Memo as a basis for disapproving portions of the 2022 Arizona Regional Haze Plan. Contrary to the commenter’s suggestion, the EPA’s guidance, including the 2021 Clarifications Memo, is not the basis for our disapproval. Rather, the partial disapproval is based on the Plan’s failure to satisfy the requirements of the relevant portions of the RHR and CAA sections 169A and 169B. We did cite the guidance documents because these documents provide helpful context explaining the EPA’s interpretations of the applicable statutory and regulatory requirements against which we are required to evaluate SIP submittals. Commenters are free to disagree and raise concerns with those interpretations as part of the notice and comment process on individual SIP actions. However, in this instance, the commenter does not appear to object to any of the interpretations in the 2021 Clarifications Memo, only to the fact that they were provided shortly before the due date for the plans.

With regard to timing, we note that the 2021 Clarifications Memo was developed in response to issues that

EPA regions and other stakeholders had raised regarding draft regional haze SIP revisions that were already under development by states.³⁰ The 2021 Clarifications Memo therefore necessarily came during the SIP development process and, in comparison to the SIP-specific feedback previously provided by the EPA prior to its issuance, was intended to “offer feedback more broadly to help support SIP development, submittal, review, and action for the second planning period.”³¹ With regard to Arizona’s Plan specifically, throughout the EPA’s collaboration with ADEQ during early engagement, EPA staff advised ADEQ of many of the interpretations that would be expressed in the 2021 Clarifications Memo. Therefore, we do not agree that it was improper for the EPA to cite to the 2021 Clarifications Memo as further explanation for why portions of the 2022 Arizona Regional Haze Plan did not comply with the applicable statutory and regulatory requirements.

B. Comment Letter From ADEQ

Sections I (“Background”) and XI (“Conclusion”) of ADEQ’s comment letter are informational and therefore do not require a response. We respond to sections II–X of ADEQ’s comment letter below.

Comment B.1. ADEQ asserts that the EPA’s changing guidance increased the burden of ADEQ’s planning efforts by introducing uncertainty and rework. ADEQ noted delays between final publication of the 2017 RHR and the 2019 Guidance, as well as later changes to the EPA’s interpretation of the RHR that came close to the plan submittal deadline, including the 2021 Clarifications Memo. ADEQ asserts that the state did not have the resources to undertake the evaluation of existing control measures, as noted in the 2021 Clarifications Memo, a process that ADEQ states was unreasonably broad-reaching and duplicative.

Response B.1. We disagree with ADEQ’s assertions about the EPA’s additional guidance increasing the burden of ADEQ’s planning efforts by introducing uncertainty and rework. First and foremost, as stated previously and throughout this notice, the EPA did not rely on guidance as the basis for its partial disapprovals. Rather, the 2019 Guidance and the 2021 Clarifications Memo merely provide additional context to the EPA’s interpretations of the statutory and regulatory requirements. Both the 2019 Guidance and the 2021 Clarifications Memo were

drafted to be used as tools by States in the development of their second planning period regional haze plans. However, neither of these documents were necessary for States to develop and submit their SIP revisions.

Regarding the contents of the guidance, we do not agree that the EPA significantly changed its interpretations in either the 2019 Guidance or the 2021 Clarifications Memo. The commenter has not provided any examples of interpretations that it believes were changed under the 2019 Guidance and provided only a single example from the 2021 Clarifications Memo, relating to the section entitled, “Determining When Existing Measures are Necessary for Reasonable Progress.” We do not agree that interpretations set forth in this section of the 2021 Clarifications Memo represented a significant change in interpretation. Rather, they were intended to clarify the following statement in the 2019 Guidance:

If a state determines that an in-place emission control at a source is a measure that is necessary to make reasonable progress and there is not already an enforceable emission limit corresponding to that control in the SIP, the state is required to adopt emission limits based on those controls as part of its long-term strategy in the SIP via the regional haze second planning period plan submission.³²

Many states and other stakeholders raised questions about this statement. In response, as part of the 2021 Clarifications Memo, the EPA laid out in further detail our interpretation of the CAA and RHR regarding how to make such a determination.

We also disagree, on multiple grounds, with the commenter’s assertion that the “EPA’s revised guidance requires an unreasonably broad-reaching review of all existing control measures that are not separately included in the regional haze plan to evaluate whether those same measures should be duplicated in the regional plan to support reasonable visibility progress.”

First, the 2021 Clarifications Memo did not establish any new requirements. On the contrary, it clearly states that “[t]his memorandum does not change or substitute for provisions or requirements of the CAA or RHR, nor does it create any new requirements. Rather, this memorandum clarifies and provides further information on the existing statutory and regulatory requirements.”³³ One of the key requirements of the CAA and RHR is that all measures that are necessary to make reasonable progress must be

²⁹ See 2019 Guidance, pp. 20–21 (“It may be more challenging for a state to reasonably use a shorter remaining useful life as the basis for not selecting sources the further away the enforceable shutdown date gets from 2028”).

³⁰ 2021 Clarifications Memo, p. 1.

³¹ *Id.*

³² 2019 Guidance, p. 423.

³³ 2021 Clarifications Memo, p. 2.

included the SIP.³⁴ However, neither the CAA, the RHR, or the 2019 Guidance explain how to determine whether an existing measure that results from a four-factor analysis (or is used as the basis to avoid such an analysis) is necessary to make reasonable progress. Based on questions received on this subject during SIP development, it was clear that further guidance on this question would be helpful. Accordingly, the EPA provided this guidance in the 2021 Clarifications Memo.³⁵

Regarding “existing measures,” the Memo explains:

When the outcome of a four-factor analysis is that no new measures are reasonable for a source, the source’s existing measures are generally needed to prevent future visibility impairment (*i.e.*, to prevent future emission increases) and thus necessary to make reasonable progress. Measures that are necessary to make reasonable progress must be included in the SIP.

However, there may be circumstances in which a source’s existing measures are not necessary to make reasonable progress. Specifically, if a state can demonstrate that a source will continue to implement its existing measures and will not increase its emission rate, it may not be necessary to require those measures under the regional haze program in order to prevent future emission increases.

Similarly, with regard to existing “effective controls” used to screen out sources from a four-factor analysis:

A decision to forgo a full four-factor analysis based on a source’s existing effective controls is equivalent to a determination that no new measures are necessary to make reasonable progress. In this scenario, existing effective controls are, therefore, generally necessary to make reasonable progress and thus must be adopted into the regulatory portion of the SIP. However, the state may provide a weight-of-evidence demonstration as described in Section 4.1 to justify that the existing effective control is not necessary for reasonable progress.

Thus, the 2021 Clarifications Memo clarifies that, under the CAA and the RHR, there is a general presumption that existing measures resulting from a four-factor analysis (or relied upon to avoid such an analysis) are necessary to prevent future visibility impairment and therefore necessary to make reasonable progress. Accordingly, states have the option to submit all such measures into the SIP (to the extent they are not already approved into the SIP) without further evaluation of whether the measures are necessary to make reasonable progress. Alternatively, states may choose to provide a weight-of-evidence demonstration that such

measures are not necessary to make reasonable progress. Importantly, however, such a demonstration is needed only where an enforceable emissions limitation corresponding to an existing measure has not already been approved into the SIP and is not being submitted for SIP approval as part of the regional haze plan. Therefore, we do not agree that a review of “all existing control measures that are not separately included in the regional haze plan” is required.

Third, to the extent that a state chooses to undertake such a demonstration that existing measures are not necessary to make reasonable progress, we do not agree that it would be duplicative. On the contrary, because such a demonstration is necessary only for measures for which emissions limitations are not submitted into the SIP, the state and the EPA need to evaluate relevant evidence concerning whether the source will continue to implement its existing measures and maintain its emissions rate in the absence of SIP-approved requirements to do so, to ensure that visibility impairment does not increase.

In sum, we disagree with ADEQ’s characterization of the contents of the 2021 Clarifications Memo and its role in our partial approval and partial disapproval of the Plan.

Comment B.2. ADEQ comments that the EPA should not issue binding decisions based on guidance alone where the bases for disapproval are not in the rule or statute. ADEQ cites to statements in the 2019 Guidance and 2021 Clarifications Memo regarding screening out of effectively controlled sources and determinations of whether existing controls are necessary to make reasonable progress, as the examples of guidance. Specifically, ADEQ asserts that “[i]t was unreasonable for the EPA’s clarification memo to issue these additional specific barriers to a determination that existing measures were effective at a given source late in the development of second round regional haze plans through guidance, and without additional notice and comment.”

Response B.2. We disagree that we issued our proposed decision based on guidance. Rather, the proposal action clearly indicates that the partial disapproval was based on failing to satisfy the requirements of the relevant portions of the RHR and CAA sections 169A and 169B, with citations to our guidance as further explanation. See Response A.3 for more explanation.

We also note that ADEQ’s comment appears to conflate two separate questions: first, whether its justification

for screening out a unit based on existing effective emissions controls was sufficient, and second, whether such existing effective control measures are necessary to make reasonable progress. In our proposal, we discussed each of these issues as two separate grounds for our proposed partial disapproval with respect to 40 CFR 51.308(f)(2).³⁶ While both questions apply to sources that are screened out from a four-factor analysis based on existing effective controls, they are distinct. The first issue is further addressed in Response B.3 of this document, while the second is addressed in Response B.1. Therefore, we do not agree that the 2021 Clarifications Memo created any additional barriers to a determination that existing measures were effective at a given source.

Comment B.3. ADEQ disagreed with the EPA’s proposed determination that Arizona failed to provide adequate justification for deferring certain emissions units from consideration. ADEQ indicated that the state has the flexibility to reasonably select a set of sources for an analysis of control measures, and that it did not exclude entire facilities from consideration or exempt sources that had previously adopted BART or reasonable progress controls, but rather excluded just the emissions processes or units that recently installed highly effective controls from the calculation of the Q/d value for that facility. ADEQ also provided additional information regarding effective controls in Attachment A of its letter.

Response B.3. We agree that states have flexibility to reasonably select a set of sources for analysis of controls measures. However, as described in our proposal, we find that ADEQ’s approach to screening out units from conducting a four-factor analysis on the basis that they are “effectively controlled” was not adequately documented.³⁷ Specifically, in some cases, ADEQ did not identify the controls for each pollutant at each unit or process, the associated limits, or where the controls and/or limits currently exist in the Arizona SIP. In other cases, ADEQ listed the controls, but did not clearly explain why it is

³⁶ See 89 FR 47398, 47428 (“ADEQ did not provide an adequate justification for screening out certain sources and units from conducting a four-factor analysis on the basis that they are “effectively controlled” as part of its source selection process”) and 47431 (“ADEQ has not addressed whether any of the existing measures relied upon in its four-factor analyses or its ‘effective controls’ determinations are necessary to make reasonable progress and thus should be a part of the State’s long-term strategy for the second planning period.”).

³⁷ 89 FR 47398, 47428.

³⁴ CAA 169A(b)(2); 40 CFR 51.308(f)(2).

³⁵ 2021 Clarifications Memo, pp. 8–9.

reasonable to assume, without conducting a four-factor analysis, that no additional controls would be reasonable.³⁸ Accordingly, ADEQ should have identified where the existing limits are found in the SIP or FIP and clearly explained why no additional controls would likely be reasonable under a four-factor reasonable progress analysis for the second planning period. Without this analysis and explanation, it is not clear what is a part of Arizona's long-term strategy for the second planning period.

As noted in its comment, ADEQ conducted its effective controls screening on a unit-specific basis. However, it did not do so on a pollutant-specific basis. Rather, ADEQ screened out entire units from further evaluation for NO_x, SO₂, or PM₁₀ if the units met ADEQ's screening criteria for any one of these pollutants. We find that this approach was unreasonable because it resulted in the screening out of entire units without consideration of whether the unit had effective controls for all three of the pollutants covered in ADEQ's long-term strategy. For example, ADEQ screened out AEPCO Apache Unit 3 and TEP Irvington Generating Station (IGS) Unit 4 from any further analysis because these units were converted from coal to natural gas under better-than-BART alternatives during the first planning period.³⁹ The EPA acknowledges that fuel combustion units that are required to combust pipeline-quality natural gas are generally considered to be effectively controlled for SO₂ and PM.⁴⁰ However, they are not necessarily effectively controlled for NO_x, based on burning natural gas alone. Therefore, we find that ADEQ has not provided adequate justification for screening these units out from an analysis of NO_x controls.

Additionally, we appreciate the documentation in Attachment A that ADEQ provided in its attachment letter. However, this information would need to be part of a SIP revision subject to review by the public and FLMs in order for the EPA to consider it as part of the long-term strategy. If ADEQ develops a new SIP revision intended to remedy the deficiencies discussed in our proposed and final actions on the Plan,

it may be appropriate to include this information in that SIP revision.

Comment B.4. ADEQ asserts that, despite indicating that flawed emissions rates were used for some of ADEQ's analyses, the proposed action identified one example of differing achievable emissions rates for selective catalytic reduction (SCR) and selective non-catalytic reduction (SNCR) controls for SGS Units 1 and 2's four factor analyses. In this example, ADEQ used 0.060 lb/MMBtu and 0.15 lb/MMBtu as reasonable estimates of the achievable rates at TEP SGS Units 1 and 2 for SCR and SNCR, respectively.

For SCR, ADEQ additionally states the study that the EPA cited for its justification that SCR has been demonstrated to achieve 0.05 lb/MMBtu (or up to 90 percent reduction) was published in 2005 and found that the 20 SCR systems examined in 2003 achieved NO_x emissions rates between 0.04 and 0.07 lb/MMBtu.⁴¹ In addition, ADEQ noted that EPA found 0.065 lb/MMBtu as a "reasonable estimate of average SCR performance" in its 2016 Regional Haze FIP action for the Salt River Project Coronado Generating Station Unit 1.

For SNCR, ADEQ additionally states that the EPA did not provide a technical citation for disagreeing with ADEQ's use of 0.15 lb/MMBtu for SNCR. ADEQ noted that the proposed rule indicated that ADEQ did not demonstrate why source specific conditions would cause SNCR on these units to achieve as little as a 15 percent reduction. ADEQ noted that Srivastava et al. found that while smaller boilers (e.g., 76–78 MW units) were able to achieve greater than 60 percent NO_x reductions, larger boilers (e.g., 500 MW units) "may be capable of achieving reductions of only ~30%." ADEQ indicates that SGS Units 1 and 2 units have nameplate ratings of 425 MW and would be expected to achieve less reductions than smaller units. ADEQ also points to the inlet concentration as another consideration for achievable emissions rates with post combustion emissions control. Citing Srivastava et al., ADEQ notes that the study found that "in the absence of reliable SCR inlet NO_x data, the SCR efficiencies are estimated using an inlet NO_x level of 0.5 lb/10⁶ Btu." However, in the case of SGS Units 1 and 2, the NO_x concentration in the exhaust from these

units is less than 100 parts per million by volume (ppmv) with an assumed rate of 0.174 lb/MMBtu and 0.178 lb/MMBtu being used in ADEQ's four factor analysis cost calculations for Unit 1 and Unit 2, respectively. Given the already low NO_x inlet concentration, an achievable emissions rate of 0.15 lb/MMBtu was determined to be reasonable. ADEQ further noted that additional information related to achievable emissions rates for SNCR for SGS Unit 1 and Unit 2 can be found in Appendix K, Section II(J), Comment 10 of the 2022 Arizona Regional Haze Plan.

Response B.4. We acknowledge that we only highlighted a single example of flawed emissions rates in our proposal—for NO_x at SGS Units 1 and 2. However, as explained in response A.1, in evaluating whether a SIP revision (or a portion thereof) meets each of these CAA requirements, the EPA is not required to separately evaluate and discuss each of the thousands of pieces of information, analyses and determinations comprising the SIP submission. Rather, the EPA may focus on those specific elements of the SIP revision that form the basis for our determination that certain applicable requirements are met and certain applicable requirements are not met. In this instance, we focused on these units because they are expected to have the highest NO_x emissions of any units in the State (2,099 and 2,283 tpy respectively) by 2028, so it is important to carefully examine whether additional NO_x reductions from these units are necessary to make reasonable progress. Given this context, and for the reasons outlined below, we do not agree with ADEQ that it has adequately documented the emissions rates assumed in this analysis, which are a critical component of a four-factor analysis.

The emissions rate achievable by a unit equipped with SCR is determined by several parameters and technological limitations. There are periods of operation in which the SCR is not able to operate, particularly during periods of startup and shutdown.⁴² The SCR emissions rate (lb/MMBtu) achievable by a particular unit represents the combination of two primary elements: (1) the controlled NO_x emissions rate during periods of normal unit operation when the SCR is able to operate, and (2) the uncontrolled NO_x emissions rate

³⁸ See 40 CFR 51.308(f)(2)(i) ("... The State must include in its implementation plan a description of the criteria is used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy"). See also 2021 Clarifications Memo, p. 5; 2019 Guidance, p. 23.

³⁹ 2022 Arizona Regional Haze Plan, Appendix C, Table 147.

⁴⁰ See 2019 Guidance, p. 24.

⁴¹ Ravi K. Srivastava, Robert E. Hall, Sikander Khan, Kevin Culligan & Bruce W. Lani (2005) Nitrogen Oxides Emission Control Options for Coal-Fired Electric Utility Boilers, *Journal of the Air & Waste Management Association*, 55:9, 1367–1388, DOI: 10.1080/10473289.2005.10464736. Available at: <https://doi.org/10.1080/10473289.2005.10464736>.

⁴² Control Cost Manual, Section 4, Chapter 2 Selective Catalytic Reduction (June 2019), section, 2.2.1 Reduction Chemistry, Reagents, and Catalyst, available at https://www.epa.gov/sites/default/files/2017-12/documents/scrcostmanualchapter7thedition_2016revisions2017.pdf.

during periods of startup and shutdown when the SCR system cannot operate, and result in unit emissions higher than the SCR controlled emissions rate that increase the unit's overall emissions rate.

With regard to the first element, the 2005 study is not the sole basis for our finding that an overall emissions rate of 0.050 lb/MMBtu is achievable with SCR on an annual average basis. There are multiple instances of coal-fired units installing SCR on a retrofit basis and achieving 0.050 lb/MMBtu in practice on an annual average basis.⁴³ These units are typically able to achieve this overall level of control by being able to operate at NO_x annual emissions rates at or below 0.050 lb/MMBtu based upon periods of normal operation. Even several of the units identified by ADEQ operating in the annual average emissions rate range of 0.055 to 0.065 lb/MMBtu are still achieving emissions rates of 0.050 lb/MMBtu and lower based upon periods of normal operation.⁴⁴ We consider this information sufficient to establish that an 0.050 lb/MMBtu emissions rate warrants consideration as technically feasible for coal fired units generally during periods of normal operation, absent source specific factors affecting feasibility. We are not aware of assertions by either ADEQ or TEP that the Springerville units specifically cannot achieve 0.050 lb/MMBtu when operating with SCR during periods of normal operation.⁴⁵ Therefore, we find that ADEQ should have considered a controlled NO_x emissions rate of 0.050 lb/MMBtu for SGS Units 1 and 2 when operating with SCR during periods of normal operation.

The majority of analysis performed by ADEQ is relevant to the second element and is intended to support a position that, when the annual emissions rate achievable during normal operations is combined with emissions from the number of startup/shutdown cycles exhibited by SGS Units 1 and 2, an annual average emissions rate of 0.06 lb/MMBtu is what is reasonably achievable for these units. We consider it appropriate to account for the effect of

startup/shutdown emissions on the emissions rate achievable by the unit, but disagree that the analysis provided by ADEQ supports an annual average emissions rate of 0.060 lb/MMBtu. TEP's four factor analysis and ADEQ's SIP submittal did not include startup/shutdown history to support the assertion that Springerville has more startup/shutdown events than comparable tangentially-fired coal fired boilers. A review of Clean Air Markets Program Data (CAMPD) emissions and operating data over a 2021–2023 timeframe indicate that SGS Units 1 and 2 each experienced approximately 9 to 14 startup events per year. While we acknowledge that some portion of SGS baseline emissions consist of startup/shutdown emissions that cannot be controlled by an SCR system, the substantial majority of baseline emissions are attributable to emissions during normal operation. We estimate that approximately 97–98% of baseline emissions are attributable to normal operations that could be controlled by SCR.⁴⁶ Given that the majority of unit emissions can be controlled by SCR to 0.050 lb/MMBtu or lower and that the remaining 2–3 percent of operations are characterized by low inlet SCR emissions rates, we do not consider the historical startup/shutdown operating profile to support deviating to an 0.06 lb/MMBtu emissions rate on an annual average basis.

ADEQ cites a limit of 0.065 lb/MMBtu established for SRP Coronado Unit 1 in a 2016 Regional Haze FIP action as support for the use of an annual average emissions rate of 0.060 lb/MMBtu. We wish to clarify that the 0.065 lb/MMBtu value was not the annual average emissions rate used in cost calculations, but was the emissions limit established on a rolling 30-boiler operating day (BOD) average, for Coronado Unit 1. We relied upon an 0.050 lb/MMBtu annual average emissions rate in developing cost calculations for SCR,⁴⁷ which is

⁴⁶ See Docket Item F–17 [SGS CAMPD 2021–23.xlsx]. To illustrate SCR control potential during periods of normal operation, this spreadsheet is based on the key assumption that emissions from any day a unit did not operate a full 24 hours would be attributable to startup/shutdown periods. An hourly analysis would provide a more refined and precise assessment, though we consider this assumption to overestimate the emissions attributable to startup/shutdown by including all emissions from partial operating days towards startup/shutdown.

⁴⁷ See Docket Item EPA–R09–OAR–2012–0021–0204 for cost calculation details. More information related to establishing a 30 BOD limit relative to an annual emissions rate can be found in our March 31, 2015 (80 FR 17010) proposed reconsideration, including Docket Items EPA–R09–OAR–2015–0165–0029 through –0033 for further details. We note that SRP identified an SCR design target

consistent with our action here. In establishing a rolling 30–BOD limit for Coronado Unit 1 in that action, we acknowledged that upward revisions to the SCR design rate achievable on an annual average basis would be appropriate in order to accommodate the effect that multiple startup/shutdown events would have to overall unit emissions rates on an averaging period that could be as short as 30 days. Based upon startup/shutdown frequency and projected controlled emissions rate information provided by SRP, we finalized 0.065 lb/MMBtu as an appropriate emissions limit and reasonable estimate of SCR performance over a short-term period.⁴⁸ Given that the 0.065 lb/MMBtu limit reference here corresponds to a different, shorter averaging period, and was itself based on an 0.05 lb/MMBtu annual average emissions rate, we do not consider it supportive of an 0.060 lb/MMBtu annual average emissions rate.

For SNCR, we appreciate the additional analysis provided in the comment and citation to Appendix K summarizing ADEQ's responses to public comments. We acknowledge that low inlet NO_x concentrations are a general consideration in evaluating NO_x controls that can negatively impact control efficiencies and achievable controlled emissions rates. Therefore, in order to further evaluate whether a rate lower than 0.15 lb/MMBtu may be achievable with SNCR at SGS Units 1 and 2 on an annual basis, we examined CAMPD emissions data over a 2019–2023 time period for SNCR-equipped units comparable to SGS Units 1 and 2, specifically filtering for tangentially-fired coal units operating with SNCR on a retrofit basis.⁴⁹ We identified four currently operating SNCR-equipped units achieving NO_x emissions rates below 0.15 lb/MMBtu, ranging between 0.10 to 0.12 lb/MMBtu.⁵⁰ These values represent the highest performing SNCR-equipped units, with the next best performing units operating at emissions rates of 0.15 lb/MMBtu and higher. At least one of the four units we identified has the capability to use natural gas,

during periods of normal operation as low as 0.03 lb/MMBtu for Coronado Unit 1, though we acknowledge there are source specific differences with the SGS units.

⁴⁸ It is unclear to what extent a comparable 30–BOD limit may be appropriate for the SGS units, but we note that the SGS units appear to have historically had at least as many startup/shutdown events as Coronado Unit 1.

⁴⁹ See Docket Item F–21, “SNCR Tangential Coal Units.xlsx.”

⁵⁰ See Docket Item F–21. These units include Boswell Energy Center (MN) Unit 4, Will County (IL) Unit 4, and Jeffrey Energy Center (KS) Units 2 and 3.

⁴³ See Docket Item F–16 “SCR Tangentially fired Coal.xlsx.”

⁴⁴ Id.

⁴⁵ TEP has indicated that vendors have been unwilling to provide manufacturer guarantees of 0.050 lb/MMBtu over the lifetime of the SCR system. Because manufacturer guarantees include contractual and financial considerations beyond technical performance of the SCR system, we do not consider an inability to secure a manufacturer guarantee to constitute a determination that an emission rate of 0.050 lb/MMBtu is not technically feasible, particularly with regard to periods of normal operation.

which could have the effect of lowering emissions rates relative to units that do not have this capability, such as SGS Units 1 and 2.⁵¹ Based on the three remaining units, each unit had relatively low pre-SNCR emissions rates that are comparable to SGS Unit 1 and 2, and each unit is able to achieve SNCR emissions rates below 0.15 lb/MMBtu and control efficiencies better than 15 percent. Neither ADEQ or TEP has provided documentation to support a claim that SGS Units 1 and 2 specifically cannot achieve an annual emissions rate lower than 0.15 lb/MMBtu with SNCR. Therefore, we find that ADEQ should have considered a NO_x emissions rate of lower than 0.15 lb/MMBtu for SNCR at SGS Units 1 and 2.

We also note that this was one of multiple flaws that formed the basis of our determination that the State's long-term strategy did not satisfy the requirements of 40 CFR 51.308(f)(2), including reasons related to source selection and control determinations, as detailed in our proposal and elsewhere in this document. Therefore, even assuming that a control efficiency of 15 percent for SNCR at SGS Units 1 and 2 was reasonable, it would not have changed our determination that the 2022 Arizona Regional Haze Plan did not satisfy the requirements of 40 CFR 51.308(f)(2).

Comment B.5. ADEQ disagrees with the EPA's determination that Arizona deviated from the Control Cost Manual without documentation as part of its four factor analyses with regards to remaining useful life calculations for the El Paso Natural Gas (EPNG) Williams facility and the use of source specific interest rates without providing adequate documentation in the control measure analyses for the EPNG Williams and Willcox facilities.

ADEQ indicates that the EPA Control Cost Manual Section 4, Chapter 2, states that “. . . a representative value of the equipment life for SCR at power plants can be considered as 30 years . . . [f]or other sources, the equipment life can be between 20 and 30 years.” ADEQ noted that while it erroneously omitted this citation from the EPNG Williams Turbine analysis, the Control Cost Manual citation and justification for use of 25 years is the midpoint between the 20–30 year range for non-EGU SCR systems and was included in the EPNG Willcox SCR analysis for Turbines 1 and

2.⁵² ADEQ also noted that it received cost calculation spreadsheets utilizing a 25-year useful life for SCR for the EPNG Williams Turbine 1 from the US Forest Service.⁵³

ADEQ also explains that in its analysis of remaining useful life for compressor engines at the EPNG Williams facility, ADEQ documented the assumptions and basis for using 20 years to amortize NO_x controls in Appendix C, Section C3.7.6.5, which includes citations to the Control Cost Manual and the EPA's 2016 technical support document for the Cross State Air Pollution Rule for the 2008 Ozone NAAQS.

Response B.5. We appreciate the clarification regarding ADEQ's reasoning for use of a 25-year remaining useful life for the EPNG Williams turbines and 20 years for the EPNG Williams engines. While there are instances of combustion turbines with operating lifetimes beyond 25 years (with or without retrofit controls), we acknowledge that EPA guidance such as the Control Cost Manual has not recommended a value beyond the 20–30 year range. ADEQ's use of a 25-year useful life represents the midpoint of Control Cost Manual recommendations, and therefore we agree that it is consistent with the Control Cost Manual. However, we note that the lack of documentation of remaining useful life for the units at Williams Compressor Station was one of the many flaws that we identified in the state's long-term strategy including reasons related to source selection and control determinations, as detailed in our proposal and elsewhere in this document. Therefore, this clarification does not change our determination that the 2022 Arizona Regional Haze Plan did not satisfy the requirements of 40 CFR 51.308(f)(2).

Comment B.6. ADEQ disagrees with the EPA's determination that ADEQ did not reasonably weigh the statutory factors in reaching its control determinations with regards to application of cost thresholds. ADEQ disagrees that Arizona's consideration of incremental cost effectiveness in its four factor analyses were done in an unreasonable manner. ADEQ cites to its explanation that the incremental cost of requiring low-emission combustion 2 (LEC 2) as opposed to Air-Fuel ratio adjustments is \$5,034/ton, which ADEQ considered reasonable, and therefore ADEQ found that LEC 2 is a more

appropriate control for Williams Reciprocating Engine 1 (RECIP–1).⁵⁴

ADEQ also asserts that it also analyzed other determinations from the regional haze first implementation period besides the incremental cost effectiveness value for the Nelson Lime Plant action, and ADEQ provides this information in Table 1 of its comment letter.

Response B.6. We appreciate ADEQ's explanation about LEC 2 on RECIP–1, but we note that ADEQ also rejected LEC 3 on Williams RECIP–1, on the grounds that the incremental costs of these controls, relative to less stringent controls, were excessive. In addition, ADEQ did not provide or consider incremental cost effectiveness values for the same controls for the other units at the same source (RECIP–2 or RECIP–5). Although states may choose to consider incremental costs in a reasonable manner,⁵⁵ we find it was unreasonable for ADEQ to do so only for specific units and controls, rather than in a consistent manner across all units and controls. Such inconsistent treatment of sources without explanation is the “the hallmark of arbitrary action.”⁵⁶

We also appreciate the addition of Table 1 identifying other first implementation period incremental cost effectiveness decisions. However, this information was not included in the Plan and therefore not subject to review by the public or FLMs. Accordingly, it cannot be relied upon to meet the requirement of 40 CFR 51.308(f)(2)(iii) for States to document the technical basis for their long-term strategy. Moreover, even if the information had been included in the Plan, it would not have justified ADEQ's inconsistent consideration of incremental cost effectiveness, for the reasons described in our proposal and the preceding paragraph.

Comment B.7. ADEQ states that, contrary to the EPA's contention, ADEQ did not rely upon visibility benefits for its control determinations, but rather visibility impacts were reported for some sources to give reference to the reader as to the relative impact of these sources or controls on visibility. ADEQ also asserts that nothing in the CAA, RHR, or 2019 Guidance prevents the department from considering visibility benefits as part of its analysis and stated that “the ADEQ's labeling of the visibility benefits associated with specific control scenarios as ‘small’

⁵¹ Based on reported natural gas fuel usage, the Boswell Energy Center appears to use natural gas primarily as a startup fuel, but does periodically use quantities of natural gas that suggest co-firing with coal for electricity generation purposes.

⁵² 2022 Arizona Regional Haze Plan, Appendix C, Section C3.8.5.2, Page 146.

⁵³ 2022 Arizona Regional Haze Plan, Appendix L, Section 4.2.4, Comment 14.

⁵⁴ 2022 Arizona Regional Haze Plan, Appendix C, Section C3.7.6.2, page 129.

⁵⁵ See, e.g., 2019 Guidance, p. 40.

⁵⁶ *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2015).

comports with similar language used by the EPA in their regional haze actions.”⁵⁷

Response B.7. We agree with ADEQ that in its Response to Comments, ADEQ stated that “[v]isibility impacts were reported for some sources to give reference to the reader as to the relative impact of these sources or controls considered on visibility. However, this information was not considered in the Department’s emissions control measure determinations.”⁵⁸ However, this assertion is contradicted by the language of some of the control determinations in the Plan. For example, in the NO_x four-factor analysis for SGS, ADEQ stated that:

*ADEQ does find visibility impacts a useful consideration given the goal of the regional haze program is to improve visibility in Class I areas. As such, ADEQ reports modeled visibility impacts in this documentation. The small modeled visibility benefits associated with the modeled hypothetical NO_x emission reduction supports the determination that no additional NO_x controls are necessary to make reasonable progress towards natural visibility at Class I areas during this implementation period.*⁵⁹

Similar language appears following the SO₂ four factor analysis for SGS⁶⁰ and in the summary of ADEQ’s NO_x reasonable progress determination for IGS Unit 3.⁶¹ This language indicates that ADEQ did consider visibility for these units, and specifically, that it weighed the “small modeled benefits” of controls in determining that no additional NO_x controls were warranted at SGS Units 1 and 2 and IGS Unit 3, and no more stringent SO₂ controls were warranted at SGS Units 1 and 2.

While states have the option to consider visibility benefits, along with the four statutory factors, in making control determinations, if they choose to do so, they must do so “in a reasonable way that does not undermine or nullify the role of the four statutory factors in determining what controls are necessary to make reasonable progress.”⁶² In this

case, we find it was not reasonable for ADEQ to consider visibility benefits only for specific sources and without any explanation of what would constitute a significant visibility benefit.

In the action cited by ADEQ where the EPA considered “relatively small visibility benefits,”⁶³ we were comparing the relatively small benefits of a control at one source to the relatively larger visibility benefits expected to result from controls at other sources.⁶⁴ In contrast, in the 2022 Arizona Regional Haze Plan, ADEQ did not find any visibility benefits at any source to be anything other than small. Thus, as explained in our proposal regarding SGS Units 1 and 2, “[i]n the absence of any opportunities for larger emissions reductions and corresponding visibility benefits, we find that ADEQ’s reliance on ‘small’ visibility benefits as an additional justification for not adopting more stringent controls at these units is not persuasive.”⁶⁵

Finally, we note that, even assuming that ADEQ did not consider visibility benefits as part of its control determinations for SGS Units 1 and 2, we would still conclude that the determinations were flawed for other reasons. In particular, for NO_x, ADEQ did not adequately justify the control efficiency used for SCR and SNCR, as discussed in the proposal and response B.4.⁶⁶ For SO₂, ADEQ unreasonably rejected wet FGD on the basis of incremental cost, and set mass-based caps that will not ensure implementation of the emissions reduction measures that are necessary to make reasonable progress at these units, as discussed in the proposal and response B.8. Furthermore, the lack of clarity in the Plan regarding whether or not ADEQ considered visibility benefits in making its control determinations for SGS Units 3 and 4 and IGS Unit 3, indicates a lack of reasoned decision making that also supports our disapproval of the Plan’s long-term strategy.

Comment B.8. ADEQ disagrees with the EPA’s determination that ADEQ did not reasonably weigh the statutory factors in reaching its control determinations with regards to three issues noted in the proposed rule concerning the mass-based emissions caps at SGS and IGS.

First, ADEQ asserts that the EPA’s rationale is arbitrary and capricious in

regard to the rejection of wet FGD for SGS Units 1 and 2. ADEQ states that the use of emissions limits in lieu of codifying specific control technologies is a flexibility that the EPA itself used in its reasonable progress determination for Phoenix Cement Clarkdale (PCC).⁶⁷ ADEQ asserts that the EPA established an emissions limit for PCC that did not require the installation of a particular control technology but rather compliance through other means of meeting the limit.

Second, regarding the EPA’s contention that spray dry absorber (SDA) upgrades may still be cost effective after the establishment of the mass-based emissions caps, ADEQ comments that this manner of analysis is not contemplated in the four-factor analysis as outlined in the RHR or the 2019 Guidance. ADEQ asserts that the EPA has never applied this standard whereby after the establishment of an emissions limit based on the reductions achievable from a considered control technology that a State must revisit and update the baseline emissions of its four-factor analysis to reflect the new emissions limit. ADEQ claims that for its analysis of SGS, ADEQ did not select a control scenario in its four-factor analysis that included the imposition of both emissions limits and the installation of SDA upgrades, and therefore, the EPA should not substitute its judgment for ADEQ’s selection of SDA upgrades as the evaluated control measure for SGS Units 1 and 2 or reject ADEQ’s determination based on an arbitrary and circular four factor analysis standard.

Third, ADEQ further disagrees with the EPA’s assertion that the mass-based emissions caps at SGS and IGS would not meaningfully constrain the emissions from one unit during periods when the other unit is not operating and argues that the rationale is arbitrary and capricious. ADEQ notes that the EPA referenced TEP’s 2023 Integrated Resources Plan (IRP) and highlighted TEP’s plans to retire SGS Unit 1 in 2027, but states that as the operating scenarios outlined in the IRP are not federally enforceable conditions, ADEQ has no basis for the consideration of these future scenarios as part of its control measure analysis and the establishment of the mass-based emissions limits. ADEQ states that the EPA should not rely upon unenforceable and hypothetical operating scenarios to reject ADEQ’s reasonable progress determinations.

Lastly, ADEQ disagrees with the EPA’s rationale that IGS Unit 3’s mass-

⁵⁷ Citing *e.g.*, “relatively small visibility benefits” in 79 FR 52419, 52439 (September 3, 2014).

⁵⁸ *Id.*, Appendix K, p. 9.

⁵⁹ Plan, Appendix C, p. 221 (emphases added).

⁶⁰ *Id.* at 234 (“The small visibility benefits associated with the modeled SO₂ controls supports the determination that CDS and wet FGD control options are not necessary to make reasonable progress towards natural visibility at Class I areas during this implementation period.”).

⁶¹ *Id.* at 197 (“The small modeled visibility benefits associated with additional controls support the determination that no additional controls are necessary to make reasonable progress towards natural visibility at Class I areas during this implementation period.”).

⁶² 2021 Clarifications Memo, p. 12 (quoting Response to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule at 186).

⁶³ 79 FR 52420, 52439.

⁶⁴ See, *e.g.*, *id.* at 52442 (referring to “large visibility benefits”) and 52458 (“we consider this visibility benefit sufficient to support installation of controls.”).

⁶⁵ 89 FR 47398, 47430.

⁶⁶ 89 FR 47398, 47428 (May 31, 2024).

⁶⁷ 79 FR 52420, 52460.

based emissions limits are not yet enforceable and therefore are not an appropriate basis for modifying the baseline control scenario for a four-factor analysis. ADEQ cites that for the EPA's BART determination for Arizona Public Service (APS) Cholla generating station, the EPA accepted a source specific permit revision for APS Cholla Unit 2 that included a trigger that was conditional on the EPA's approval of the SIP revision that altered the remaining useful life of the unit in ADEQ's four factor analysis.⁶⁸ Therefore, ADEQ concludes that the EPA should approve ADEQ's reasonable progress determination for IGS Unit 3.

Response B.8. We disagree with ADEQ's comments arguing that the EPA's justification for disapproving the reasonable progress determinations for SGS and IGS as it relates to the mass-based emissions caps at SGS and IGS was improper.

First, we wish to clarify that we do not object to the use of numeric emissions limitations as a means to implement control determinations. Indeed, CAA section 169A(b)(2) specifically requires the long-term strategy to include "enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress." As explained in our proposal:

The amount of progress that is "reasonable progress" is based on applying the four statutory factors in CAA section 169A(g)(1) in an evaluation of potential control options for sources of visibility impairing pollutants, which is referred to as a "four-factor" analysis. The outcome of that analysis is the emissions reduction measures that a particular source or group of sources needs to implement to make reasonable progress towards the national visibility goal. . . . Such measures must be represented by "enforceable emissions limitations, compliance schedules, and other measures" (i.e., any additional compliance tools) in a state's long-term strategy in its SIP.⁶⁹

We find that the mass-based emissions caps set for SGS do not represent the emissions reduction measures that were the outcome of the state's four-factor analysis for the reasons described in our proposal⁷⁰ and herein. Therefore, these caps do not meet the requirements of 169A(b)(2) and (g)(1), or the corresponding provisions of the RHR.

Regarding PCC, we agree that in the EPA's reasonable progress determination for PCC in the first implementation period, the EPA established a mass-based emissions

limitation for NO_x. However, the circumstances between PCC and SGS Units 1 and 2 differ in important ways. The limit for PCC was set pursuant to 40 CFR 51.308(d)(3), which required the long-term strategy for the first implementation period to "include enforceable emissions limitations, compliance schedules, and other measures *as necessary to achieve the reasonable progress goals* established by States having mandatory Class I Federal areas."⁷¹ In this instance, the Class I areas primarily affected by emissions from PCC were in Arizona,⁷² and the emissions reductions from PCC were reflected in the applicable RPGs for these areas by scaling of visibility extinction components in proportion to changes in total annual emissions.⁷³ Under these circumstances, an annual mass-based emissions limit corresponding to the level of annual emissions reductions assumed in the RPG calculations was sufficient to meet the applicable requirement for an emissions limit "as necessary to achieve" the relevant RPGs.

In contrast, for the second planning period, the EPA clarified in 40 CFR 51.308(f)(2) that "the long-term strategy must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to (f)(2)(i) through (iv)." 40 CFR 51.308(f)(i) in turn requires the state to "evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering" the four statutory factors. Thus, the revised rule clarifies that the long-term strategy must include emissions limitations, compliance schedules, and other measures representing the emissions reduction measures that the state determined to be necessary to make reasonable progress, considering the four statutory factors.

The EPA provided recommendations on the appropriate form of such emissions limitations and other measures in the 2019 Guidance and the Clarifications Memo. Specifically, the 2019 Guidance recommends the use of throughput-based limits, rather than mass-based limits (i.e., "caps") for emissions limitations to implement measures necessary for reasonable progress in most instances.⁷⁴ The Guidance notes that mass-based limits

are allowed under the RHR, but explains that, "[i]f the state has determined, independent of the forecasted operating level, that operation of the emission control equipment . . . is necessary to make reasonable progress, a mass-based emission limit may not be appropriate."⁷⁵ The Clarifications Memo also reaffirms that "whether for new or existing measures . . . an emission limit . . . should be in the form of the emission rate achieved when implementing those measures (e.g., pounds per million British thermal units or lbs/MMBtu, pounds per hour or lbs/hr, or pounds per ton or lbs/ton of produced material)."⁷⁶

With regard to SGS 1 and 2, ADEQ concluded, based on a four-factor analysis that, "it is reasonable to require TEP to upgrade the current SDA systems"⁷⁷ and did not indicate that this determination was conditioned on a particular level of operation. Therefore, ADEQ should have set limits in the form of the emissions rates achieved when implementing SDA upgrades, e.g., lb/MMBtu limits, or should have provided a rationale for why the mass-based limits, which could be met without any control upgrades, nonetheless represent SDA upgrades.

We also note that the mass-based limit at PCC was for a single unit, meaning that it necessarily constrained the emissions from that unit on an annual basis. In contrast, the mass-based limit at SGS Units 1 and 2 were set across two units. Accordingly, if one unit ceases to operate, the limits would not meaningfully constrain emissions from the other unit. In addition, ADEQ rejected more stringent controls at SGS Units 1 and 2 based on its "determination that another viable reasonable control exists to reduce SO₂ emissions from Units 1 & 2 (upgraded SDA)." In contrast, the EPA did not reject any more stringent controls for PCC based on incremental cost effectiveness. Furthermore, the cap at PCC was intended, in part, to address concerns raised during consultation with the facility's owner, the Salt River Pima Maricopa Indian Community (SRPMIC).⁷⁸ No similar considerations exist with respect to SGS Units 1 and 2. Therefore, we find that the circumstances concerning the PCC

⁷⁵ Id. pp. 44–45.

⁷⁶ 2021 Clarifications Memo, p. 11.

⁷⁷ Plan Appendix C, p. 232.

⁷⁸ 79 FR 9318, 9366 ("An annual cap would allow SRPMIC to delay installation of controls until the Plant's production returns to pre-recession levels and would thus help to address the Community's concerns about the budgetary impacts of control requirements.")

⁷¹ 40 CFR 51.308(d)(3) (emphasis added).

⁷² See 79 FR 9318, 9354 Table 41 (showing impacts on Arizona I class I areas).

⁷³ 79 FR 52420, 52468–52469; *FIP_RPG_estimates.xlsx*.

⁷⁴ 2019 Guidance p. 44.

⁶⁸ 81 FR 46852, 46860 (July 19, 2016).

⁶⁹ 89 FR 47398, 47402–47403.

⁷⁰ 89 FR 47398, 47430.

mass-based cap are distinguishable from those concerning SGS Units 1 and 2.

Second, regarding our finding that SDA upgrades would be cost effective after the establishment of the mass-based emissions caps, we disagree that we substituted our judgment for ADEQ's by arbitrarily rejecting ADEQ's determination based on a circular four-factor analysis standard. Contrary to ADEQ's suggestion, we did not state that ADEQ was required to revisit and update the baseline emissions of its four-factor analysis to reflect the new emissions limitation. However, we note that ADEQ did use this approach for IGS Unit 3 and determined that with the emissions reductions associated with the new Unit 3 emissions caps, no additional controls are necessary to make reasonable progress. ADEQ did not provide any rationale for why it used this approach for IGS Unit 3, but not for SGS Units 1 and 2.

Furthermore, the fact that the SDA upgrades would still be cost effective following implementation of the mass-based caps at SGS Units 1 and 2 is relevant to whether the use of caps (in lieu of throughput-based limits) is reasonable and appropriate in this particular case. The fact that throughput-based (*e.g.*, lb/MMBtu) limits equivalent to SDA would still be cost-effective following implementation of the caps (*i.e.*, if TEP complies with the caps by lowering its operating level) indicates that throughput limits based on the emissions rates achievable with SDA upgrades may be necessary to make reasonable progress, regardless of the future operating level. As previously noted, the 2019 Guidance explains that, under such circumstances, mass-based caps are generally not appropriate. Therefore, we believe this consideration is relevant to the evaluation of whether mass-based caps were reasonable and consistent with the requirements of the RHR in this case.

Third, we agree with ADEQ's statement that the operating scenarios outlined in the IRP are not federally enforceable conditions. However, ADEQ's statement in its comment letter that it has "no basis for the consideration of these future scenarios as part of its control measure analysis and the establishment of the mass-based emission limits" is inconsistent with its stated rationale in the Plan for establishing caps instead of mass-based limits. Specifically, ADEQ stated that:

As discussed in TEP's 2020 IRP, Units 1 will transition to seasonal operation in 2023 and Unit 2 in 2024. TEP is planning to retire Unit 1 in 2027 and Unit 2 in 2032. TEP will be very likely to manage its operating level strategically instead of completing the

upgrades to the SDA systems for meeting the RP requirements. Therefore, ADEQ determines that a mass-based emission limit is reasonable.⁷⁹

In other words, ADEQ elected to establish caps *specifically because* it anticipated that TEP could comply with these caps by reducing its operating level consistent with its then-current IRP. Therefore, we do not agree that it was inappropriate for the EPA to consider information contained in TEP's most recent (2023) IRP in evaluating whether the mass-based caps were reasonable and consistent with the RHR.

Lastly, we agree that for APS Cholla Unit 2, the EPA accepted a source-specific permit revision that included a trigger that was conditional on the EPA's approval of the SIP revision that altered the remaining useful life of the unit in ADEQ's four factor analysis. However, the APS Cholla scenario was distinguishable because, as explained in the proposed rule,⁸⁰ the SIP revision for APS Cholla replaced the FIP that was applicable to these units.⁸¹ Therefore, it would not have been reasonable to subject them to two inconsistent requirements, one State and one Federal, under the RHR at the same time. Thus, under these circumstances it was appropriate for ADEQ to make the effectiveness of the permit conditions contingent on EPA SIP approval. In the current case, there is no existing FIP in place applicable to IGS Unit 3, so no similar rationale exists for making the cap contingent upon approval by the EPA.

Comment B.9. ADEQ asserts that the EPA should approve ADEQ's reasonable progress goal (RPG) for the Sycamore Canyon Wilderness Area. The state indicates that it provided the required "robust demonstration" by including a detailed analysis of visibility data at the Sycamore site to demonstrate that its slower rate of progress results from significant increases in light extinction from coarse mass.

Response B.9. As ADEQ notes in its comment, its analysis regarding Sycamore Canyon focused on the substantial increase in coarse mass and soil impairment at the Sycamore Canyon site. However, as explained in our proposal, the rule requires a state with a Class I area whose RPG is above the glidepath to demonstrate, based on the source selection and four factor analyses required under 40 CFR 51.308(f)(2)(i), that there are no additional emissions reduction

measures for sources that may reasonably be anticipated to contribute to visibility impairment in the Class I area that would be reasonable to include in the long-term strategy.⁸² Although ADEQ provided a detailed analysis of monitoring data concerning Sycamore Canyon, it did not provide "a robust demonstration, including documenting the criteria used to determine which sources or groups or sources were evaluated and how the four factors required by paragraph (f)(2)(i) were taken into consideration in selecting the measures for inclusion in its long-term strategy."⁸³ Instead, it relied solely on monitoring data and the source selection and four-factor analyses contained elsewhere in the Plan.⁸⁴ For the reasons described in our proposal and elsewhere in this document, we find that these analyses were inadequate to meet the requirements of 40 CFR 51.308(f)(2). Therefore, the Plan also did not meet the requirements of 40 CFR 51.308(f)(3)(ii)(A) with respect to Sycamore Canyon.

Comment B.10. ADEQ indicates that the State intends to coordinate with EPNG to provide supporting documentation for the interest rate. ADEQ indicates that it intends to provide the interest rate documentation as confidential business information (CBI) to the EPA for review prior to publication of the final rule and requests that the EPA approve the cost calculation for EPNG Willcox and Williams based on the site-specific interest rate and supporting documentation.

Response B.10. Although ADEQ referenced the existence of documentation and the possibility of sharing it with the EPA in its response to comments in the Plan,⁸⁵ no supporting documentation for the interest rate was submitted as part of the Plan or prior to the close the public comment period on the EPA's proposed partial approval and partial disapproval. Therefore, the EPA is unable consider the interest rate information as part of this action.

Additionally, we note that the lack of documentation of EPNG's firm-specific interest rate was one of several flaws that we identified in the state's long-term strategy. Therefore, even if the appropriate documentation had been submitted and within the proper time frame, that alone would not have changed our determination that the

⁸² 89 FR 47398, 47433.

⁸³ 40 CFR 51.308(f)(ii)(A).

⁸⁴ See Plan p. 106, footnote 112 (citing Plan Section 8 and Appendix C).

⁸⁵ 2022 Arizona Regional Haze Plan, Appendix K.

⁷⁹ 2022 Arizona Regional Haze Plan, Appendix C, p. 236.

⁸⁰ 89 FR 47398, 47407, Table 1.

⁸¹ 77 FR 72511 (December 5, 2012).

2022 Arizona Regional Haze Plan did not satisfy the long-term strategy requirements of 40 CFR 51.308(f)(2).

Comment B.11. ADEQ voiced procedural concerns with the lack of specificity in the EPA's proposed disapproval of the 2022 Arizona Regional Haze Plan. ADEQ cites CAA 307(d)(3) as requiring a detailed notice of rulemaking and cites *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518–19 (D.C. Cir. 1983), for the proposition that the notice provided in the proposal may be too general to be adequate and that “[a]gency notice must describe the range of alternatives being considered with reasonable specificity.” The commenter asserts that the EPA's proposed rule does not provide “detailed notice” of certain specific issues that form the basis for disapproval of entire sections of the 2022 Arizona Regional Haze Plan, denying ADEQ the opportunity to specifically address those bases for disapproval during the comment period.

Response B.11. We disagree that the EPA's proposal provided inadequate notice. The EPA's action on the 2022 Arizona Regional Haze Plan is not subject to the requirements of CAA section 307(d). Those requirements apply only to specific enumerated types of actions under the CAA and to “such other actions as the Administrator may determine.”⁸⁶ Actions on SIPs are not one of the enumerated actions, and the Administrator had not determined that this action is subject to 307(d) pursuant to Section 307(d)(1)(V). Therefore, this action is subject to the procedural requirements of the Administrative Procedure Act (APA).

Accordingly, pursuant to 5 U.S.C. 553(b)(2) and (3), the EPA's notice of proposed rulemaking regarding the Plan was required to include “reference to the legal authority under which the rule is proposed” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” The proposal clearly met these requirements, as it stated the applicable legal authorities and provided the EPA's review of the Plan in relation to those requirements. The comment provides no basis to conclude that the proposal failed to meet these requirements. Indeed, the opinion cited by the commenter contrasts these more general APA requirements to the more exacting requirements of CAA section 307(d) concerning the contents of proposed rulemaking.⁸⁷ While we agree with the commenter that “[a]gency

notice must describe the range of alternatives being considered with reasonable specificity,”⁸⁸ we find that our proposal met this requirement, as it plainly stated that the EPA was considering partially approving and partially disapproving the 2022 Arizona Regional Haze Plan and detailed the reason for this proposed action. Please also see Responses A.1.

Comment B.12. ADEQ acknowledges that further FLM consultation is required for a plan revision that will correct the deficiencies identified in the proposed rulemaking action, but contends that the inclusion of the nonpoint source selection analysis and selected controls for nonpoint sources in the FLM review draft of the plan provided FLMs adequate notice and review of Arizona's nonpoint source rules that were codified after plan submission and submitted in the 2023 Arizona Regional Haze Rules Supplement.⁸⁹

Response B.12. The EPA disagrees with ADEQ's contention that it provided the FLMs with adequate notice and review of Arizona's nonpoint source rules. The information about FLM consultation regarding the rules specifically is not detailed in either the 2023 Arizona Regional Haze Rules Supplement, or the 2022 Arizona Regional Haze Plan. The 2023 Arizona Regional Haze Rules Supplement indicated that further information on how this SIP revision complied with 40 CFR 51.308(i) requirements for federal land manager consultation is section 2.4 of the 2022 Arizona Regional Haze Plan.⁹⁰ However, section 2.4 of the plan only describes the FLM review of the 2022 Arizona Regional Haze Plan, and does not specify if ADEQ provided a draft of the three nonpoint source rules to the FLMs for review. The rules were not included in the 2022 Arizona Regional Haze Plan. Should Arizona choose to submit a SIP revision, clarification of the FLM review process of the nonpoint source rules that are listed in Table 1–1 of the 2023 Arizona Regional Haze Rules Supplement would be helpful for EPA review.

C. Comment Letter From the Chamber and AMC

Parts I (“The Chamber and AMC are supportive of the goals of the Regional Haze Rule”) and III (“Conclusion”) of the Chamber and AMC's comment letter are informational and therefore do not

require a response. We respond to part II, sections A–E of the Chamber and AMC's comment letter below.

Comment C.1. The Chamber and AMC note that the EPA's delayed action and partial disapproval of Arizona's Regional Haze Plan is an example of erosion of cooperative federalism. The commenter contends that the timeline of events leading up to the EPA's partial disapproval of Arizona's Regional Haze Plan is problematic and that the EPA seems to routinely miss statutory deadlines, only to get sued by third-party entities for failure to act, resulting in agreements to deadline extensions that delay action for years. In the meantime, the resources and analysis invested by states depreciate in value, often requiring states to reinvest in efforts to update an analysis with new information. The commenter also asserted that “[r]egularly, an even worse scenario plays out in which EPA denies a SIP because the information submitted in good faith by a state has since become dated and stale.”

Response C.1. We do not agree that either the timing or substance of the EPA's partial disapproval of Arizona's Regional Haze Plan is an example of the erosion of cooperative federalism. We acknowledge that the EPA did not act on the 2022 Arizona Regional Haze Plan within the statutory deadline under CAA section 110(k)(3), and that we were subsequently sued for failing to meet that deadline. This resulted in a court-ordered deadline for the EPA to take action on the Plan by March 30, 2025.⁹¹ However, we do not agree that this resulted in a “deadline extension” of any sort, or an erosion of cooperative federalism. On the contrary, in issuing a partial approval and partial disapproval of the Plan, the EPA is fulfilling our statutorily-mandated role to review SIPs for compliance with the requirements of the CAA and the RHR, as further described in Response D.3.

We also disagree with the suggestion that the EPA is disapproving the 2022 Arizona Regional Haze Plan, partially or entirely because information became “dated or stale.” The comment did not provide examples of information becoming dated, resulting in disapproval; thus, we cannot comment on any specific concerns the commenter has with the information within the 2022 Arizona Regional Haze Plan.

Further, as explained in Responses A.1 EPA staff also discussed with ADEQ many of the concerns that became bases for our disapproval during the SIP development process.

⁸⁶ Id. at 549.

⁸⁷ ADEQ SIP Revision: Nonpoint Rules to Supplement Arizona's 2022 Regional Haze SIP, “2023 Arizona Regional Haze Rule Supplement,” August 22, 2023.

⁸⁸ Id. at Chapter 4.

⁹¹ *Sierra Club v. EPA* (D.D.C. Case No. 1:23-cv-01744–JDB), Consent Decree entered July 12, 2024.

⁸⁶ CAA Section 307(d)(1).

⁸⁷ *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518–19 (D.C. Cir. 1983).

Comment C.2. The Chamber and AMC state that guidance should not be cited as grounds to disapprove the 2022 Arizona Regional Haze Plan. The commenter asserts that guidance should be viewed only as a reference and not a legal requirement to be used to approve or disapprove a state's plan. The Chamber and AMC also claim that the EPA published final guidance for Regional Haze Plans three weeks before the plans were due, making compliance with the guidance practically impossible before the deadline. The commenter concludes that relying on the guidance to partially disapprove the Plan was therefore arbitrary and capricious, and the EPA should withdraw all of the proposed disapprovals based upon the 2021 Clarifications Memo.

Response C.2. The EPA disagrees that it relied on guidance, including the 2021 Clarifications Memo, as the basis for our partial disapproval. See responses A.5, B.1, and B.2.

Comment C.3. The Chamber and AMC assert that Arizona's source selection methodology was reasonable and that the EPA should give deference to the State on this matter. The commenter indicates that sources that applied controls in the first round of Regional Haze had recently made significant investments in the design, engineering, procurement, construction and operation of those air pollution control devices. They note that forcing facilities to consider improvement or replacement of these air pollution control devices long before they have depreciated is an unnecessary economic burden for the source and the State. The Chamber and AMC note that ADEQ chose not to force additional analysis from these sources and reasonably relied upon reductions from other emissions sources for visibility improvement, a method that resulted in all but one of Arizona's Class I areas either meeting or exceeding the uniform rate of progress (URP) toward natural conditions.

Response C.3. We disagree that it was reasonable for Arizona to screen out sources solely because they applied controls during the first planning period, for the reasons described in section IV.E.2.a. of our proposal and in response B.3 of this document.

We also disagree that our disapproval will automatically force sources to consider improving or replacing any recently installed air pollution devices. Rather, ADEQ has the option to provide additional documentation and justification for its effective control determinations in a responsive SIP revision. We anticipate that for many

units that recently installed controls, ADEQ will be able to provide an adequate demonstration of effective controls on a unit-specific and pollutant-specific basis, if it chooses to do so, which would preclude the need for a four-factor analysis for those units and pollutants. Any affected units and pollutants for which ADEQ is unable to make such demonstration would be subject to the four-factor analysis requirement as required by 40 CFR 51.308(f)(2).

Finally, we note that all states are subject to the requirements at 40 CFR 51.308(f)(2) and (3) regardless of whether the 2028 RPGs for Class I Areas they affect are above or below URP.

Comment C.4. The Chamber and AMC assert that the EPA should give deference to Arizona's deviation from the EPA Control Cost Manual in developing cost estimates. The commenter notes that the Cost Control Manual is not accurate for all sources and cites examples such as variable interest and emissions rates. They conclude that the use of different interest rates and different control efficiencies for different projects should be viewed as reasonable.

Response C.4. We do not agree that we should have deferred to Arizona's deviation from the EPA Control Cost Manual in the absence of adequate justification. As discussed in Response D.3, Congress charged the EPA with independently evaluating and reviewing SIP submissions for compliance with the applicable requirements under the CAA. 40 CFR 51.308(f)(2)(iii) requires states to "document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects." The technical documentation must include the modeling, monitoring, cost, engineering, and emissions information on which the state relied to determine the measures necessary to make reasonable progress. For the reasons noted in section IV.E.2.b.ii ("Deviations from Cost Control Manual") of our proposed rule, we found that Arizona failed to adequately document the technical basis that it relied upon to determine emissions reduction measures, as required by 40 CFR 51.308(f)(2)(iii). Specifically, as explained in our proposal, it is important to use consistent methods in order to allow for reasoned comparisons between different sources within a state,

and cost analyses in other states.⁹² Therefore, while our regulations allow for flexibility among various methodologies, where a state deviates from these methods, it should explain how its alternative approach is reasonable, appropriate, and consistent with the regulations and the statutory requirement to make reasonable progress towards the national goal. Arizona did not do so. We therefore disagree that the EPA should give deference to Arizona's approach in the Plan.

Comment C.5. The Chamber and AMC indicate that Arizona's plan should be viewed in the context that it results in all but one monitor having an RPG that provides for a greater rate of visibility improvement than the adjusted URP. The commenter asserts that Arizona has created a plan that meets or exceeds the URP at all monitors except for Sycamore Canyon, which was moved to an intersection of two dirt roads in 2014. The commenter concludes that the fact that visibility at Arizona's Class I areas is improving at a pace to reach natural conditions prior to the RHR goal of 2064 is important context in evaluating the source selection methodology and other decisions made by Arizona.

Response C.5. We do not agree with the commenter's characterization of the role of the URP. As explained in our proposal:

The URP is a planning metric used to gauge the amount of progress made thus far and the amount left before reaching natural visibility conditions. However, the URP is not based on consideration of the four statutory factors and therefore cannot answer the question of whether the amount of progress being made in any particular implementation period is "reasonable progress."⁹³

Moreover, being on or below the URP does not exempt a state from any of the requirements of the CAA or the Regional Haze Rule.⁹⁴

It should also be noted that the URP represents the amount of visibility improvement that would need to be achieved during each implementation period to achieve natural visibility conditions by the end of 2064. However, the 2064 date is used solely to calculate the URP as a tracking metric. The CAA and RHR do not contain any end dates for the regional haze program and do not have a "goal" or requirement to achieve natural conditions by 2064 specifically.

Please also see Response B.9 for more information on the robust

⁹² 89 FR 47398, 47428–47429.

⁹³ 89 FR 47398, 47406.

⁹⁴ See 82 FR 3078, 3093 and 3099–3100.

demonstration required for Sycamore Canyon under 40 CFR 51.308(f)(3)(ii), which is missing from Arizona's submission.

D. Comment Letter From TEP

The "Background" section of TEP's comment letter is informational and therefore does not require a response. We respond to the "Comments of Proposed Disapproval" section of TEP's comment letter below.

Comment D.1. TEP claims that ADEQ's source selection methodology was reasonable and the EPA should approve the determination. First, TEP cites to the 2019 Guidance and 2021 Clarifications Memo as providing states discretion for source selection and notes that ADEQ applied a Q/d screening threshold of 10 for each process at a source. TEP further describes ADEQ's screening out processes where the facility recently adopted "effective controls," which the Agency defined as controls installed to meet the requirements of the PSD program (BACT), the first regional haze planning period (BART), or other NAAQS requirements. Second, TEP further suggests that the EPA is proposing to approve "many aspects of ADEQ's source selection process," including ADEQ's choice of screening threshold and focus on NO_x, SO₂, and PM₁₀ in evaluating visibility impacts, but simultaneously proposing to find that the State did not adequately justify its determination of effective emissions reduction measures.

Response D.1. First, we disagree with the commenter that ADEQ applied a Q/d screening threshold of 10 for each process at a source. As noted in the 2022 Arizona Regional Haze Plan, the Q value was calculated from *facility-wide* PM₁₀, NO_x, and SO₂ annual emissions, not process-specific emissions.⁹⁵

Second, we clarify that the EPA did not propose to approve "many aspects of ADEQ's source selection process." We found that ADEQ reasonably and adequately explained and documented many aspects of its source selection process, such as its focus on sulfate, nitrate, and coarse mass and its use of a Q/d value of 10 for point sources. However, we are not separately approving or disapproving specific elements of ADEQ's long-term strategy, including any elements of the source-selection process. Rather, we are disapproving the long-term strategy as a whole under 40 CFR 51.308(f)(2), for the reasons described in our proposal and in this document.

Comment D.2. TEP asserts that ADEQ reasonably evaluated existing controls at IGS Unit 4 and SGS Units 3 and 4.

First, the commenter states that ADEQ did not determine that sources were effectively controlled based on BART controls alone, but also evaluated additional emissions reduction measures at several units that were controlled during the first regional haze planning period, citing Table 8–2 in the 2022 Arizona Regional Haze Plan. For IGS Unit 4 specifically, the commenter states that ADEQ evaluated existing emissions reduction measures at IGS Unit 4 from a source-specific perspective, and determined that further analysis would be futile. TEP cites to statements regarding post-combustion controls in the 2019 Guidance and states that, in a recent FIP action for Arizona, the EPA determined that eliminating coal combustion at Unit 4 would control emissions beyond the best available NO_x and SO₂ controls.⁹⁶ TEP concludes that these emissions reduction measures remain the best available controls at this unit in the second planning period. TEP further notes that ADEQ's determination that IGS Unit 4 is well-controlled is also consistent with recent decreasing emissions trends across BART-eligible EGUs, including IGS Unit 4, and between 2014 and 2019. TEP points to the recent proposed rule for Georgia's Regional Haze SIP,⁹⁷ and comments that the EPA cited to similar visibility-impairing emissions trends as support for Georgia's source-selection methodology. Citing to the 2021 Clarifications Memo,⁹⁸ TEP also indicates that ADEQ was not required to consider emissions trends and that the State has discretion to emphasize other considerations, such as the EPA's prior FIP evaluation.

Second, TEP states that the EPA's proposed disapproval fails to engage with ADEQ's analysis for SGS Unit 3 and 4. TEP notes that ADEQ considered potential additional control measures that could be used to achieve emissions reductions at SGS Units 3 and 4 based on an initial control analysis submitted by TEP.⁹⁹ In this analysis, TEP provided

information on technically feasible control measures, as well as the actual and projected emissions rates at each unit.

Response D.2. We disagree that ADEQ's evaluations regarding effective controls at IGS Unit 4 and SGS Units 3 and 4 were reasonable and justified. Contrary to TEP's claim, ADEQ did not evaluate additional emissions reduction measures at several units that were controlled during the first regional haze planning period. Table 8–2 cited by TEP to support its claim that ADEQ evaluated additional emissions reduction measures at units that were controlled during the first regional haze planning period only depicts annual, source-level total emissions of NO_x, SO₂ and PM₁₀ and does not include any information regarding unit-specific or pollutant specific emissions rates or controls. The commenter also provides no citation for its assertion that ADEQ evaluated existing emissions reduction measures at IGS Unit 4 from a source-specific perspective. Therefore, based on the contents of the 2022 Arizona Regional Haze Plan, it was reasonable for the EPA to determine that ADEQ did not evaluate additional emissions reduction measures at units that were controlled during the first regional haze planning period.

Similarly, the commenter's citation to the discussion of post-combustion controls in the 2019 Guidance is misleading because no such controls were installed at IGS Unit 4. Rather, the unit was converted from coal to gas as part of a "better-than-BART" determination pursuant to 40 CFR 51.308(e)(2).¹⁰⁰ Therefore, the actual relevant effective controls discussion in the 2019 Guidance is the discussion of fuel combustion units that are required to burn pipeline quality natural gas. Such units are generally considered to be effectively controlled for SO₂ and PM.¹⁰¹ However, they are not necessarily effectively controlled for NO_x. Therefore, we disagree with the commenter that, given TEP's recent conversion of IGS Unit 4 from coal to natural gas, ADEQ's conclusion that further analysis was not required was reasonable. As stated in the proposed rule,¹⁰² ADEQ should have explained why it is reasonable to assume, without conducting a four-factor analysis, that no additional NO_x controls would be reasonable.¹⁰³

CFR 51.308(f)(2) (Mar. 2020), available at https://static.azdeq.gov/aqd/haze/tep_spr_4fa_u34.pdf.

¹⁰⁰ See 40 CFR 52.145(j)(4).

¹⁰¹ See 2019 Guidance, p. 24.

¹⁰² 89 FR 47398, 47428.

¹⁰³ See 40 CFR 51.308(f)(2)(i) ("... The State must include in its implementation plan a

⁹⁵ 79 FR 52420, 52422.

⁹⁷ 89 FR 47481 (June 3, 2024).

⁹⁸ Specifically, TEP quotes page 3 of the 2021 Clarifications Memo ("[t]he [Regional Haze Rule] does not explicitly list factors that states must or may not consider when selecting sources for analysis,") and cites page 5 of the 2021 Clarifications Memo as supporting its assertion that "EPA has recommended that states consider projected and actual emissions in evaluating existing emission reduction measures."

⁹⁹ TEP, Identification and Evaluation of Emission Control Measures for Units 3 and 4 at the Springerville Generating Station for Purposes of the Regional Haze Second Planning Period Under 40

⁹⁵ 2022 Arizona Regional Haze Plan, Appendix C2.2, p. 26.

The commenter's discussion of emissions trends is also misleading on several grounds. First, the commenter mischaracterizes the EPA's review of Georgia's regional haze source selection methodology. In the section of the Georgia proposal cited by TEP, the EPA considered trends in total measured visibility impairment at three Class I areas affected by Georgia's sources as supporting the reasonableness of the state's overall source selection methodology.¹⁰⁴ The EPA did not, however, consider trends in emissions from specific sources and did not indicate that such trends would be relevant either to the reasonableness of a state's overall source selection methodology or especially to the question of a whether a particular source may be screened out on the grounds that it is "effectively controlled." Furthermore, the trends cited by the commenter were for multiple BART-eligible EGUs, not just IGS. Therefore, we do not agree that decreasing SO₂ and NO_x emissions at BART-eligible EGUs in Arizona between 2014 and 2019 are relevant to whether IGS Unit 4 is effectively controlled.

Second, the commenter mischaracterizes the contents of the 2021 Clarifications Memo as it relates to how to determine whether a source is effectively controlled. The first section cited by the commenter, regarding "Factors to Consider for Source Selection"¹⁰⁵ relates to a State's overall source selection methodology, which is generally considered to be the first step of determining what measures are necessary for reasonable progress.¹⁰⁶ Whether and how to screen out particular sources on the grounds that they are effectively controlled is a subsequent step. As previously noted, we found that many aspects of ADEQ's source selection process were reasonable and adequately explained and documented,¹⁰⁷ consistent with the statement in the Clarifications Memo that, "whatever choices states make should be reasonably explained and produce a reasonable outcome."¹⁰⁸

description of the criteria is used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy." See also 2021 Clarifications Memo, p. 5; 2019 Guidance, p. 23.

¹⁰⁴ 89 FR 47481, 47497–47498.

¹⁰⁵ 2021 Clarifications Memo, p. 3.

¹⁰⁶ Id. ("Source selection is a critical step in states' analytical processes. All subsequent determinations of what constitutes reasonable progress flow from states' initial decisions regarding the universe of pollutants and sources they will consider for the second planning period.")

¹⁰⁷ 89 FR 47428.

¹⁰⁸ 2021 Clarifications Memo, p. 3.

However, once the sources were initially selected for evaluation of additional control measures, we found that ADEQ did not provide an adequate justification for subsequently screening out certain sources and units from ultimately conducting a four-factor analysis on the basis that they are effectively controlled.

The second section of the 2021 Clarifications Memo mischaracterized by the commenter, "Sources that are Not Selected Based on Existing Effective Controls," does address the screening out of particular sources on the grounds that they are effectively controlled. In particular, this section recommends that, "States should *first* assess whether the source in question already operates an 'effective control' as described in the August 2019 Guidance. They should *further* consider information *specific to the source*, including recent actual and projected emission rates, to determine if the source could reasonably attain a lower rate."¹⁰⁹ For the reasons detailed in our proposal and elsewhere in this document, we find that ADEQ did not reasonably explain and support its determination at the first step that IGS Unit 4 already operates effective controls, particularly for NO_x. Moreover, even if IGS Unit 4 does have effective controls, ADEQ should have considered recent actual and projected emissions rates *for this particular* unit, not for all BART-eligible units as a group, in order to determine whether these controls are necessary to make reasonable progress.

Finally, we disagree that our proposed disapproval fails to engage with ADEQ's analysis for SGS Unit 3 and 4. Contrary to the commenter's suggestion, ADEQ did not screen out SGS Units 3 and 4 at the source selection stage,¹¹⁰ but instead conducted four-factor analyses for these units.¹¹¹ We summarized these analyses on pages 47422–47423 of our proposal. We did not note any particular flaws in these analyses or the resulting determinations that no additional controls were necessary to make reasonable progress in our proposal. However, we found that ADEQ had not addressed whether any of the *existing* measures relied upon in these four-factor analyses were necessary to make reasonable progress and thus should be a part of the State's long-term strategy for the second planning period.¹¹² We also noted that, as part of its analysis of whether these existing measures are

¹⁰⁹ Id., p. 5 (emphasis added).

¹¹⁰ 2022 Arizona Regional Haze Plan, Appendix C, Exhibit CI.

¹¹¹ Id., Chapter C3.13.

¹¹² 89 FR 47431.

necessary to make reasonable progress, the State should have considered whether the relevant sources are subject to enforceable emissions limits that ensure their emissions rates will not increase. Without this information, it is not clear what measures are in the State's long-term strategy for the second planning period and how controls on these units result in each of the affected Class I areas making reasonable progress towards the national goal.

Comment D.3. TEP asserts that ADEQ reasonably evaluated additional control measures using a four-factor analysis for SGS Units 1 and 2. Citing *Oklahoma v. EPA*, 723 F.3d 1201, 1209 (10th Cir. 2013), the commenter asserts that while the statute identifies the factors that must be considered, Congress left to states the determination as to how these factors should be weighed.

Response D.3. While we agree that states have significant discretion in how they consider and apply the four statutory factors as part of a Regional Haze SIP, they do not have unlimited discretion. On the contrary, the EPA has a crucial role in reviewing such SIP submissions for compliance with the requirements of the CAA and the RHR. Pursuant to CAA section 110, states must submit SIP revisions to the EPA for review and the EPA must evaluate whether each SIP submission meets all of the applicable requirements of the Act.¹¹³ The EPA must disapprove any SIP revision that "would interfere with any applicable requirement" of the Act.¹¹⁴ CAA section 110(a)(2)(J) specifically requires that SIPs "meet the applicable requirements" of Part C of Title I of the CAA including the requirements for visibility protection set forth in sections 169A and 169B.¹¹⁵ Pursuant to section 169A(b), the EPA is required to promulgate visibility protection regulations that apply to "each applicable implementation plan" (i.e., each SIP or FIP)¹¹⁶ for each State containing one or more Class I areas and each State "emissions from which may reasonably be anticipated to cause or contribute to any impairment of

¹¹³ CAA section 110(a)(1), (k)(3), 42 U.S.C. 7410(a)(1) and (k)(3).

¹¹⁴ CAA section 110(l), 42 U.S.C. 7410(l).

¹¹⁵ CAA sections 110(a)(2)(J), 169A and 169B 42 U.S.C. 7410(a)(2)(J), 7491 and 7492.

¹¹⁶ Under the CAA, "applicable implementation plan" is defined as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under [CAA section 110], or promulgated under [CAA section 110](c) . . . and which implements the relevant requirements of [the CAA]." CAA section 302(q), 42 U.S.C. 7602(q). In other words, an "applicable implementation plan" is an EPA-approved SIP or Tribal Implementation Plan, or an EPA-promulgated FIP.

visibility in any [Class I area].” The CAA specifies that these regulations (including the RHR) must require each such SIP or FIP to “contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.”¹¹⁷ Thus, the statute provides the EPA a key oversight role in reviewing SIPs, including regional haze SIPs, and the “EPA has substantive authority to assure that a state’s proposals comply with the Act, not simply the ministerial authority to assure that the state has made some determination.”¹¹⁸

Nothing in the *Oklahoma* case cited by the commenter undermines this authority. On the contrary, the *Oklahoma* court upheld the EPA’s disapproval of BART determinations that were part of a regional haze SIP, noting BART “does not differ from other parts of the CAA—states have the ability to create SIPs, but they are subject to EPA review.”¹¹⁹ Likewise, all regional haze SIPs are subject to EPA review, as described in the preceding paragraph.

In our action on the Plan, we are exercising our substantive authority to review the state’s submittal for compliance with the applicable requirements of the CAA and RHR. Based on our review of the Plan, we find, among other things, that ADEQ had not reasonably evaluated and weighed the four statutory factors for SGS Units 1 and 2 for the reasons noted in section IV.E.2 of our proposal and responses B.4., B.6, B.7 and B.8 of this document.

Comment D.4. TEP states that ADEQ’s choice of cost-effectiveness threshold was reasonable, and that the EPA’s proposed rule did not afford appropriate deference to ADEQ’s assessment of reasonable cost-effectiveness values. TEP also cites a previous EPA action stating that “Congress did not provide any direction as to how states should consider ‘the costs of compliance’ when determining reasonable progress.”¹²⁰ TEP also provides the following reasons for why it believes ADEQ’s choice of cost-effectiveness threshold was reasonable.

First, TEP states that ADEQ selected a threshold based on the State’s evaluation of the highest cost controls during the first planning period. TEP notes that this threshold is nearly \$1,000/ton higher than the 98th

percentile value for EGU boilers during the first planning period and \$1,500/ton higher than costs rejected by Georgia in evaluating additional emissions reduction measures in its SIP submission.¹²¹

Second, TEP claims that ADEQ’s bright-line approach to analyzing available controls above its cost-effectiveness threshold was also reasonable. TEP disagrees with the EPA’s concern about the average cost of installing SNCR at SGS Unit 2 being \$269/ton above ADEQ’s \$6,500/ton threshold.¹²² TEP states that the 2019 Guidance emphasized that the RHR does not prevent states from implementing “bright line” cost-effectiveness thresholds when considering additional control measures, consistent with the Ninth Circuit’s decision in *NPCA v. EPA*.¹²³ TEP asserts that this threshold sets an amount above which a state would reject control options as too expensive, and that for controls falling below this threshold, it is reasonable for ADEQ to evaluate additional factors, such as incremental costs, visibility impacts, and the other statutory factors, in determining whether these controls are necessary for reasonable progress.

Response D.4. As TEP describes, the EPA noted in prior rulemakings that “Congress did not provide any direction as to how states should consider ‘the costs of compliance’ when determining reasonable progress.” However, consistent with our prescribed statutory role, as described in Response D.3, the EPA is required to evaluate whether each State exercised its flexibility and conducted the required analyses in a reasonable way and in accordance with the applicable requirements. As described throughout our proposal and this final action, we determined that Arizona did not do so.

For example, contrary to TEP’s claim, the EPA did not find that ADEQ’s average cost-effectiveness thresholds of \$6,500/ton for point sources and \$5,000/ton for nonpoint sources were unreasonable. Rather, as explained in our proposal, we found that the State inconsistently and unreasonably applied these cost thresholds to the control determinations.¹²⁴

In particular, we found that ADEQ incorrectly characterized its average cost effectiveness threshold for points sources as a bright-line threshold,¹²⁵

given that ADEQ, in fact, rejected controls that were below this threshold. In these instances, ADEQ relied on incremental cost effectiveness as a basis to find the cost of control excessive, but, again, did not do so consistently, as described in Response B.6 of this document. Thus, ADEQ did not consistently apply either its chosen average cost effectiveness threshold or any defined incremental cost effectiveness threshold as a basis to choose whether to adopt or reject control measures, nor did it explain its reasoning for these inconsistencies. The EPA finds this to be unreasonable. Based on this and other flaws in the long-term strategy described in the proposal and elsewhere in this document, we find that the long-term strategy in the Plan did not meet the requirements of 40 CFR 51.308(f)(2).

We also note that, while our proposed rule recommended that ADEQ revisit control determinations with controls that were slightly above the cost thresholds, given the flaws in the cost-effectiveness analyses, we did not indicate that, in the absence of such flaws, use of a bright line threshold would have been improper, as long it was appropriately justified and consistently applied. Finally, we note that the fact that other states have applied lower or similar thresholds does not automatically make Arizona’s threshold reasonable.

Comment D.5. TEP states that ADEQ’s evaluation of control costs is conservative and results in projected costs that are lower than what TEP would incur. TEP asserts that ADEQ selected baseline assumptions consistent with the EPA’s Control Cost Manual. In particular, TEP indicates that ADEQ calculated control costs using an assumed interest rate of 4.75 percent and a maximum equipment life of 30 years, but that these assumptions resulted in unrealistically low control cost estimates. TEP noted that the EPA previously used 20-year equipment life and 7 percent interest rate for both NO_x and SO₂ candidate emissions reduction measures for IGS as part of a previous regional haze FIP,¹²⁶ and that these assumed values of 7 percent and 20 years better reflect actual control costs.

TEP also asserted that ADEQ is not required to treat the guidance provided by the Control Cost Manual as dispositive, and, citing *Wyoming v. EPA*, 78 F.4th 1171, 1180 (10th Cir. 2023), TEP asserted that the EPA cannot treat nonbinding guidelines as mandatory in evaluating a SIP submission.⁸⁸

¹¹⁷ 42 U.S.C. 7491(b)(2).

¹¹⁸ *Arizona ex. rel. Darwin v. EPA*, 815 F.3d 519, 531 (9th Cir. 2016).

¹¹⁹ *Oklahoma v. EPA*, 723 F.3d 1201, 1209 (10th Cir. 2013).

¹²⁰ 81 FR 296, 310 (January 5, 2016).

¹²¹ 89 FR 47494.

¹²² 89 FR 47429.

¹²³ 2019 Guidance at 38 (citing *NPCA v. EPA*, 788 F.3d 1134, 1142–43 (9th Cir. 2015)).

¹²⁴ 89 FR 47398, 47429.

¹²⁵ See 2022 Arizona Regional Plan, Appendix K, p. 7.

¹²⁶ 79 FR 9318.

Response D.5 We do not agree that ADEQ's evaluation of costs was conservative and results in projected costs that are lower than what TEP would incur. Regarding the EPA's previous analyses for IGS, first, we note that the EPA has revised several chapters of the Control Cost Manual, since the 2014 regional haze FIP cited by TEP in the comment letter. In particular, the chapter concerning SCR was updated in 2019.¹²⁷ As part of that update, the remaining useful life for SCR was revised from 20 years to 30 years.¹²⁸ Consistent with this change, ADEQ used a remaining useful life of 30 years for SCR, but used 20 years for SNCR.¹²⁹

Second, as explained in the Control Cost Manual,¹³⁰ interest rates change with time due to changes in prices over time for all relevant goods and services such as capital equipment, engineering services, other materials and reagents used in the construction and operation of control equipment. In the absence of source-specific information, ADEQ relied on a 4.75 percent interest rate developed by analyzing and averaging historical bank prime rate data. ADEQ looked at 3-year average bank prime rates for the periods of 2017–2019 (4.83 percent) and April 2018–March 2020 (4.78 percent). These dates were chosen as they were the most recent data at the time of the analysis.¹³¹ In contrast, ADEQ also explained in its SIP submittal that the 7 percent interest rate from the first planning period FIP cited by TEP was the 3-year average bank prime rate during 2005–2007.¹³² Therefore, the 7 percent rate used by the EPA in our previous FIP was not appropriate for the cost analysis for the

Plan, which was developed in 2020–2022.

Finally, we disagree with the commenter's suggestion that we treated the Control Cost Manual, or any other guidance, as binding. As discussed in Responses A.3 and C.4, the EPA's citations to guidance documents were intended to provide further context on what is generally considered to be a reasonable approach to fulfill the statutory and regulatory requirements. We acknowledge that the suggestions in those guidance documents are not binding, but are generally assumed to be reasonable. States can deviate from the suggestions within EPA guidance documents. However, they must do so in a reasonable way, accompanied by sufficient justification. The Plan did not do so for the reasons described in our proposal and elsewhere in this document.

Comment D.6. TEP asserts that ADEQ's analysis of SCR and SNCR reasonably approximated emissions limits achievable at SGS Units 1 and 2. TEP explains that the emissions rate used in the analysis was unit-specific, and that ADEQ considered baseline NO_x emissions, inlet concentrations, and the frequency of startup/shutdown cycles at SGS Units 1 and 2. TEP reiterates that ADEQ explained that a higher number of startup/shutdown cycles results in higher average NO_x emissions rates with SCR, and that SGS Units 1 and 2 experience a higher frequency of startup/shutdown cycles than average EGUs.

TEP further disagrees that SGS Units 1 and 2 are able to achieve an emissions rate of 0.05 lb/MMBtu. TEP notes that ADEQ further explained in its response to public comments that it was inappropriate to use an annual emissions limit of 0.05 lb/MMBtu because the CAMPD database only contains three comparable units, out of fifty-eight units, which are operating below this emissions limit in 2019–2021. The CAMPD database shows that approximately 20% of the units achieved emissions below 0.06 lb/MMBtu in 2019–2021, which ADEQ believed was a reasonable estimate of the rate achievable with SCR for SGS Units 1 and 2. TEP also notes that based on their extensive industry experience, vendors will not guarantee a rate of 0.05 lb/MMBtu due to concerns about degradation over time.

TEP also states that even if ADEQ adopted the EPA's preferred emissions rate of 0.05 lb/MMBtu, ADEQ's analysis of control measures for SGS Units 1 and 2 would remain substantially the same. Table 3 of TEP's comment letter provides the updated cost-effectiveness

value using a 0.05 lb/MMBtu rate for SGS Units 1 and 2, assuming a 4.75 percent interest rate and a remaining useful life of 30 years.

Response D.6. We do not agree that ADEQ's analysis of SCR and SNCR reasonably approximated emissions limits achievable at SGS Units 1 and 2. Our proposed rule acknowledged the startup/shutdown considerations noted by ADEQ.¹³³ However, the proposed rule also explains that ADEQ has not demonstrated why these startup/shutdown considerations would be significant enough at SGS Units 1 and 2 on an annual average basis, which is the averaging period used to calculate ton/year emissions reductions for cost effectiveness calculations, to preclude them from achieving this emissions reduction level with SCR. As discussed in more detail in Response B.4, we would consider it appropriate for an emissions limitation established on a shorter averaging period to have a higher value to account for startup/shutdown emissions, which have a greater effect on overall unit emissions rates over shorter averaging periods.

We also disagree with TEP that ADEQ's review of emissions rates for other tangentially fired coal units in CAMPD should be determinative of the SCR emissions rate achievable for the SGS units. We do not necessarily consider the inventory of unit emissions data in CAMPD to be representative of what is achievable with SCR technology because units whose emissions are included in CAMPD have been required to install SCR as a result of a variety of regulatory programs. Not all of these programs may have fully considered technological factors in establishing emissions requirements or allowable emissions limits, which would have the effect of elevating reported emissions rates. For example, several units in the eastern U.S. have installed SCR but have not been required to operate in a manner that fully accounts for periods of startup operations,¹³⁴ while other units may only operate their SCR systems seasonally.¹³⁵ Other SCR systems may have been required by a Consent Decree, which involves a

¹³³ 89 FR 47398, 47428.

¹³⁴ 87 FR 31798 (May 25, 2022) and Docket Item EPA–R03–OAR–2022–0347–0059 for further details.

¹³⁵ Docket Items EPA–HQ–OAR–2021–0668–0115 and EPA–HQ–OAR–2021–0668–0096 examine ozone season data from several mid-atlantic states and identifies best performing months for several units. An examination of operating data on a monthly or daily basis over the course of a calendar year indicates that several units, such as Pleasants Power Station 1 and 2 (WV), Conemaugh 2 (PA), and DB Wilson W1 (KY) operate at much lower NO_x emission rates during ozone season months.

¹²⁷ Control Cost Manual, Section 4, Chapter 2 Selective Catalytic Reduction (June 2019), section, 2.4.2 Total Annual Costs, Indirect costs, available at https://www.epa.gov/sites/default/files/2017-12/documents/scrcostmanualchapter7thedition_2016revisions2017.pdf.

¹²⁸ Id. at page 87 of 107 (PDF document pagination), (“a representative value of the equipment life for SCR at power plants can be considered as 30 years”).

¹²⁹ Id., Appendix C, p. 219 (“The estimated life for SCR and SNCR were set at 30 and 20 years respectively to match current EPA guidance for these control technologies on utility boilers.”) The commenter's citation to page 146 of the Plan appears to be in error, as there is no such page in the main body of the Plan, and page 146 of Appendix C discusses the Willcox compressor station.

¹³⁰ Control Cost Manual, Section 4, Chapters 1 and 2, available at <https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/cost-reports-and-guidance-air-pollution>.

¹³¹ 2022 Arizona Regional Haze Plan, Chapter 8.3.2.

¹³² Id.

negotiated settlement in which allowable emissions limits may be established as part of injunctive relief, and may not necessarily be representative of SCR technical capabilities. Therefore, we find that ADEQ's analysis of other tangentially fired coal units in CAMPD is not determinative of the SCR emissions rate achievable for the SGS units.

Finally, though we appreciate the summary provided in Table 3 of the comment letter, the analysis is new information not included in the Plan. This information would need to be part of a SIP revision subject to review by the public and FLMs in order for the EPA to consider it as part of the long-term strategy.

Comment D.7. TEP asserts that ADEQ reasonably determined that SO₂ emissions limits were an appropriate and equivalent control measure compared to SDA upgrades. TEP notes that while the EPA suggests that TEP should also be required to install the SDA upgrades in addition to the mass-based limits, the EPA does not explain why SDA upgrades would achieve emissions reductions beyond the mass-based limits adopted by TEP, which are equivalent to SDA upgrades.

Further, TEP states that the selection of emissions limits is consistent with the CAA and is entitled to deference. First, TEP reasons that the CAA does not require the installation of specific control technologies, and that the EPA has recognized in the 2019 Guidance that mass-based limits may be a reasonable alternative to specific control technologies, particularly where fixed capital costs are high, so long as such limits do not enable a source to cease operating an existing control technology. Second, TEP asserts that the emissions limits are equally or more protective than control technologies because the total SO₂ emitted cannot exceed the caps, and whether one or both units is operating is irrelevant, and because it provides the flexibility for greater total emissions reductions to occur, should TEP ultimately retire SGS Unit 1 in 2027. The commenter specifies that if TEP elects to achieve compliance with the proposed caps by shutting down Unit 1, it is projected to reduce SO₂ emissions by 2,982 tpy and achieve significant reductions in NO_x and PM emissions, whereas the installation of SDA upgrades at both units is projected to reduce SO₂ emissions by 2,122 tpy. Third, TEP asserts that the emissions limits are consistent with EPA precedent. TEP listed previous examples of EPA-approved mass-based emissions limits, such as the Hawaii Regional Haze FIP for three Hawaiian

Electric facilities¹³⁶ and the Regional Haze FIP for PCC.¹³⁷

Response D.7. We disagree with TEP's assertions that the selection of mass-based SO₂ emissions limits for SGS Units 1 and 2 was reasonable for the reasons described in Section IV.E.2.c.iii of our proposal,¹³⁸ and Response B.8 of this document.

We also disagree with TEP's assertion that the EPA did not explain why SDA upgrades would achieve emissions reductions beyond the mass-based limits adopted by ADEQ. As stated in the proposed rule,¹³⁹ because the limits are set across two units and the ton per day (tpd) limit is based on a 30-calendar-day average (rather than a 30-day-boiler-operating day average),¹⁴⁰ they would not meaningfully constrain the emissions from one unit during periods when the other unit is not operating. In particular, the annual SO₂ cap of 3,739 tpy is significantly higher than ADEQ's projected 2028 SO₂ emissions for either Unit 1 or Unit 2 (2,869 and 2,982 tpy, respectively)¹⁴¹ and nearly double each unit's recent emissions (1,980 and 1,988 tpy respectively on average 2021–2023).¹⁴² Accordingly, if TEP shuts down SGS Unit 1 by 2028, as it has stated it intends to do,¹⁴³ Unit 2 would be able to emit 3,739 tpy SO₂ in 2028, nearly double what it emitted on average in 2021–2023 and significantly *more* than the 2,982 tpy it is projected to emit in the absence of a cap and closure of Unit 1. In contrast, a lb/MMBtu limit representing SDA upgrades on each unit would ensure emissions from Unit 2 would be reduced by approximately 1/3 from recent emissions levels (*i.e.*, a reduction of roughly 663 tpy) even if Unit 1 ceases operation. Therefore, under the scenario projected by TEP to occur in 2028 (*i.e.*, closure of SGS Unit 1), implementation of SDA upgrades at Unit 2 would achieve significant emissions reductions beyond the mass-based limits adopted by ADEQ.

¹³⁶ 77 FR 61478 (October 9, 2012).

¹³⁷ 79 FR 52420.

¹³⁸ 89 FR 47398, 47430–47431.

¹³⁹ *Id.*

¹⁴⁰ A limit based on boiler operating days would effectively exclude days with zero emissions from the calculation of the 30-day average whereas a limit based on calendar days does not.

¹⁴¹ Plan, appendix C, p. 213, Table 83.

¹⁴² Emissions information can be publicly accessed through the EPA Clean Air Markets Program data, available at <https://campd.epa.gov/>.

¹⁴³ As part of its preferred alternative in its 2023 Integrated Resources Plan, p. 56, TEP states that “Initially, the units will alternate idling between spring and fall (both seasons include the adjacent winter months). TEP plans to transition Unit 1 to summer-only operations prior to full retirement at the end of 2027.”

We also note that, if SGS Unit 1 does not close and both units continue operation at roughly the same level as 2021–2023, a lb/MMBtu limit representing SDA upgrades on each unit would ensure emissions from both Unit 1 and Unit 2 would be reduced by approximately 1/3 (*i.e.*, a reduction of roughly 1,323 tpy based on 2021–2023 emissions), whereas ADEQ's annual cap of 3,739 tpy would only ensure reductions of 229 tpy (*i.e.*, compared to total 2021–2023 annual average emissions of 3,968). Therefore, we expect that lb/MMBtu limits representing SDA upgrades on each unit would achieve significantly greater emissions reductions than the two-unit mass-based limits adopted by ADEQ.

For similar reasons, we also do not agree with TEP's statements that “the proposed form of the limit is potentially more environmentally protective than the installation of controls because it provides the flexibility for greater total emission reductions to occur, should TEP ultimately retire SGS Unit 1 in 2027” and that “[r]equiring the use of air pollution control technology at each unit individually would foreclose a *more* environmentally beneficial compliance option.” Specifically, TEP incorrectly cites Table 83 as supporting its assertion that if it “elects to achieve compliance with the proposed caps by shutting down Unit 1, it is projected to reduce SO₂ emissions by 2,982 tpy and also to achieve significant reductions in NO_x and PM emissions.” This mischaracterizes the content of Table 83, which reflects ADEQ's *baseline* projection of emissions at the TEP units, based on emissions and throughput data for 2016, 2018 and 2019.¹⁴⁴ These values were the starting point for ADEQ's four-factor analysis and do not represent the projected emissions of these units following implementation of the emissions caps and/or the closure of Unit 1. No such projection is included in the Plan. However, as noted in the preceding paragraph, if TEP shuts down SGS Unit 1 by 2028, as it has stated it intends to do, Unit 2 could emit as much as 3,739 tpy SO₂ in 2028, nearly double what it emitted on average in 2021–2023 and significantly more than the 2,982 tpy it is projected to emit in the absence of a cap and closure of Unit 1.

Third, in response to TEP's claim about EPA precedent, both FIP actions cited by TEP apply to first planning period requirements and thus preceded the 2017 revisions to the RHR, which added 40 CFR 51.308(f). Please see Response B.8 for more information

¹⁴⁴ Plan, Appendix C, pp. 212.

about PCC. The other precedent cited by ADEQ, a cap on the Hawaiian Electric sources, was not based solely on a determination that a particular control measure was necessary to make reasonable progress under the four statutory factors. Rather, the cap was intended primarily to ensure that no degradation in visibility conditions would occur at the affected Class I area during the first or subsequent planning periods, as required under the RHR.¹⁴⁵ This was based on circumstances that were specific to Hawaii in the first planning period, namely, that no photochemical modeling had been performed for Hawaii's Class I areas and the EPA set the RPGs for these areas based on island-specific emissions inventories.¹⁴⁶ None of these circumstances apply to Arizona generally, or to SGS Units 1 and 2 specifically, in the second regional haze planning period and thus are inappropriate to rely upon.

Comment D.8. TEP comments that ADEQ reasonably rejected additional control measures based on the four factors. For remaining useful life specifically, TEP indicates that a 20-year remaining useful life is more appropriate for SGS Units 1 and 2 because the shutdowns are publicly documented in the 2023 IRP. TEP cites the 2021 Clarifications Memo as stating, "reasonable bases for projecting that future emissions will be significantly different than past emissions are enforceable requirements and energy efficiency, renewable energy, or other similar programs, where there is a documented commitment to participate and a verifiable basis for quantifying changes in future emissions."¹⁴⁷ TEP noted that consistent with this guidance, TEP's planned retirement of these units significantly shortens the remaining useful life of any controls and projected emissions reductions, and a 20-year remaining useful life is a reasonable, conservative basis to analyze cost-effectiveness of additional controls.

Response D.8. We disagree that 20 years is a reasonable remaining useful life for SGS Units 1 and 2. The portion of the 2021 Clarifications Memo cited by TEP concerns setting emissions limits for control measures found necessary to make reasonable progress, not remaining useful life. Therefore, this

citation does not support TEP's assertion. Additionally, the 2019 Guidance and Clarifications Memo clearly indicate that, under the RHR, where a shutdown date is used to shorten a source's remaining useful life as part of a reasonable progress determination, an enforceable requirement to shutdown must be included in the SIP and/or be federally enforceable.¹⁴⁸ The potential shutdowns of SGS Units 1 and 2 are not federally enforceable. Therefore, they cannot be relied upon to shorten the remaining useful life of these units. In the absence of an enforceable requirement for SGS Units 1 and 2 to retire, we do not agree that a 20-year remaining useful life is reasonable.

Comment D.9. TEP comments that ADEQ reasonably rejected additional control measures in part by considering incremental costs. TEP noted that ADEQ determined incremental costs for additional controls would range from \$9,400–13,500/ton, and that even the low end of this range exceeded similar incremental costs that the EPA determined to be excessive for sources in Arizona as part of the 2014 BART FIP.¹⁴⁹

TEP further states that ADEQ reasonably considered incremental cost-effectiveness where the cost impacts were not clear due to uncertainty in the remaining useful life of the additional controls. Citing *American Corn Growers Association vs. EPA*, TEP states that it is reasonable for a state to consider incremental visibility improvements and other incremental metrics to inform its assessment of whether a particular control is "too costly . . . for a particular source."¹⁵⁰ TEP notes that such an assessment does not give "controlling weight" to the cost factor, but rather considers whether, on balance, it would be unreasonable to require installation of a control, consistent with the language of CAA section 169A.

Lastly, TEP asserts that ADEQ reasonably compared the costs of and emissions reductions achievable with wet FGD and circulating dry scrubbers (CDS) to the costs of and emissions reductions achievable with SDA upgrades, even where such upgrades were not required to be installed. The commenter argues that ADEQ reasonably used SDA upgrades as a proxy for its mass-based emissions

limits, since these limits were developed based on equivalence with SDA upgrades and the EPA's approach for Hawaiian Electric.

Response D.9. We disagree that ADEQ's use of incremental cost effectiveness was reasonable for the reasons explained in Section IV.E.2.C.IX of our proposal¹⁵¹ and Response B.6 of this document. We also note that, while the commenter refers to "similar incremental costs that the EPA determined to be excessive for sources in Arizona as part of the 2014 BART FIP," the accompanying citation refers to only a single source, *i.e.*, Nelson Lime Kiln, which is the same source cited by ADEQ in the Plan.

We also find that the commenter's citation to *American Corn Growers* is inapposite. That decision concerned the EPA's interpretation of the BART provisions of the CAA and turned on the fact that the CAA includes the "the degree in improvement in visibility that would be expected at each Class I area as a result of imposing BART" as one of five factors to be considered in BART determinations.¹⁵² In contrast, the Act does not mandate visibility improvement as one of the four factors to be considered in determining reasonable progress.¹⁵³ As discussed in Response B.7, ADEQ indicated in its Response to Comments that it did not consider this factor in its determinations.¹⁵⁴ Furthermore, even if ADEQ did consider visibility improvement in making control determinations for SO₂ at SGS Units 1 and 2,¹⁵⁵ it is evident that ADEQ did not consider *incremental* visibility improvement associated with Wet FGD compared to SDA upgrades. Rather, ADEQ considered only "a hypothetical SO₂ emission reduction of 3,236 tpy, which is approximately equivalent to 0.08 lb/MMBtu for SGS Units 1 and 2."¹⁵⁶ This level of reductions does not correspond either to SDA upgrades or wet FGD, so ADEQ could not possibly have considered the incremental visibility benefit between the levels of control. Accordingly, *American Corn Growers* has no bearing on our assessment of whether ADEQ's approach to its four factor analyses and

¹⁵¹ 89 FR 47398, 47429.

¹⁵² *Id.* (interpreting CAA section 169A(g)(2)).

¹⁵³ CAA 169A(g)(1).

¹⁵⁴ 2022 Arizona Regional Haze Plan, Appendix K, p. 9.

¹⁵⁵ See 2022 Arizona Regional Haze Plan, Appendix C, p. 234 ("small visibility benefits associated with the modeled SO₂ controls supports the determination that CDS and wet FGD control options are not necessary to make reasonable progress towards natural visibility at Class I areas during this implementation period").

¹⁵⁶ *Id.*

¹⁴⁵ 77 FR 31692, 31712 (May 29, 2012) ("without further control, emissions of SO₂ on the Big Island are projected to increase by nearly 4% between 2005 and 2018. Therefore, additional, federally enforceable SO₂ reductions are needed on the Big Island to ensure reasonable progress.")

¹⁴⁶ *Id.* at 31708.

¹⁴⁷ 2021 Clarifications Memo, p. 12.

¹⁴⁸ 2019 Guidance, p. 34 (citing 40 CFR 51.308(f)(2)); Clarifications Memo, p. 10.

¹⁴⁹ 79 FR 9318, 9341, Table 24 (rejecting DSI based on incremental costs of \$8,576/ton compared to lower sulfur fuel blend).

¹⁵⁰ *American Corn Growers Association v. EPA*, 291 F.3d 1, 6–7 (D.C. Cir. 2002).

determinations for SGS Units 1 and 2 were reasonable.

In addition, we also disagree that there is uncertainty in the remaining useful life of SGS Units 1 and 2, because the potential shutdowns at these units are not federally enforceable. See Response D.8.

Finally, we disagree that ADEQ reasonably used SDA upgrades as a proxy for its mass-based emissions limits. See Responses B.8 and D.7.

Comment D.10. TEP states that the EPA incorrectly implies that ADEQ based its control determinations on visibility benefits, when ADEQ stated otherwise in its SIP submission.¹⁵⁷

Second, TEP notes that any consideration of visibility would be consistent with recent EPA actions on regional haze and the text of the statute. Citing the EPA's recent proposed action on the Georgia Regional Haze SIP, TEP states that the EPA emphasized incremental visibility improvements and that "Georgia is also not contributing to visibility impairment at any Class I areas above the URP."¹⁵⁸ TEP claims that because Arizona has similarly de minimis contributions to visibility impairment at Class I areas,¹⁵⁹ the EPA cannot apply inconsistent criteria to its review of SIP submissions by different states. Finally, citing *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024), TEP argues that "EPA's suggestion that visibility should play little-to-no role in a state's assessment of reasonable progress is unreasonable and counter to the text of the statute."

Response D.10. Regarding whether ADEQ considered visibility benefits, in its control determinations, please see Response B.7.

We disagree that the EPA is applying inconsistent criteria to review of SIP submissions by different states. As explained in Response D.2, in the section of the Georgia action cited by the commenter, the EPA considered overall trends in visibility impairment in evaluating the reasonableness of Georgia's source selection methodology. This is entirely different from weighing the potential visibility benefits of specific controls at specific units, which is what the commenter appears to be advocating for. Additionally, the quoted section of the Georgia proposal simply states as a fact that Georgia is not contributing to visibility impairment at any Class I areas above the URP. That

information is not used and should not be used as a "safe harbor" argument to exclude contributing sources from a four-factor analysis and potentially including cost-effective controls in the long-term strategy.

Moreover, we do not agree that Arizona has de minimis contributions to visibility impairment at Class I areas. In support of this assertion, TEP cites Table 21 on page 47432 of the proposal. This table shows Baseline Conditions, Adjusted URP and 2028 RPGs at Arizona's Class I areas. However, the table provides no indication of which sources contribute to visibility impairment at these Class I areas, or whether these sources are located in Arizona or elsewhere. This table also does not address any Class I areas outside of Arizona. Furthermore, there is no other information in the Plan that suggests that emissions from Arizona have de minimis contributions to visibility impairment at all potentially affected Class I areas. Therefore, we do not agree that the EPA is applying inconsistent criteria to review of SIP submissions by different states.

Finally, we disagree that we suggested that "visibility should play little-to-no role in a state's assessment of reasonable progress." Rather, we stated that "[w]hether a particular visibility impact is meaningful should be assessed in context and cannot be used to undermine the four statutory factors that are to be analyzed in order to determine what measures are necessary for reasonable progress."¹⁶⁰ Applying these considerations to ADEQ's discussion of visibility benefits at SGS Units 1 and 2, we found that "[i]n the absence of any opportunities for larger emissions reductions and corresponding visibility benefits, we find that ADEQ's reliance on 'small' visibility benefits as an additional justification for not adopting more stringent controls at these units is not persuasive."¹⁶¹ Therefore, we do not agree with the commenter's characterization of our proposal.

Comment D.11. TEP asserts that ADEQ appropriately incorporated "on-the-way" measures in assessing baseline conditions at IGS Unit 3. TEP cites the 2021 Clarifications Memo and states that the EPA has explicitly recognized "on-the-way" measures that "have not yet been implemented and the associated emissions reductions have not yet occurred as of the SIP submission date," and that the EPA indicated that these measures may impact a state's choice of baseline for a

four-factor analysis at a particular source ("reasonable bases for projecting that future emissions will be significantly different than past emissions are enforceable requirements and energy efficiency, renewable energy, or other similar programs, where there is a documented commitment to participate and a verifiable basis for quantifying changes in future emissions").¹⁶² TEP claims that the operational conditions at IGS Unit 3 have been incorporated in an enforceable permit, and will become effective upon approval of Arizona's SIP submission. TEP also claims that it has a documented commitment to complying with these limits by requesting these permit limits.

Response D.11. TEP mischaracterizes the contents of the 2021 Clarifications Memo. The first section of the memo cited by the commenter, entitled "On-the-Way" Measures and Shutdowns, states that "on-the-way measures . . . are necessary to make reasonable progress and must be included in a SIP."¹⁶³ In this case, because the IGS Unit 3 limits have not taken effect under State law, their inclusion as part of the SIP revision is not meaningful, and they are not an appropriate basis for modifying the baseline control scenario for a four-factor analysis.

The second portion of the 2021 Clarifications Memo cited by TEP concerns setting emissions limits for control measures that have been found necessary to make reasonable progress. It is not relevant to the question of the extent to which existing measures may be considered as part of the baseline for a control analysis. Regarding this latter question, the 2019 Guidance states that:

Enforceable requirements are one reasonable basis for projecting a change in operating parameters and thus emissions; energy efficiency, renewable energy, or other such programs where there is a documented commitment to participate and a verifiable basis for quantifying any change in future emissions due to operational changes may be another. A state considering using assumptions about future operating parameters that are significantly different than historical operating parameters should consult with its EPA Regional office.¹⁶⁴

Again, the emissions limits at IGS Unit 3 are not enforceable by the State or the EPA unless and until the resulting reasonable progress determination is approved into the SIP. Moreover, the permit conditions that would implement the caps were adopted specifically to meet regional

¹⁵⁷ 2022 Arizona Regional Haze Plan, Appendix K at 9 (explaining that visibility information "was not considered in the Department's emission control measure determination").

¹⁵⁸ Citing 89 FR 47481, 47498.

¹⁵⁹ 89 FR 47398, 47432, Table 21.

¹⁶⁰ 89 FR 47398, 47430 (citing 40 CFR 51.308(f)(2)(i)).

¹⁶¹ Id.

¹⁶² 2021 Clarifications Memo, pp. 10, 12.

¹⁶³ Id. p. 10.

¹⁶⁴ 2019 Guidance p. 29 (emphases added).

haze requirements and were not part of “energy efficiency, renewable energy, or other such programs.”¹⁶⁵ Therefore, we find that they are not a reasonable basis for projecting a change in operating parameters.

Comment D.12. TEP asserts that ADEQ reasonably evaluated additional control measures using a four-factor analysis for IGS Unit 3 based on excessive costs. TEP explains that each of the NO_x controls available for IGS Unit 3 exceed Arizona’s cost threshold of \$6,500/ton, and ADEQ therefore determined that no additional controls were reasonable for the second planning period. TEP also noted that while the average cost of installing combustion control retrofits at IGS Unit 3 was only \$230/ton above ADEQ’s \$6,500/ton threshold, the RHR does not prevent states from implementing “bright line” cost-effectiveness thresholds when considering additional control measures.

Response D.12. We partly agree with this comment. We agree that the NO_x controls analyzed for IGS Unit 3 exceed the cost threshold of \$6,500, when the emissions limits in the permit (which are not yet in effect) are considered as part of the baseline control scenario. However, as described in section IV.E.2.c.iii of our proposal, and Response D.11, we do not agree that these limits are an appropriate basis for modifying the baseline control scenario for a four-factor analysis. We also agree the RHR does not prevent states from implementing “bright line” cost-effectiveness thresholds, but we find that ADEQ did not do so in a reasonable or consistent manner in the Plan, as discussed in Response D.4.

E. Comment Letter From SRP

Sections I (“Introduction”), II (“Background”), III (“SRP Facilities Subject to the Proposed Rule”) and IV (“EPA Has Appropriately Proposed Approval of Several Aspects of Arizona’s Regional Haze SIP”) of SRP’s comment letter either provide background information or are supportive and therefore do not require a response. We respond to sections V–XI of SRP’s comment letter below.

Comment E.1. SRP comments that the proposed rule is vague and deprives the public of an adequate opportunity for comment. Citing *American Iron & Steel*

Institute v. EPA, SRP notes that the EPA is obligated to provide the public with information sufficient to facilitate public comment on the proposal, and that it is not clear which grounds for the proposed partial disapproval of the SIP submission apply to which sources. SRP provides a few examples of allegedly vague language in the proposed rule, for example, noting “some” of Arizona’s four-factor analyses were affected in a few instances. SRP asserts that because it is not clear which aspects of the EPA’s analysis apply to which facilities, the public cannot reasonably evaluate the grounds for the proposed disapproval actions, and therefore the EPA needs to issue a new proposed rule that provides additional necessary detail in support of the proposed actions.

Response E.1. We disagree with this comment. In *American Iron & Steel Institute*,¹⁶⁶ the court denied, in part, review of an EPA interim final rule due to a lack of proper notice. However, as described in Response A.1, we do not agree that the proposed rule deprives the public of an adequate opportunity for comment.

We also note that, in acting on the 2022 Arizona Regional Haze Plan, the EPA is not issuing new requirements applicable to any emissions sources. Rather, this final partial disapproval establishes a two-year deadline for the EPA to promulgate a FIP to address the relevant requirements under CAA section 110(c), unless the EPA approves a subsequent SIP submission that meets these requirements. Accordingly, Arizona can develop and submit a SIP revision addressing the disapproved elements of the Plan. Both the state’s adoption of that SIP revision and the EPA’s subsequent action on that SIP revision would be subject to public notice and comment requirements.¹⁶⁷ Similarly, if the EPA does not fully approve a SIP submission addressing the disapproved elements of the Plan, any FIP promulgated by the EPA would be subject to public notice and comment. Accordingly, there will be ample additional opportunities for the public, including potentially regulated entities, to engage in the rulemaking process before any additional requirements take effect.

Comment E.2. SRP asserts that the EPA should approve Arizona’s determination that Coronado Generating Station and SGS Unit 4 are effectively controlled because they are consistent with the law and EPA guidance. SRP

states that the 2019 Guidance indicates that sources that have recently installed effective controls are the prime example of sources that do not require evaluation during the current planning period. Specifically, SRP notes that the 2019 Guidance states that BART-eligible units that installed and began operating controls to meet BART emissions limits for the first implementation period, including sources that installed controls to comply with a better-than-BART alternative, may be considered to be effectively controlled.

For Coronado, SRP states that the source is subject to a better-than-BART alternative that the EPA approved in October 2017, and that there have been no intervening changes in technology since that time. SRP states that Coronado will also install new controls (SCR) to comply with the BART alternative by January 2026.¹⁶⁸ SRP noted that the first planning period regional haze SIP submission for Coronado also includes two additional requirements for SO₂: an SO₂ emissions limit of 0.060 lb/MMBtu, calculated on a 30-boiler-operating-day rolling average and an annual plant-wide SO₂ emissions cap of 1,970 tons per year.

SRP further asserts that SGS Unit 4 is similarly well-controlled. ADEQ determined that Unit 4’s existing controls of combustion controls (LNB+OFA) and SCR is the most effective control technology available for NO_x for coal fired EGUs, and thus, no further analysis for other control technologies was needed. For SO₂, Unit 4 is equipped with SDA systems subject to the MATS rule and has been achieving an SO₂ emissions rate over the most recent five years ranging from 0.076 to 0.10 lb/MMBtu on an annual basis. For PM, Unit 4 is equipped with a baghouse, which ADEQ found to have the highest PM control efficiency of any PM control considered for Unit 4.

Response E.2. Regarding Coronado Generating Station, we agree that the source was subject to a better-than-BART alternative. However, we note that the commenter mischaracterizes the contents of the 2019 Guidance regarding effective control determinations for BART-eligible sources. The relevant portion of the Guidance includes as an example of potentially effective controls, “BART-eligible units that *installed and began operating controls to meet BART emission limits* for the first implementation period, *on a*

¹⁶⁵ See, e.g., 2022 Arizona Regional Haze Plan, Appendix C, p. 197 (describing TEP’s submittal of permit application for NO_x caps in response to ADEQ’s initial regional haze control determination); Appendix G, p. 58 (“The purpose of the proposed SIP and significant permit revision is to support ADEQ’s forthcoming periodic comprehensive regional haze SIP submittal to EPA.”).

¹⁶⁶ See 568 F.2d 284 (3d Cir.1977), cert. denied, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978).

¹⁶⁷ See CAA section 110(l), 40 CFR 40 CFR 51.102, and 5 U.S.C. 553.

¹⁶⁸ SRP cited in the comment letter, but we note that the correct citation is 82 FR 46903 (October 10, 2017).

*pollutant-specific basis.*¹⁶⁹ The Guidance further explains that:

Although the Regional Haze Rule anticipates the re-assessment of BART-eligible sources under the reasonable progress Rule provisions, if a source installed and is currently operating controls to meet BART emission limits, it may be unlikely that there will be further available reasonable controls for such sources. *However, states may not categorically exclude all BART-eligible sources, or all sources that installed BART controls, as candidates for selection for analysis of control measures.*

The associated footnote clarifies that this consideration is not applicable to BART-subject units for which the BART requirement was met in whole or in part by emissions reductions at other units as part of a better-than-BART alternative or trading program.¹⁷⁰

As discussed in our proposal and Response B.3 of this document, ADEQ excluded all units that installed BART (or better-than-BART) controls between 2014 and 2028 for *any* pollutant. We therefore disagree that Arizona followed the 2019 Guidance in evaluating effective controls because it categorically excluded all such units without considering whether the unit in question installed effective controls for NO_x, SO₂ and PM₁₀, or whether the BART requirement was met in part by reductions at other units as part of a better-than-BART alternative.

Regarding SGS Unit 4, see Response D.2.

Comment E.3. SRP states that the EPA's assumed emissions rate for SCR controls of 0.05 lb/MMBtu is not feasible at coal-fired EGUs. SRP asserts that the EPA cannot assume all coal-fired units are capable of the same efficiencies following pollution control installation or that these controls incur the same costs for each unit nationwide, irrespective of the local conditions and operations impacting individual units. SRP further notes that the EPA's conclusion that all SCR retrofitted units can uniformly meet a NO_x emissions limit of 0.05 lb/MMBtu without proper evaluation and consideration of individual units is arbitrary and capricious and may unlawfully impose limits on EGUs that are unachievable. SRP further points out that the cited Srivastava et al. study notes units that achieved NO_x emissions rates between 0.04 and 0.07 lb/10⁶ Btu, and that this range illustrates the variability associated with SCR-controlled coal-fired unit NO_x emissions rates and the

importance of considering unit-specific factors when identifying a controlled emissions rate.

Citing Appendix K of the Plan, SRP further asserts that ADEQ specifically addressed unit-specific considerations when setting the SGS Unit 1 and 2 NO_x emissions rates by reviewing CAMPD data. By assuming an SCR controlled NO_x emissions rate of 0.06 lb/MMBtu, ADEQ is assuming that SGS Units 1 and 2 will achieve a controlled emissions rate within the top 21 percent of tangentially-fired EGUs. SRP indicates that without acknowledging ADEQ's evaluation, the EPA states that ADEQ did not provide adequate justification and unreasonably assumes an emissions rate within the top 5 percent of SCR controlled tangentially-fired EGUs is appropriate for the SGS Unit 1 and 2. SRP concludes that while the state made reasonable conclusions as to the emissions rates achievable by SCR at specific facilities, the EPA has not.

Response E.3. We disagree that the EPA has assumed that all coal-fired units are capable of the same efficiencies following pollution control installation or that these controls incur the same costs for each unit. As described in Responses B.4 and D.6, we have considered unit-specific factors in evaluating the emissions rates achievable with SCR at SGS Units 1 and 2, and we are not aware of any assertions that SGS specifically cannot achieve 0.050 lb/MMBtu when operating with SCR during periods of normal operation. Therefore, we find that ADEQ should have considered a controlled NO_x emissions rate of 0.050 lb/MMBtu for SGS Units 1 and 2 when operating with SCR during periods of normal operation. As further explained in Response B.4, this does not mean that 0.050 lb/MMBtu would be an appropriate 30–BOD limit for these units, but rather that it should be considered as annual emissions rate for purposes of the control cost analysis.

Comment E.4. SRP comments that it is not necessary to include control requirements for Coronado Generating Station in Arizona's Regional Haze SIP. SRP states that under CAA section 169A, a state (or the EPA) may only require a long-term strategy to include those control measures that are found to be necessary to make reasonable progress through the evaluation of the four statutory reasonable progress factors. SRP claims that the EPA's position that in the absence of a four-factor analysis supporting new controls, existing controls should generally be deemed necessary to make reasonable progress and be included in the regional haze SIP is not a valid reading of the

CAA's visibility provisions. Further, SRP claims that the CAA framework ties reasonable progress controls to the four-factor analysis, and does not leave room for the EPA's presumption that existing controls must be included in a SIP even whenever a four-factor analysis failed to identify new controls that should be implemented. Such existing controls may only be deemed necessary components of a regional haze SIP if a four-factor analysis independently identifies such controls as necessary for reasonable progress.

SRP further cites both the 2021 Clarifications Memo ("There may be other cases where, after having conducted robust source selection and rigorous analysis of the four factors, states have not identified any new measures that are reasonable to require for a source. In such cases, states will have to address whether the source's existing measures are necessary to make reasonable progress") and 2019 Guidance: ("[i]f a state determines that an in-place emission control at a source is a measure that is necessary to make reasonable progress and there is not already an enforceable emission limit corresponding to that control in the SIP, the state is required to adopt emission limits based on those controls as part of its long-term strategy in the SIP via the regional haze second planning period plan submission"). SRP claims that the EPA therefore acknowledged that there should be no presumption that existing measures are needed for reasonable progress.

Lastly, SRP states that Coronado Generating Station is already subject to a source-specific SIP revision that was designed to implement the better-than-BART alternative during the first planning period of the regional haze program. SRP asserts that because these requirements are already binding and enforceable, there is no need for any additional action to address Coronado.

Response E.4. First, we disagree that existing controls being necessary for reasonable progress does not have a basis in the statute for two reasons. First, under CAA 169A(a)(1), the national visibility goal is generally separated into two parts: (1) the prevention of any future, and (2) the remedying of any existing anthropogenic visibility impairment. As noted in the proposed rule,¹⁷¹ and in response B.1, continued implementation of the source's existing measures is generally necessary to prevent future emissions increases and thus necessary

¹⁶⁹ See 2019 Guidance, p. 25 (emphasis added).

¹⁷⁰ *Id.*, n. 54.

¹⁷¹ 89 FR 47398, 47404.

to make reasonable progress towards the national goal.

Second, control measures used to fulfill a CAA requirement must be in the SIP.¹⁷² In this instance, in order to make reasonable progress toward the national goal, the CAA requires every regional haze SIP to contain “such emission limits, schedules of compliance, and other measures as may be necessary for reasonable progress.”¹⁷³ The CAA also requires each regional haze SIP submission to include a long-term strategy “for making reasonable progress toward meeting the national goal.”¹⁷⁴ Finally, reasonable progress is defined in the CAA as a consideration of the four factors outlined in CAA 169A(g)(1). If the State opts to avoid conducting the required consideration of the four statutory factors on a source or group of sources based solely on the source’s existing measures, then, in order to fulfill its long-term strategy requirements, those existing measures must also be in the SIP, or else the state must demonstrate that the existing measures are not necessary to make reasonable progress. This ensures that this source’s contribution to visibility impairment will not increase, and also ensures that all measures being relied upon to fulfill the regional haze requirements are in the SIP. Therefore, if Arizona is relying on existing measures to avoid the statutorily required four factor analysis, then those existing measures must be in the SIP and thus a part of its long-term strategy for the second planning period, unless the State demonstrates that they are not necessary to make reasonable progress.

Additionally, we disagree that the EPA’s guidance documents acknowledged that there should be no presumption that existing measures are needed for reasonable progress. The 2021 Clarifications Memo is clear that, under the CAA and the RHR, “when the outcome of a four-factor analysis is that no new measures are reasonable for a source, the source’s *existing measures are generally needed to prevent future visibility impairment (i.e., to prevent future emission increases) and thus necessary to make reasonable progress.*”¹⁷⁵ ADEQ did not provide this analysis of whether existing measures are necessary to make reasonable progress.

Finally, while we agree that Coronado Generating Station is already subject to

a source-specific SIP that was designed to implement a better-than-BART alternative for the first implementation period, we do not agree that this automatically means, without further justification, that there is no need for any additional action to Coronado in the second implementation period for the reasons described in E.2.

Comment E.5. SRP asserts that the EPA should approve Arizona’s control determinations and four-factor analyses with respect to cost-effectiveness thresholds, incremental costs, compliance with the Control Cost Manual, and consideration of visibility.

First, regarding cost-effectiveness thresholds, SRP indicates that Arizona’s cost-effectiveness threshold of \$6,500/ton is reasonable and should be approved, along with the control determinations the state made in reliance on that threshold. SRP noted other examples of cost-effectiveness thresholds in other states (Georgia and Arkansas) that are lower than the values Arizona adopted. SRP also cites the EPA’s recent proposal for Missouri that cites a \$6,060 to \$7,600/ton threshold from the Central Regional Air Planning Association and Texas BART FIP threshold range of \$5,300/ton to \$6,500/ton that is consistent with the \$6,500/ton threshold adopted by Arizona. Therefore, SRP concludes that ADEQ’s threshold is reasonable and represents a conservatively high threshold from a historical perspective.

Second, regarding incremental costs, SRP asserts that the EPA provided no rationale for finding ADEQ’s approach unreasonable, and that it was appropriate to only consider incremental costs if a simple dollar-per-ton analysis suggests a control might be cost-effective in the absence of more nuanced information. SRP notes that suggesting that states cannot reasonably take incremental costs into account to reject control requirements far exceeds the EPA’s statutory authority, citing the court decision in *American Corn Growers Association vs. EPA* as stating that “[t]he Haze Rule calls for states to play the lead role in designing and implementing regional haze program to clear the air in national parks and wilderness areas.” SRP further states that the EPA states that Arizona considered only a single BART determination in finding that incremental costs of \$9,400–13,500/ton were excessive, but this value is in line with past EPA actions finding incremental costs excessive.¹⁷⁶

Third, regarding compliance with the Control Cost Manual, SRP states that the EPA did not provide enough information for the public to tell what it considers to be the full range of the deviations from the Cost Control Manual, except for some of the State’s remaining useful life values. SRP asserts that the EPA’s rules specifically allow for deviations from the Manual’s methodology and sample calculations and values whenever site-specific information is more accurate.

Lastly, regarding consideration of visibility, SRP asserts that the EPA appears to place inappropriate limits on Arizona’s consideration of visibility impacts as part of its assessment of reasonable progress, and that the State took visibility into account as additional confirmation that controls were not reasonable. SRP also states that the EPA has provided no context or analysis for stating that visibility impacts must be assessed in context to determine if they are truly meaningful and justify expensive control requirements. SRP points out that Table 10–5 of the 2022 Arizona Regional Haze Plan shows that natural visibility is projected to occur at all statewide sites between 2028 and 2056, well ahead 2064 natural conditions. SRP concludes that Arizona appropriately determined that controls were not reasonable for SGS when visibility is rapidly improving, costs are over or very near a reasonable cost threshold, and where visibility improvements from potential controls would be relatively small.

Response E.5. The EPA disagrees with this comment for a number of reasons. First, with respect to cost-effectiveness thresholds, the EPA clarifies that we are not disapproving Arizona’s average cost-effectiveness threshold specifically, but rather, finds that the State inconsistently applied the threshold and did not adequately justify how this approach resulted in a reasonable set of control measures in the long-term strategy for the second planning period. We also note that the fact that other states have applied lower or similar thresholds does not automatically make Arizona’s threshold reasonable. For further explanation on this point, see Response D.4.

Second, with respect to incremental costs, contrary to the commenter’s assertion, our proposed rule did not suggest that Arizona cannot consider incremental costs. However, we reiterate that, if a state chooses to consider incremental costs, it must do so in a reasonable and consistent manner and

¹⁷² See *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1175–77 (9th Cir. 2015).

¹⁷³ CAA 169A(b)(2).

¹⁷⁴ CAA 169A(b)(2)(B).

¹⁷⁵ 2021 Clarifications Memo, pp. 8–9 (emphasis added).

¹⁷⁶ See, e.g., 79 FR 9318, 9342 (rejecting controls based on incremental costs of \$8,803 and \$8,576/ton); 76 FR 80754, 80756 (December 27, 2011)

(rejecting controls based on incremental costs of \$5,367/ton).

that Arizona did not do so in the Plan. See Responses B.6, B.8, and D.9.

Third, with respect to compliance with the Control Cost Manual, we note that, in addition to discussing remaining useful life values, we cited an example of where the State used an interest rate that was above the then-current prime rate without adequate documentation.¹⁷⁷ While we agree with the commenter that States can deviate from the Cost Control Manual's methodology and sample calculations and values whenever site-specific information is more accurate, ADEQ did not provide such relevant site-specific documentation. In situations where an enforceable shutdown date does not exist, the remaining useful life of a control under consideration should be the full period of the useful life of that control as recommended by the EPA's Control Cost Manual.¹⁷⁸ See Responses A.1 and C.4.

With respect to consideration of visibility, we disagree that the EPA has provided no context or analysis for stating that visibility impacts must be assessed in context. On the contrary, in our proposed notice, we explained why the evaluation and control of smaller and better-controlled sources in Arizona may be necessary to achieve the national goal.¹⁷⁹ However, we also noted that SGS specifically is by far the largest emissions source analyzed by ADEQ in the 2022 Arizona Regional Haze Plan and ADEQ found that Units 3 and 4, as well as Units 1 and 2 for PM₁₀, were effectively controlled, leaving only NO_x and SO₂ at Units 1 and 2 as providing an opportunity for further control at this source.¹⁸⁰ In addition, we cited to portions of the 2019 Guidance and Clarifications Memo that provide additional recommendations to states that visibility improvements could reasonably be considered in conjunction with a four-factor analysis. To the extent that the commenter is arguing that the EPA should have provided our own analysis of visibility impacts, we disagree. The EPA's role in reviewing SIP submittals is to assess their compliance with applicable requirements, not to address those requirements ourselves, as we would be obligated to do in a FIP.

Regarding Table 10–5, we note that this table is based on Arizona's RPGs, and that contrary to SRP's suggestion, ADEQ did not cite or discuss this table or otherwise reference its RPGs in making its control determinations. Furthermore, as explained in our proposal “[b]ecause RPGs are the modeled result of the measures in states’ long-term strategies (as well as other measures required under the CAA), they cannot be determined before states have conducted their four-factor analyses and determined the control measures that are necessary to make reasonable progress.”¹⁸¹ Accordingly, we do not agree that Arizona did or should have considered the information in Table 10–5 in making its control determinations. We also note that the commenter mischaracterizes the contents of this table, insofar as the “projected date of natural visibility for SYCA” is 2089, which is well after 2064. See also response C.5.

In sum, we disagree that Arizona appropriately determined that controls were not reasonable for SGS for the reasons described in this response, elsewhere in this document and in our proposal.

Comment E.6. SRP claims that the EPA improperly asserts that Arizona's SIP must require installation of specific control technologies, specifically with regards to SDA upgrades at SGS Units 1 and 2. SRP states that the regional haze program has not been used to impose requirements to install and operate specific technologies, and that some states have made use of emissions caps rather than emissions rates and other creative tools to address regional haze requirements, including Coronado Generating Station during the first planning period.

Response E.6. We agree with the commenter that ADEQ was not obligated to require installation of a particular control. However, the State is obligated to set emissions limitations or establish other measures corresponding to the controls that it determined to be necessary to make reasonable progress.¹⁸² See also Response B.8 where we note issues with ADEQ's

provided rationale in justifying the mass-based emissions caps at SGS and IGS. Finally, we note that the example of Coronado Generating Station was under the better-than-BART provisions of 40 CFR 51.308(e)(2), rather than the provisions of 40 CFR 51.308(f), which govern regional haze plans for the second implementation period.

Comment E.7. SRP comments that the EPA's disapproval of 40 CFR 51.308(f)(3)(ii) for the Sycamore Canyon monitor fails to acknowledge or address critical monitoring deficiencies. SRP noted that ADEQ's determination that monitor irregularities should preclude the site from 40 CFR 51.308(f)(3)(ii)(A) requirements, and that the EPA cannot ignore the issues. SRP states that ADEQ has shown that the site would have experienced drastic visibility improvements if not for the impact of PM, and that the increases of coarse mass and soil that occurred after the monitor was relocated in 2015 shows that the increasing trends of dust at the monitor originate from local sources. SRP further notes that the current monitor location is not within the Class I area, so it is unreasonable to assume the local dust impacts experienced at the monitor result in visibility degradation within the Class I area. SRP asserts that the EPA's current disapproval deprives the public of an adequate opportunity to comment as the EPA fails to discuss the monitoring irregularities at the monitor. SRP claims that the EPA's disapproval of 40 CFR 51.308(f)(3)(ii) is arbitrary and capricious because the action ignores the facts presented by ADEQ, ADEQ's recommendation that the SYCA monitor should not be used for long-term progress analysis, and instead relies on questionable monitoring data without any discussion of its merits.

Response E.7. Please see Response B.9.

Further, we do not agree that we ignored ADEQ's monitoring analysis. On the contrary, we specifically acknowledged this analysis in our proposal.¹⁸³ However, we found this analysis was insufficient to meet the requirements of 40 CFR 51.308(f)(3)(ii)(A), given the flaws in ADEQ's long-term strategy.

We also disagree with the commenter's assertion that ADEQ determined that monitor irregularities should preclude the site from 40 CFR 51.308(f)(3)(ii)(A) requirements. Rather, ADEQ asserted that the Plan complied

¹⁸¹ Id. at 47405.

¹⁸² CAA 169A(b)(2) (“... each applicable implementation plan for a State . . . which may reasonably be anticipated to cause or contribute to any impairment of visibility . . . [must] contain such emissions limits, schedules of compliance and other measures as may be necessary to make reasonable progress[.]”); 40 CFR 51.308(f)(2) (“Each State must submit a long-term strategy that addresses regional haze visibility impairment . . . the long-term strategy must include the enforceable emissions limitations . . . that are necessary to make reasonable progress.”); see also 2021 Clarifications Memo, pp. 8–9.

¹⁷⁷ 89 FR 47398, 47429.

¹⁷⁸ 2019 Guidance, pp. 33–34. See also 40 CFR 51.308(f)(2)(iii) (“The State must document the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine the emission reduction measures that are necessary to make reasonable progress in each mandatory Class I Federal area it affects”).

¹⁷⁹ 89 FR 47398, 47430.

¹⁸⁰ Id.

¹⁸³ See 89 FR 47398, 47433 (“ADEQ provided a discussion in its submission that explains how the monitor was relocated in 2015 and experienced increases in soil and coarse mass extinction.”)

with these requirements.¹⁸⁴ We do not agree with this assertion for the reasons stated in our proposal and Response B.9 of this document. ADEQ also noted that it will continue to monitor and investigate the source of coarse mass impacts at the monitor site during subsequent progress reports and periodic comprehensive Regional Haze SIP revisions.¹⁸⁵ We will work with ADEQ and other stakeholders on the consideration of this issue in the development of future SIP revisions.

F. Community Sign-On Letter

The Community Sign-On Letter is supportive with three suggestions for improvement. The supportive portions of the letter do not require a response.

Comment F.1. The commenter requests that the EPA confirm the polluting facilities that ADEQ improperly excluded from analysis in the state's plan.

Response F.1. Please see Response A.1, which describes the EPA's approach to reviewing the Plan generally and source selection specifically.

Comment F.2. The commenter requests that the EPA confirm the specific errors in each of the selected source's review of pollution controls.

Response F.2. We have explained the bases for our partial disapproval with respect to 40 CFR 51.308(f)(2) in our proposal and elsewhere in this document. Therefore, the EPA's disapproval of 51.308(f)(2) is justified.

Comment F.3. The commenter requests that the EPA consider the equity and environmental justice impacts of the state's plan and maximize the environmental justice co-benefits of haze pollution reduction opportunities.

Response F.3. The regional haze statutory provisions do not explicitly address considerations of environmental justice, and neither do the regulatory requirements of the second planning period in 40 CFR 51.308(f), (g), and (i). As explained in "EPA Legal Tools to Advance Environmental Justice,"¹⁸⁶ the CAA provides states with the discretion to consider environmental justice in developing rules and measures related to regional haze. While a State may consider environmental justice under

the reasonable progress factors, neither the statute nor the RHR requires states to conduct an environmental justice analysis for the EPA to approve a SIP submission. Furthermore, the CAA and applicable implementing regulations neither prohibit nor require such an evaluation of environmental justice with regard to a regional haze SIP submission. The EPA is not identifying environmental justice as a basis for its decision to partially approve and partially disapprove Arizona's SIP revision.

G. Comment Letter From NPCA et al.

Sections I ("Background") and II ("EPA's Proposed Rule Correctly Disapproves ADEQ's Approach To Source Selection, Four-Factor Analyses, Control Determinations, and Reasonable Progress Goals") of the NPCA et al.'s comment letter either provide background information or are supportive and therefore do not require a response. We respond to sections III–VI of the NPCA et al.'s comment letter below.

Comment G.1. NPCA et al. request the EPA to be more specific about the point sources of concern. First, the commenter states that in the final rule, the EPA should list the sources that ADEQ improperly screened out and failed to conduct a four-factor reasonable progress analysis for, namely Apache Unit 3, Cholla Units 1, 3–4, Coronado, ASARCO Hayden Smelter, Lhoist-Nelson Lime Plant, Apache Nitrogen, Freeport-McMoRan Miami Smelter.

Second, the commenter states that the EPA should list each point source for which the EPA is disapproving ADEQ's control determinations, namely SGS Units 1 and 2 NO_x and SO₂ analyses, SGS 3 and 4 SO₂ analyses, IGS 3 and 4 NO_x analyses, Williams Compressor Station NO_x analysis, Wilcox Compressor Station NO_x analysis, Drake Cement Plant NO_x and SO₂ analyses, and Phoenix Cement-Clarkdale Plant, NO_x and PM₁₀ analyses.

Response G.1. See Response A.1. The EPA is disapproving long-term strategy as a whole. Any subsequent SIP revision developed by the State, or FIP developed by EPA, will need to establish a long-term strategy in accordance with the regulatory requirements. 40 CFR 51.308(f)(2).

Comment G.2. NPCA et al. comment that the EPA must consider the equity and environmental justice impacts of its action on Arizona's Regional Haze SIP. The commenter indicates that the EPA guidance documents direct states to consider the broader environmental implications of their regional haze plans, by requiring an analysis of the

"non-air quality environmental impacts of compliance," including environmental justice, and that meaningful outreach and engagement to environmental justice communities is crucial. NPCA et al. request ADEQ and the EPA to conduct meaningful outreach, substantively incorporate equity and environmental justice into the SIP revision and the supporting technical documents, such as preparing maps that detail the location of environmental justice communities in Arizona and the location of nearby visibility-impairing sources. The commenters specify that a number of visibility-impairing sources in Arizona are located near vulnerable communities, yet ADEQ did not conduct a four-factor analysis for many of these sources.

Response G.2. See Response F.3. NPCA et al. provided additional demographic information for communities near several sources in Arizona. Without agreeing with the particular relevance or accuracy of this information, the EPA acknowledges the demographic information provided as part of the comment. As discussed in our proposal and in this document, the EPA has evaluated Arizona's SIP submission against the statutory and regulatory regional haze requirements and determined that it has not satisfied certain minimum requirements.

Comment G.3. NPCA et al. note that the EPA must disapprove ADEQ's adjustments to the URP glidepath for each Class I area. The commenter asserts that the EPA can only approve these URP glidepath adjustments if it determines ADEQ used "scientifically valid data and methods" per 40 CFR 51.308(f)(1)(vi)(B), and they request the EPA to disapprove ADEQ's URP glidepath adjustments for two reasons.

First, NPCA et al. state that the EPA incorrectly suggests that ADEQ's adjustments were de minimis and had no effect on whether the RPGs for each Class I area are above or below the URP glidepath. However, ADEQ's decision to adjust the default URP glidepaths significantly affected whether the RPG for several Class I areas are above or below the glidepath, such as Chiricahua Wilderness, Saguaro National Park, and Superstition Wilderness.

Second, NPCA et al. state that the EPA's determination that ADEQ's glidepath adjustments used scientifically valid data and methods is unsound given that the EPA previously expressed concerns with these data and methods. The commenter further states that the EPA highlighted substantial problems in its 2019 Modeling

¹⁸⁴ Plan p. 106 ("In accordance with 40 CFR 51.308(f)(3)(ii)(A), Arizona has provided robust documentation in support of the state's source selection criteria and reasonable progress determinations for selecting measures for inclusion in its long-term strategy.")

¹⁸⁶ See EPA Legal Tools to Advance Environmental Justice, May 2022, available at www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf at 35–36.

Technical Support Document (TSD)¹⁸⁷ with available data and methods for adjusting Class I glidepaths based on both international and prescribed wildland fire emissions, including international emissions data from just a single year,¹⁸⁸ and uncertainty in many of the calculations and modeling and ambient data.¹⁸⁹

Response G.3. As noted in our proposal and in our response to Comment C.5, being on or below the URP does not relieve a state from considering the four statutory factors to determine what level of control is needed to achieve reasonable progress.¹⁹⁰ The URP is used in later steps of the reasonable progress analysis for informational purposes and to provide a non-enforceable benchmark against which to assess a Class I area's rate of visibility improvement. Achieving the URP does not mean that a Class I area is making "reasonable progress" and does not relieve a state from using the four statutory factors to determine what level of control is needed to achieve such progress.¹⁹¹

We also find that the specific points raised by NPCA are overstated, and we therefore disagree that we should disapprove ADEQ's glidepath adjustments. First, the EPA's proposal stated, "[t]he *choice of adjustment option* made no difference in whether the RPG for each area was above or below its URP glidepath,"¹⁹² not that an adjustment, in general, made no difference. That is, the glidepath adjustment results were nearly the same between the option that adjusted for international anthropogenic impacts alone, and the option that adjusted for international impacts together with wildland prescribed fire impacts. The commenter is correct that for several Class I areas, the adjustment itself does make a difference in the assessment of whether projected visibility impacts are above or below the glidepath. Our assessment of the URP and RPGs took that into account, as noted in our proposal.¹⁹³ If the adjustment were

rejected altogether, that would strengthen the case for the need for the State to make a "robust demonstration" that there are no reasonable additional emissions reduction measures, although in this case that need is already established because Sycamore Canyon Wilderness impacts are above its glidepath with or without adjustment.¹⁹⁴

Second, the EPA disagrees that the glidepath adjustments were not based on scientifically valid data and methods. The 2019 Modeling TSD acknowledges various limitations and uncertainties in various model inputs and calculation approaches, which is always the case in modeling. That acknowledgement was not intended as an assertion by the EPA that its own data and methods were scientifically invalid. Similarly, it was not intended that a glidepath adjustment made using the same or similar methods would not be based on scientifically valid data and methods. Rather, the data and methods used were the best available to the EPA at the time of the modeling in that TSD, and presented as a reasonable and valid approach for glidepath adjustment that states could consider in developing their SIPs, without precluding the use of better data and methods that a state might develop. The EPA's specific statement about "uncertainty in many of the calculations and modeling and ambient data" was in the context of alternative approaches to adjusting the glidepath, for which the 2019 Modeling TSD provided five,¹⁹⁵ including the default. Those approaches differed in whether international impacts and prescribed fire should be combined with the baseline model run on an absolute or relative basis (*i.e.*, simply added in or applied as a percent difference), and whether natural conditions should be estimated from monitored data or from modeling. There is not one clearly best approach that would be most appropriate for all Class I areas in the country, but the EPA chose one as the default and provided a range of adjustment results. For Arizona Class I areas, the glidepath adjustment in the default approach was nearly the same as the maximum among the approaches examined, except for the Grand Canyon and Sycamore Canyon Wilderness, where it gave closer to the minimum adjustment among the approaches considered.¹⁹⁶ As noted in the EPA's proposal, the WRAP results used by ADEQ were fairly close to default

approach values estimated by the EPA and were determined to be based on scientifically valid data and methods.¹⁹⁷ The EPA does not find any reason, and the commenters do not provide any additional reasons to determine otherwise.

Comment G.4. NPCA et al. indicate that the EPA must disapprove additional aspects of ADEQ's source selection process, noting that ADEQ's Q/d threshold of 10 is arbitrarily high, ADEQ should not have eliminated the totality of "effectively-controlled" process emissions from its Q/d analysis, and ADEQ's "de minimis point source process determination" is arbitrary and capricious.

Response G.4. As explained in our proposal and the 2021 Clarifications Memo, the RHR does not require states to consider controls for all sources, all source categories, or any or all sources in a particular source category.¹⁹⁸ Rather, the states have discretion to choose any source selection methodology or threshold that is reasonable, but the choices they make must be explained and should be designed to result in a set of sources which capture a meaningful portion of the state's total contribution to visibility impairment. To this end, 40 CFR 51.308(f)(2)(i) requires that a state's SIP submission must include "a description of the criteria it used to determine which sources or groups of sources it evaluated." The technical basis for source selection, which may include methods for quantifying potential visibility impacts such as emissions divided by distance metrics, trajectory analyses, residence time analyses, and/or photochemical modeling, must also be appropriately documented, as required by 40 CFR 51.308(f)(2)(iii).

Overall, in this particular instance, the EPA finds that that many aspects of ADEQ's source selection process, such as its focus on sulfate, nitrate, and coarse mass and its use of a Q/d value of 10 for point sources, were reasonable and adequately explained and documented. However, we also find that ADEQ did not provide an adequate justification for screening out certain sources and units from conducting a four-factor analysis on the basis that they are "effectively controlled" as part of its source selection process.¹⁹⁹ As the

¹⁸⁷ Memorandum from Richard A. Wayland, Director, Air Quality Assessment Division, EPA, to Regional Air Division Directors, Subject: "Availability of Modeling Data and Associated Technical Support Document for the EPA's Updated 2028 Visibility Air Quality Modeling," September 19, 2019, available at <https://www.epa.gov/visibility/technical-support-document-epas-updated-2028-regional-haze-modeling>.

¹⁸⁸ 2019 Modeling TSD, p. 37.

¹⁸⁹ 2019 Modeling TSD, p. 67.

¹⁹⁰ 89 FR 47398, 47402, n. 52.

¹⁹¹ See, e.g., 82 FR 3078, 3093 and 89 FR 47398, 47402, n. 52.

¹⁹² 89 FR 47398, 47411 (emphasis added).

¹⁹³ 89 FR 47398, 47432–47433.

¹⁹⁴ 2022 Arizona Regional Haze Plan, p. D–24 and Figure D–39.

¹⁹⁵ 2019 modeling TSD, p. 55.

¹⁹⁶ 2019 modeling TSD, p. 56, Table 5–2.

¹⁹⁷ 89 FR 47398, 47411.

¹⁹⁸ 89 FR 47398, 47403; 2021 Clarifications Memo, Sections 2 and 2.1.

¹⁹⁹ See 40 CFR 51.308(f)(2)(i) (" . . . The State must include in its implementation plan a description of the criteria is used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration

EPA has previously stated, “[s]ource selection is a critical step in states’ analytical processes. All subsequent determinations of what constitutes reasonable progress flow from states’ initial decisions regarding the universe of pollutants and sources they will consider for the second planning period.”²⁰⁰ Therefore, Arizona’s source selection methodology, including unjustified effectively controlled determinations, supports the EPA’s determination that Arizona’s long-term strategy did not include all measures necessary to make reasonable progress. Therefore, EPA’s disapproval of 40 CFR 51.308(f)(2), as a whole, is reasonable.

Comment G.5. NPCA et al. state that ADEQ’s average cost-effectiveness threshold is too low, and requests the EPA to further clarify that ADEQ’s \$6,500 per ton cost threshold is too low and unreasonably excludes cost-effective control measures.

Response G.5. While the EPA is not disapproving ADEQ’s cost threshold, we nonetheless find that the State did not apply this threshold in a consistent and reasonable manner, as described in our proposal²⁰¹ and Response D.4 of this document.

Comment G.6. NPCA et al. comment that the EPA must promptly issue a Regional Haze FIP for Arizona. The commenter recommends that to provide sufficient time for sources to implement control measures before the second implementation period ends in 2028, the EPA should issue a proposed FIP in 2024 and finalize the FIP by the end of 2025.

Response G.6. Disapproving a SIP submission establishes a two-year deadline for the EPA to promulgate a FIP to address the relevant requirements under CAA section 110(c), unless the EPA approves a subsequent SIP submission that meets these requirements. The EPA is not proposing a FIP for the disapproved requirements of the 2022 Arizona Regional Haze Plan at this time.

III. Final Action

Under CAA section 110(k)(3), and based on the evaluation and rationale presented in the proposed rule and this final rule, the EPA is partially approving and partially disapproving the 2022 Arizona Regional Haze Plan. Specifically, the EPA is approving the elements of the 2022 Arizona Regional Haze Plan related to requirements contained in 40 CFR 51.308(f)(1), (f)(4)–

(6), and (g)(1)–(5). The EPA is disapproving the elements of the 2022 Arizona Regional Haze Plan related to requirements contained in 40 CFR 51.308(f)(2), (f)(3), and (i)(2)–(4). Further, the EPA is disapproving the interstate transport requirements of CAA section 110(a)(2)(D)(i)(II) prong 4 (visibility) for the 2018 Ozone I–SIP submittal and 2015 PM_{2.5} I–SIP submittal.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of part D, title I of the CAA or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) starts a sanctions clock. Arizona’s 2022 Regional Haze Plan, 2018 Ozone I–SIP submittal, and 2015 PM_{2.5} I–SIP submittal were not submitted to meet any of these requirements. Therefore, the disapprovals noted in section III.B will not trigger any offset or highway sanctions clocks. Disapproving a SIP submission also establishes a two-year deadline for the EPA to promulgate a FIP to address the relevant requirements under CAA section 110(c), unless the EPA approves a subsequent SIP submission that meets these requirements. We anticipate that any SIP or FIP that remedies the disapprovals with respect to Regional Haze requirements, would also, in conjunction with the existing Arizona Regional Haze FIP, remedy the disapproval for the interstate transport visibility requirement of CAA section 110(a)(2)(D)(i)(II) for the 2018 Ozone I–SIP submittal and 2015 PM_{2.5} I–SIP submittal.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this final action partially approves and partially disapproves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or Tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

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

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction, and will not impose substantial direct costs on Tribal governments or preempt Tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those

in selecting the measures for inclusion in its long-term strategy”).

²⁰⁰ 2021 Clarifications Memo, p. 3.

²⁰¹ 89 FR 47398, 47429.

regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it merely partially approves and partially disapproves state law as meeting federal requirements. Furthermore, the EPA’s Policy on Children’s Health does not apply to this action.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on communities with environmental justice (EJ) concerns to

the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements E.O. 12898 and defines EJ as, among other things, “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.”

The State did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898/14096 of achieving EJ for communities with EJ concerns.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 18, 2025. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it

extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: December 10, 2024.

Martha Guzman Aceves,
Regional Administrator, Region IX.

For the reasons stated in the preamble, the EPA amends chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart D—Arizona

■ 2. In § 52.120(e), amend Table 1 by adding an entry for “State Implementation Plan Revision: Regional Haze Program (2018–2028)” before the entry for “Arizona State Implementation Plan Revision under Clean Air Act Section 110(a)(1) and (2); Implementation of the 2008 Lead National Ambient Air Quality Standards, excluding the appendices.”

The addition reads as follows:

§ 52.120 Identification of plan.

* * * * *
(e) * * *

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES
[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively] ¹

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
The State of Arizona Air Pollution Control Implementation Plan				
Clean Air Act Section 110(a)(2) State Implementation Plan Elements (Excluding Part D Elements and Plans)				
* * *	* * *	* * *	* * *	*
State Implementation Plan Revision: Regional Haze Program (2018–2028), excluding Chapters 2, 6.1, 6.2, 6.3, 7, 8, 9, and 10 and Appendices B, C, D, E, F, G, H, I, J, and L.	State-wide	August 15, 2022	January 17, 2025.	

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES—Continued

[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively]¹

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
* * * * *				
¹ Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.				
* * * * *				
■ 3. Section 52.145 is amended by adding paragraph (o) to read as follows:	ACTION: Final rule.			number: (202) 564–4016; e-mail address: lloyd.tyler@epa.gov .
§ 52.145 Visibility protection.	SUMMARY: The Environmental Protection Agency (EPA or the Agency) is amending the new chemicals procedural regulations under the Toxic Substances Control Act (TSCA). These amendments align the regulatory text with the amendments to TSCA's new chemicals review provisions contained in the Frank R. Lautenberg Chemical Safety for the 21st Century Act, enacted on June 22, 2016, will improve the efficiency of EPA's review processes, and update the regulations based on existing policies and experience implementing the New Chemicals Program. This final rule includes amendments that will increase the quality of information initially submitted in new chemicals notices and improve the Agency's processes for timely, effective completion of individual risk assessments and the new chemicals review process overall. EPA is also finalizing several amendments to the regulations for low volume exemptions (LVEs) and low release and exposure exemptions (LoREXs), which will require EPA approval of an exemption notice prior to commencement of manufacture, make per- and polyfluoroalkyl substances (PFAS) categorically ineligible for these exemptions, and provide that certain persistent, bioaccumulative, toxic (PBT) chemical substances are ineligible for these exemptions.			<i>For general information contact:</i> The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: TSCA-Hotline@epa.gov .
(o) <i>Disapproval.</i> On August 15, 2022, the Arizona Department of Environmental Quality submitted the “State Implementation Plan Revision: Regional Haze Program (2018–2028).”				SUPPLEMENTARY INFORMATION:
(1) The following portions of the “State Implementation Plan Revision: Regional Haze Program (2018–2028)” are disapproved because they do not meet the applicable requirements of Clean Air Act sections 169A and 169B and the Regional Haze Rule in 40 CFR 51.301 through 51.308.				I. Executive Summary
(i) Chapters 2, 6.1, 6.2, 6.3, 7, 8, 9, and 10;				<i>A. Does this action apply to me?</i>
(ii) Appendices B, C, D, E, F, G, H, I, J, and L.				You may be potentially affected by this action if you intend to manufacture a new chemical substance, or manufacture or process a chemical substance for a significant new use. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:
■ 4. Section 52.147 is amended by adding paragraph (f) to read as follows:	DATES: This final rule is effective January 17, 2025.			• Chemical Manufacturers (NAICS code 325). • Petroleum and Coal Products (NAICS code 324). • Merchant Wholesalers, Nondurable Goods (NAICS code 424).
§ 52.147 Interstate transport.	ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2022–0902, is available online at https://www.regulations.gov . Additional instructions for visiting the docket, along with more information about dockets generally, is available at https://www.epa.gov/dockets .			This list details the types of entities that EPA is aware could potentially be regulated by this action. Other types of entities not listed could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR 720.22, 721.5, 723.50, and 725.1. If you have questions regarding the applicability of this action, please consult the technical person listed under FOR FURTHER INFORMATION CONTACT .
(f) <i>Disapproval.</i> The SIPs submitted on December 11, 2015 and September 24, 2018 do not meet the requirements of Clean Air Act section 110(a)(2)(D)(i)(II) (interfere with measures in any other state to protect visibility, only) for the 2012 PM _{2.5} NAAQS and the 2015 ozone NAAQS, respectively.				<i>B. What is the Agency's authority for taking this action?</i>
[FR Doc. 2024–29508 Filed 12–17–24; 8:45 am]				EPA is promulgating this rule pursuant to its authority in TSCA section 5 (15 U.S.C. 2604). Section 5(a)(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2604(a)(1), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016 (Pub. L. 114–182) (herein referred to as the “2016 Lautenberg
BILLING CODE 6560–50–P				
ENVIRONMENTAL PROTECTION AGENCY				
40 CFR Parts 68, 372, 703, 720, 721, 723, 725, and 761				
[EPA–HQ–OPPT–2022–0902; FRL–7906–02–OCSPP]				
RIN 2070–AK65				
Updates to New Chemicals Regulations Under the Toxic Substances Control Act (TSCA)				
AGENCY: Environmental Protection Agency (EPA).				

Amendments”), provides that no person, as defined at 40 CFR 720.3, may manufacture (which includes import under TSCA) a new chemical substance or manufacture or process a chemical substance for a use which EPA has determined is a significant new use, unless at least 90 days prior to such manufacture or processing that person submits a notice to EPA containing the information required by TSCA section 5(d). EPA must conduct a review of the notice, make one of five possible determinations pertaining to the likelihood of unreasonable risk of injury to health or the environment, and take any actions required as a result of that determination, all within the applicable review period. The submitted notice must include the information described in TSCA section 5(d)(1): insofar as known to the submitter or reasonably ascertainable, information described in certain provisions of TSCA section 8(a)(2) (e.g., chemical identity, use, and exposure information); in the form and manner prescribed by EPA, information in the possession or control of the submitter related to the health or environmental effects of the chemical substance; and a description of any other information concerning the environmental and health effects of the chemical substance, insofar as known to the submitter or reasonably ascertainable.

C. What action is the Agency taking?

EPA is promulgating amendments to the procedural regulations at 40 CFR parts 720, 721, and 725 to align with the requirements in TSCA section 5, as amended by the 2016 Lautenberg Amendments, and to make additional updates. EPA is amending the regulations to specify that EPA must make a determination on each Pre-Manufacture Notice (PMN), Significant New Use Notice (SNUN), and Microbial Commercial Activity Notice (MCAN) received before the submitter may commence manufacturing or processing of the chemical substance that is the subject of the notice, and to list the five possible determinations and the actions required in association with those determinations. In addition, EPA is finalizing amendments that will clarify the level of detail expected for the information that a submitter is required to include in a PMN, SNUN, or exemption notice in order for the notice to be considered complete. EPA is also finalizing amendments to the procedures for reviewing PMNs and SNUNs; specifically, procedures for addressing PMNs and SNUNs that have errors or are incomplete or that are amended during the applicable review

period. Additionally, EPA is finalizing several amendments to the regulations at 40 CFR 723.50 for LVEs and LoREXs. These amendments would require EPA approval of an exemption notice before the submitter may commence manufacture, allow EPA to inform an LVE or LoREX holder when the chemical substance that is the subject of the exemption becomes subject to a significant new use rule (SNUR) under TSCA and the chemical identity is confidential, make PFAS categorically ineligible for these exemptions, and make certain PBTs ineligible for these exemptions. Finally, EPA is amending the regulations pertaining to suspensions for all TSCA section 5 notices to allow submitters to request suspensions for up to 30 days via oral or e-mail request. This final rule takes into consideration comments received on the proposed rule (88 FR 34100, May 26, 2023 (FRL-7906-01-OCSP)). Details on the final rule requirements, including modifications from the proposal, are explained in Unit III.

D. Why is the Agency taking this action?

Under amended TSCA, EPA must review all notices submitted under TSCA section 5(a)(1) and make a determination pertaining to the risks of new chemical substances or significant new uses of chemical substances described in such notices before they can proceed to the marketplace. Before the 2016 Lautenberg Amendments, TSCA allowed the PMN or SNUN submitter to commence manufacturing or processing upon expiration of the review period unless EPA made an affirmative finding of unreasonable risk. Under amended TSCA, EPA must review all notices submitted under TSCA section 5(a)(1) and make a determination pertaining to the risks of every new chemical substance or significant new use of a chemical substance described in such notices before they can proceed to the marketplace. To reflect and better meet these requirements, EPA is amending the procedural regulations codified at 40 CFR parts 720, 721, and 725 and making additional updates based on existing policies or lessons learned from administering the New Chemicals Program since TSCA was amended in 2016.

EPA is also finalizing amendments that will clarify the information that is required to be included in PMNs, SNUNs, and exemption notices to reduce the need to redo all or part of the risk assessment (“rework”) due to late submissions of information. This action is expected to reduce rework of risk assessments by minimizing requests

from submitters to amend their PMNs, SNUNs, or exemption notices with additional information after the review period has commenced. The Agency is also finalizing amendments to make clear the procedures that will be employed if submitters amend their PMNs or SNUNs during the applicable review period.

EPA is amending the regulations for LVEs and LoREXs so that submitters may not commence manufacture until EPA has issued a decision for the exemption notice, to better ensure that manufacture under LVEs and LoREXs will not present an unreasonable risk. Additionally, EPA is promulgating amendments that allow the Agency to notify submitters if a chemical substance for which they hold an LVE or LoREX is or becomes subject to a proposed or final SNUR and the chemical identity is confidential, so that chemical manufacturers are made aware that they may be subject to additional TSCA requirements. EPA is also finalizing amendments to make PFAS categorically ineligible for an LVE or LoREX, which would ensure that all new PFAS are reviewed through the full PMN process. In addition, EPA is making certain PBTs ineligible for these exemptions, to better manage risks associated with PBT chemical substances that have anticipated environmental releases and potentially unreasonable exposures to humans or environmental organisms.

Lastly, EPA is promulgating amendments that will allow informal (oral or e-mail) requests for review period suspensions of up to 30 days to reduce the number of repeated requests for 15-day suspensions, because EPA believes that e-mail may be more expedient than oral communication for many submitters.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the costs and benefits of this rulemaking and provided an Economic Analysis (EA) of the potential impacts associated with this rule, titled “Economic Analysis for the Final Rule: Updates to New Chemicals Regulations under the Toxic Substances Control Act” (Ref. 1), which is available in the docket and briefly summarized here. The benefits of the rule include increased efficiency in both the submission and review processes for notices submitted through the PMN form. The changes under this rule would clarify the information requirements on the PMN form in the Agency’s Central Data Exchange (CDX) to make more transparent the level of detail that EPA needs in order to make

a reasoned evaluation. As submitters provide more complete information in their initial submissions, the changes under this rule are expected to reduce the frequency with which PMNs, SNUNs, and exemption notices are amended with additional information and the amount of rework of risk assessments that the Agency conducts following such amendments.

In addition, the more detailed and comprehensive 90-day review afforded to PMNs allows EPA to make a more informed hazard determination for PFAS, leading to improvement in the expected outcome of these decisions. More informed decision making about a PFAS's potential risks is likely to result in a reduction in the cost of risk-based decision making about the PFAS, and an improvement in the expected outcome of the decisions.

As a result of the changes presented in this rule, the total annual burden to industry is expected to decrease by approximately 4,528 hours, while total annual costs to industry submitters are expected to have a net increase of approximately \$203,150. The Agency is expected to experience an annual cost savings of approximately \$1,117,132.

II. Background

A. What did EPA propose?

On May 26, 2023 (88 FR 34100; FRL-7906-01-OCSPP), EPA proposed amendments intended to align the regulatory text with the amendments to TSCA's new chemicals review provisions contained in the 2016 Lautenberg Amendments, to improve the efficiency of EPA's review processes, and update the regulations based on existing policies and experience implementing the New Chemicals Program. Additionally, the proposal included amendments that would reduce the need to redo all or part of a risk assessment by improving information initially submitted in new chemicals notices, which should also help reduce the length of time that new chemicals notices are under review. EPA also proposed several amendments to the regulations for LVEs and LoREXs, which included requiring EPA approval of an exemption notice prior to commencement of manufacture, making PFAS categorically ineligible for these exemptions, and providing that certain PBT chemical substances would be made ineligible for these exemptions, consistent with EPA's 1999 PBT policy. Lastly, the proposal included amendments related to the suspension of the review period.

B. How did the 2016 Lautenberg Amendments change TSCA section 5?

As enacted in 1976, TSCA provided EPA with authority to require reporting, recordkeeping, and testing, and to issue restrictions relating to chemical substances and/or mixtures. TSCA section 5(a)(1) required that a person submit to EPA a notice at least 90 days before commencing manufacture of a new chemical substance or manufacture or processing of a chemical substance for a use which EPA determined to be a significant new use. Under the 1976 law, EPA was not obligated to make a determination or finding regarding unreasonable risk for each notice submitted under TSCA section 5(a)(1). EPA's obligations with respect to making determinations on notices submitted under TSCA section 5(a)(1) fundamentally changed with the passage of the 2016 Lautenberg Amendments. The 2016 Lautenberg Amendments added a new paragraph to TSCA at section 5(a)(3) titled "Review and Determination," under which EPA must review and make one of five determinations pertaining to the likelihood of risk on all notices received under TSCA section 5(a)(1), which include PMNs, SNUNs and MCANs, within the applicable review period. EPA's obligation to take action after making a determination on a notice submitted under TSCA section 5(a)(1) also changed with the passage of the 2016 Lautenberg Amendments.

The 2016 Lautenberg Amendments require EPA to review each notice submitted under TSCA section 5(a)(1), make a determination on that notice, and take the action required in association with that determination within the applicable review period. Under TSCA section 5(i)(3), the "applicable review period" means 90 days from the date EPA receives a notice under TSCA section 5(a)(1), or up to 180 days from that date if EPA extends the applicable review period according to the provisions in TSCA section 5(c). The 2016 Lautenberg Amendments also added a new paragraph at TSCA section 5(a)(4) explaining that a failure by EPA to render a determination within the applicable review period would not relieve EPA of any requirement to make such determination, but would, with certain exceptions, result in a fee refund to the notice submitter.

TSCA section 5(h) was not significantly amended by the 2016 Lautenberg Amendments. TSCA section 5(h) provides EPA the authority to exempt a person from certain TSCA section 5 requirements under certain situations. EPA developed the current

LVE and LoREX regulations in 1995 pursuant to TSCA section 5(h)(4) (60 FR 16336, March 29, 1995). See Unit II. of the May 26, 2023, proposed rule (88 FR 34100) for further discussion of the 2016 Lautenberg Amendments.

C. How are the new chemicals regulations structured?

EPA's regulations related to TSCA section 5 are codified in Title 40, Chapter I, Subchapter R of the Code of Federal Regulations (CFR). They include:

- Regulations pertaining to PMNs, which are codified at 40 CFR part 720;
- Regulations pertaining to SNUNs, which are codified at 40 CFR part 721;
- Regulations pertaining to certain exemptions, which are codified at 40 CFR part 723; and
- Regulations pertaining to MCANs and microorganism-related exemptions, which are codified at 40 CFR part 725.

The information requirements codified for PMNs in 40 CFR 720.45 generally also apply to SNUNs under 40 CFR part 721 (see 40 CFR 721.1(c) and 721.25(a), which cross-reference 40 CFR part 720) and to LVEs and LoREXs submitted under 40 CFR 723.50 (see 40 CFR 723.50(e)(2), which cross-references 40 CFR 720.45). As a result, the amendments to the requirements in 40 CFR 720.45 apply to PMNs and also to SNUNs, LVEs, and LoREXs. The review procedures for PMNs codified in 40 CFR part 720 generally also apply to SNUNs under 40 CFR part 721 (see 40 CFR 721.25(c)) but not to exemptions under 40 CFR part 723, so the amendments to the part 720 review procedures promulgated by this action apply to PMNs and SNUNs but not to such exemptions. Neither the information requirements nor the review procedures in 40 CFR part 720 apply to MCANs or microorganism-related exemptions under 40 CFR part 725, so EPA is also finalizing certain amendments to the MCAN and microorganism-related exemption regulations at 40 CFR part 725.

D. Did EPA receive public comments on the proposed rule?

EPA received 51 public comments on the proposed rule. Commenters included potentially affected businesses, trade associations, environmental and public health advocacy groups, unions, and other Federal agencies. In this preamble, EPA has responded to many of the significant comments on the proposed rule; however, the more comprehensive version of EPA's response to comments for this rulemaking can be found in the Response to Comments document (Ref.

2). The Response to Comments document summarizes all the comments relevant to the proposal and EPA's response to those comments. In the Response to Comments document, EPA also discusses any changes to and clarifications from the proposed rule made in this final rule.

III. Overview of the Final Rule

This final rule is based on the May 26, 2023, proposed rule (88 FR 34100) and in consideration of the public comments received on the proposed rule.

A. Amendments To Conform Regulations to 2016 Lautenberg Amendments

EPA is amending the PMN procedural regulations at 40 CFR part 720 to align them with the notice review and determination requirements in TSCA section 5, as amended by the 2016 Lautenberg Amendments. These procedural regulations also generally apply to SNUNs under 40 CFR part 721 (see 40 CFR 721.1(c) and 721.25(c)). EPA is also promulgating similar changes to the MCAN procedural regulations at 40 CFR part 725 to align them with the same notice review and determination requirements added by the 2016 Lautenberg Amendments. EPA has been implementing the amended statutory requirements but, prior to this rulemaking, had not yet codified these updates into the new chemicals procedural regulations. The amendments specify that EPA must make a determination on each PMN, SNUN, and MCAN received before the submitter may commence manufacturing (which includes importing) or processing and lists the five possible determinations and the actions required in association with those determinations. EPA is also adding definitions for new terms and to update existing terminology introduced by the 2016 Lautenberg Amendments.

1. Commencement of Manufacture or Processing

As proposed, EPA is finalizing amendments at 40 CFR 720.75(d) by removing outdated language allowing the submitter to commence manufacture of a chemical substance when the review period expires and adding new language specifying that EPA must issue a determination and take any required action on each PMN before manufacture may commence. EPA is also finalizing an amendment to 40 CFR 721.25(d) to state that any person submitting a SNUN shall not manufacture or process a chemical substance for a significant new use until EPA has issued a determination with respect to the

significant new use and taken the actions required in association with that determination. Likewise, EPA is finalizing an amendment at 40 CFR 725.170(b) and (c) by removing similar outdated language allowing the submitter to commence manufacture of a new microorganism or manufacture or processing of a microorganism for a significant new use when the review period expires and adding new language specifying that EPA must issue a determination and take any required action on each MCAN before manufacture or processing may commence.

Some comments on the proposal challenged the EPA's description of how the New Chemicals Program operated prior to the passage of the 2016 Lautenberg Amendments and suggested that the 2016 Lautenberg Amendments had only minor impacts on the Program. EPA disagrees with these comments, as prior to the 2016 Lautenberg Amendments, EPA was not required to conduct a review of and issue a determination for every notice. Following the 2016 Lautenberg Amendments, EPA must review all notices submitted under TSCA section 5(a)(1) and make a determination pertaining to the risks of a new chemical or significant new use of an existing chemical before it is allowed into the marketplace. For a detailed response to these and other comments, please see the Response to Comments document (Ref. 2).

2. Required Determinations and Associated Actions

As proposed, EPA is finalizing amendments at 40 CFR 720.75(d) and 725.170 by listing the five possible determinations that EPA must make for each PMN, SNUN, or MCAN it receives. EPA is also finalizing amendments to 40 CFR 720.75(d) and 725.170(b) to describe the actions that EPA must take in association with its determination for a PMN, SNUN, or MCAN. EPA is codifying those actions, which EPA has been implementing, as applicable, for every PMN, SNUN, and MCAN since the 2016 Lautenberg Amendments, to be clear about EPA's review process to the public.

After EPA issues an order under TSCA section 5(e) or (f) and the applicable review period concludes, the submitter may submit studies, tests, reports, or other additional information. If EPA concludes from an assessment of the additional information that one or more of the prohibitions or limitations contained in the order are no longer necessary to protect against an unreasonable risk of injury to health or

the environment, EPA may modify or revoke the prohibitions or limitations of the order. If EPA determines that none of the order terms are warranted after assessment of the additional information, EPA may revoke all the requirements of the order.

Several comments on the proposed rule asserted that EPA not only has the authority to revoke or lessen restrictions in an order after it has been issued, but also can and must strengthen protections in an order based on new information received on a chemical substance that demonstrates the order is insufficient to protect against unreasonable risk. The commenters further urged EPA to clarify that an order may be modified based on new information obtained from any source, not solely the submitter. EPA agrees with these commenters and a detailed response is available in the Response to Comments document (Ref. 2). Upon consideration of these comments, EPA is modifying the proposed amendments at 40 CFR 720.75(d)(3) and 725.170(b)(3) to clarify that new information may be received from any source, and to add that where such information demonstrates that the prohibitions or limitations of the order are not sufficient to protect against an unreasonable risk of injury to health or the environment, EPA may modify the order or take other action, as appropriate, to the extent necessary to protect against such risk.

3. Other Updates

As proposed, EPA is finalizing amendments to the regulation that will replace the undefined terms "notice period," "notification period," "statutory review period," and "notice review period" with the term "applicable review period" throughout 40 CFR part 720 to conform to the new terminology in TSCA section 5 added by the 2016 Lautenberg Amendments. EPA is also finalizing an amendment to add, as proposed, a definition for "applicable review period" to 40 CFR 720.3, which EPA would define as the period starting on the date EPA receives a complete notice under section 5(a)(1) of the Act and ending 90 days after that date or on such date as is provided for in sections 5(b)(1) or 5(c) of the Act. In response to the proposed amendment adding a definition for "applicable review period," commenters expressed difficulty in determining what EPA considers to be a complete notice and requested that the Agency clearly define what constitutes a notice that is "complete." EPA considers a complete notice to be a notice that meets all the procedural requirements indicated in 720.65(c)(1) (e.g. a notice that includes

a company signature, is submitted via CDX, includes a second copy of the submission with all confidential information deleted, includes the payment identity number, etc.) and includes all required information that is known to or reasonably ascertainable by the submitter, as described in 720.45 and 720.50. A submission that fails to meet the statutory information requirements is incomplete, and EPA is justified in refusing to review the notice until the information is received. In the Response to Comments document (Ref. 2), EPA discusses in more detail the longstanding definition of “known to or reasonably ascertainable by” and its application in specific contexts.

After considering the comments, EPA is finalizing an amendment to add a definition for “potentially exposed or susceptible subpopulation” (PESS) to 40 CFR 720.3. For this rule, EPA is defining “potentially exposed or susceptible subpopulation” as proposed and using the same definition that was proposed and finalized as part of the rulemaking entitled “Procedures for Chemical Risk Evaluation under the Toxic Substances Control Act (TSCA)” (89 FR 37028, May 3, 2024 (FRL-8529-02-OCSPP)).

As a primary matter, the inclusion of “overburdened communities” in the list of example subpopulations in this definition is not itself a determination. Rather, it is an example of a subpopulation that EPA may identify as a PESS in future risk assessments, and it is reflective of the reality that, in addition to groups like children and pregnant women, there are communities of people that may experience disproportionate environmental risks from chemicals due to greater exposure or susceptibility to environmental and health harms.

EPA proposed to add a regulatory definition of PESS that includes the term “overburdened communities” in the list of example subpopulations. This term, which is an addition to the examples provided in the statutory definition of PESS at TSCA section 3(12), reflects the Agency’s understanding and acknowledgment that a chemical substance may disproportionately expose and/or may disproportionately impact communities already experiencing disproportionate and adverse human health or environmental burdens. Such disproportionality can be as a result of greater exposure or vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased exposure or vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health,

economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to impact health and the environment and contribute to persistent environmental health disparities. These situations may apply to communities with environmental justice concerns.

While some commenters on the proposed rule objected to the inclusion of “overburdened communities,” EPA believes that it is appropriate to include “overburdened communities” as an example subpopulation in the definition of PESS. Congress’ inclusion of “such as” in the statutory definition provides EPA with clear discretion to go beyond the statute’s list of examples. EPA further disagrees that this addition is substantively changing the criteria for identification of PESS (i.e., greater exposure or susceptibility and greater risk than general population).

EPA does not believe it is necessary to define “overburdened communities” as part of this rule. In the same way that EPA considers whether children or workers or the elderly are a PESS in the context of a specific risk assessment, EPA will look to whether “overburdened communities” may become subject to exposure or could be more susceptible than the general population. EPA does not intend for this term to be confined to a location or geographic proximity but would use reasonably available information for each new chemical substance or significant new use to determine the inclusion of specific communities. Those who could potentially experience “greater exposure” could include individuals or communities that would experience higher levels of exposure to a chemical substance due to geography (e.g., fenceline communities in close proximity to facilities that could emit air pollutants or living near potential effluent releases to water), unique exposure pathways that differ from those of the general population (e.g., Tribal communities where reliance on subsistence fishing may result in increased exposure via ingestion), and/or aggregate exposure via multiple conditions of use (e.g., a worker potentially exposed to the chemical substance who also lives in close proximity to the facility that may also release the chemical substance through air emissions).

In making these additions to 40 CFR 720.3, EPA is also revising the overall format used to list the definitions in 40 CFR 720.3, by removing the designations for each definition and

adopting the alphabetical listing approach consistent with the recommendation of the Office of the Federal Register (OFR). See page 2–27 of the OFR’s Document Drafting Handbook, August 2018 Edition (Revision 2.1, dated October 2023), <https://www.archives.gov/federal-register/write/ddh/>. Specifically, EPA is using the revise and republish instructions in the regulatory text of this final rule to reflect the addition of the two definitions and the adoption of the recommended undesignated alphabetical listing format for this definition section. This change also requires corresponding technical corrections to the citation in several other regulations. The existing definitions and these other regulations are otherwise unchanged. Conforming edits to remove the designations for the definitions in 40 CFR 720.3 are being made to 40 CFR 68.115, 372.38, 703.3, and 761.3.

EPA is also promulgating an update to 40 CFR 720.70(b) by revising paragraph (b)(3). Some commenters opposed EPA’s proposal to remove the regulatory-only requirement in 40 CFR 720.70(b)(3) to publish a list of test data submitted in accordance with 40 CFR 720.50(a) in the TSCA section 5(d)(2) notice of receipt. EPA disagrees with these comments. As EPA explained in the preamble to the proposed rule (88 FR 34100, May 26, 2023), the Agency believes that its objective of providing such information to the public is now better achieved through ChemView than through publication in the **Federal Register**. Through ChemView, the Agency currently makes the section 5 notice, including test data submitted with it, publicly available generally within 5 business days of receipt, subject to confidentiality protections. EPA is finalizing the change to 720.70(b)(3) as proposed. For additional response to the comments received on the amendments to 40 CFR 720.70(b)(3), see the Response to Comments document (Ref. 2).

B. Amendments Related to Notice Information Requirements

EPA is promulgating amendments to the notice information requirements at 40 CFR 720.45, as well as corresponding changes to the PMN form in CDX, to clarify the level of detail expected for information that must be submitted to EPA in PMN, SNUN, and certain exemption notices. EPA is finalizing these amendments largely as proposed, with most changes representing minor clarifications to the proposed regulatory text in response to the comments.

1. Background

A notice submitted under TSCA section 5(a)(1) must include the information described in TSCA section 5(d)(1): (1) insofar as known to the submitter or reasonably ascertainable, information described in certain provisions of TSCA section 8(a)(2); (2) in the form and manner prescribed by EPA, information in the possession or control of the submitter related to the health or environmental effects of any manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or any article containing such substance; and (3) a description of any other information concerning the environmental and health effects of the chemical substance, insofar as known to the submitter or reasonably ascertainable. EPA has promulgated regulations detailing these information requirements in 40 CFR 720.45 and 720.50.

EPA has developed an application form in CDX to collect such information from submitters. The user guide for CDX is listed in the references section of this final rule and can be found in the docket (Ref. 3). This form is prescribed by EPA for submission of PMNs, SNUNs, LVEs, LoREXs, and test marketing exemption (TME) applications. In this preamble, EPA refers to the form as the “PMN form” for simplicity, but the changes outlined in this section would impact the other types of notices that use the same form (*i.e.*, PMNs, SNUNs, LVEs, LoREXs, and TMEs).

EPA has observed that most section 5 notices do not contain all required information at the level of detail that EPA needs to perform refined risk assessments. As described in the preamble of the proposed rule, these deficiencies frequently result in EPA using conservative assumptions in its risk assessments due to lack of available data, which can create delays in the timeline for case completion, particularly when submitters provide information to EPA late in a case’s review in response to risk estimates stemming from the lack of available data. In recent years, EPA has issued guidance documents (Ref. 3 and 4), established pre-screen processes for incoming cases, and conducted outreach efforts (Ref. 5) to make clearer to submitters the level of detail necessary for timely review of their chemicals, as well as to minimize the need for costly rework of case assessment materials. EPA believes that amending the notice information requirements at 40 CFR 720.45 to specify the level of detail needed, as well as building that

additional detail into the CDX user interface, will help submitters provide more detailed section 5 notices and help to minimize the need for EPA to use default values and conservative assumptions in its risk assessments due to the lack of available data. Therefore, EPA is finalizing the amendments to the notice information requirements at 40 CFR 720.45 as well as the corresponding changes to the PMN form in CDX largely as described in the proposed rule.

2. Changes to 40 CFR 720.45, 40 CFR 720.50, and the PMN Form

EPA is amending 40 CFR 720.45 and the PMN form in CDX to clarify the information requirements for a notice. Specifically, EPA is adding details to certain information requirements already contained in 40 CFR 720.45. EPA is also adding additional reporting fields to the PMN form to reflect these details. In this action, EPA is adding these details as separate, unique information requirements in 40 CFR 720.45 and making corresponding changes to the PMN form to clarify the level of detail needed for EPA’s review of section 5 notices and to ensure that the fields in the PMN form are consistent with the regulations. In some cases, information requested in the PMN form is not clearly required in the 720.45 regulations, so EPA is adding those details to 40 CFR 720.45 to ensure that the regulations and PMN form are as consistent as possible. Although EPA is finalizing these amendments largely as they were described in the proposed rule, changes, mostly to improve clarity, have been made to some amendments in response to comments received by EPA. In response to comments, EPA is also finalizing additional amendments to the regulations at 720.45 and 720.50, as well as to the PMN form in CDX, that further add clarity and better align the PMN form with the regulations. See Ref. 6, which includes tables that detail the changes that are being made to 40 CFR 720.45, 720.50, and the CDX interface per this final rule. Additionally, EPA has amended 40 CFR 723.50(e) to update a cross-reference to 40 CFR 720.45 based on the amendments made in this rule.

Consistent with TSCA section 5(d)(1), for all information requirements under 40 CFR 720.45, submitters are only required to provide information to the extent that it is known to or reasonably ascertainable by the submitter, as defined at 40 CFR 720.3. Under the amendments to 40 CFR 720.45, a submitter is required to include in the PMN form the detailed information finalized in this action, along with all other information already required, to

the extent the information is known to or reasonably ascertainable by the submitter. This is an important point because a submitter may not know or be able to reasonably ascertain certain details about the chemical substance that is the subject of the notice, such as details about manufacturing, processing, or use sites not controlled by the submitter. In those situations, EPA will make conservative assumptions and use default values for any information that is not known to or reasonably ascertainable by the submitter and therefore not provided in the PMN form.

Based on a public comment, EPA is adding language to 720.50(c) to clarify that submitters can submit additional information not otherwise required by 720.50(a)–(b) to facilitate EPA’s review of the notice.

a. Physical and Chemical Properties and Environmental Fate Characteristics

The first set of detailed information requirements that EPA is adding to 40 CFR 720.45 concerns the physical and chemical properties and environmental fate characteristics of the chemical substance (see Table 1 in Ref. 6). Currently, if submitters have physical-chemical or environmental fate test data, they must provide the test data or a standard literature citation in accordance with 720.50(a)(2)–(3). EPA collects physical and chemical properties test data required by 40 CFR 720.50, “Submission of test data and other data concerning the health and environmental effects of a substance,” in two ways. First, the CDX user interface prompts the submitter to attach relevant documents, such as test data, to the PMN form using an attachment function. Second, the PMN form includes a CDX user interface screen with form fields for physical and chemical properties available for completion via a pick list. Data provided in the PMN form via CDX may be pulled from the test data provided by submitters per 720.50(a)(2)–(3), or the data can be submitted as standalone information for which submitters do not have underlying test data. EPA believes that the information requirements in 40 CFR 720.45 should reflect the PMN form fields. EPA is therefore adding relevant physical and chemical properties information requirements in a new provision at 40 CFR 720.45(j)(1) that are already specified within the PMN form. Submitters must submit physical-chemical and environmental fate information in the corresponding PMN form fields in accordance with new paragraph 720.45(j), which is added as described in the proposed rule.

EPA is also adding several information requirements to 40 CFR 720.45(j)(1) that are not already specified within the PMN form for physical and chemical properties. Specifically, EPA is requiring that data on surface tension and ultraviolet-visible (UV-VIS) absorption, as well as any particle size distribution analysis, be submitted as part of the PMN form, to the extent it is known to or reasonably ascertainable by the submitter. One commenter requested that EPA clarify the language outlined in the proposed rule for the particle size distribution analysis data requirement to make it clear that it includes both the analysis method as well as any data used to develop the particle size distribution value, a suggestion that EPA is incorporating in this final rule. Two commenters requested that EPA include several amendments to the nanomaterial morphology requirements outlined in the proposed rule, recommendations that EPA considers to be overly prescriptive and as such is declining to finalize. Additionally, after considering these comments, EPA anticipates that the proposed requirements at 40 CFR 720.45(j)(1) for information on aspect ratio, thickness, and number of layers or walls for nanomaterials are likely to be applicable only to a narrow subset of nanomaterials. Because this information would not be relevant to most nanomaterials, EPA will not include the proposed nanomaterial data requirements in the final regulations. For all other amendments to 40 CFR 720.45(j), as was proposed in the May 2023 proposed rule, EPA will also add fields for attaching associated data on the physical and chemical properties screen of the PMN form.

As proposed, EPA is also adding information requirements for the environmental fate characteristics of the chemical substance (see Table 1 in Ref. 6) to 40 CFR 720.45(j)(2). Environmental fate characteristics test data are already required by 40 CFR 720.50; however, this provision does not describe in detail what these relevant characteristics include. In addition, this information is already collected by EPA as attachments to the PMN form; however, fields for environmental fate characteristics are not yet included on the CDX user interface screen pick list. EPA is thus adding the relevant environmental fate characteristics to the information requirements at 40 CFR 720.45(j)(2) and form fields to the PMN form by expanding the pick list.

b. Categories of Use

The next set of changes that EPA is finalizing at 40 CFR 720.45 relates to the categories of use of the chemical substance (see Table 2 in Ref. 6). The requirements being finalized include detailed information on commercial and consumer uses, which already have form fields in the PMN form in CDX. Although the regulations at 40 CFR 720.45(f) previously required a description of intended categories of use by function and application, the estimated percent of production volume devoted to each category of use, and the percent of the new substance in the formulation for each commercial or consumer use, certain details on commercial and consumer uses were not specified. The added information requirements include the types of products or articles that would incorporate the new chemical substance (*e.g.*, household cleaners, plastic articles), how and where a product or article incorporating the new chemical substance would be used (*e.g.*, spray applied indoors, brushed on outdoor surfaces), consumption rates and frequency and duration of use for products or articles containing the new chemical substance, and information related to the use of products or articles containing the new chemical substance by potentially exposed or susceptible subpopulations. Additionally, EPA is finalizing at 40 CFR 720.45(f) a requirement to designate applicable consumer and commercial product categories using Organization for Economic Co-operation and Development (OECD)-based functional use codes, which would create consistency with TSCA section 8(a) Chemical Data Reporting (CDR) requirements in 40 CFR part 711. EPA is finalizing corresponding changes to the PMN form fields in CDX for this data element. EPA is also finalizing amendments to 40 CFR 721.25 to ensure that submitters of SNUNs include in their notice both a description of the intended categories of use, as required by 40 CFR 720.45(f)(1), and of all known categories of use, to the extent known to or reasonably ascertainable by the submitter. Such categories of use may include uses that are ongoing and not subject to a significant new use rule (SNUR). Such information is valuable for EPA in determining necessary regulatory action should potential risks be identified during review of a SNUN. In the final rule, this provision appears in a new paragraph (e) of 40 CFR 721.25 rather than as an addition to paragraph (c), and the text was rephrased slightly for clarification. One commenter

requested that EPA include a provision at 40 CFR 720.45(f) that would require submitters with chemicals having more than 10 intended uses to designate codes only for the 10 uses that represent the largest proportion of the anticipated production volume of the chemical, a suggestion that EPA is finalizing. EPA, however, will still require submitters to identify in the free form text field of the PMN form all intended or known uses of the chemical substance.

c. Details Concerning Manufacture, Processing, and Use

The third set of information requirements that EPA is finalizing at 40 CFR 720.45 is information related to where and how the chemical substance will be manufactured, processed, or used. These requirements apply to sites controlled by submitters as well as sites controlled by others, and although the information requirements that EPA is finalizing are similar for both, different types of activities often occur at submitter-controlled sites versus those at sites controlled by others (*e.g.*, manufacturing versus processing). Moreover, activities at sites controlled by others are typically not as well characterized by submitters compared to descriptions of the submitters' own activities, since in many cases the identity and number of sites controlled by others is unknown to and not reasonably ascertainable by the submitters when a notice is submitted. As such, some slight differences exist in the requirements EPA is finalizing for information related to sites controlled by submitters versus sites controlled by others. See Ref. 6 for more details.

Both for sites controlled by submitters and for sites controlled by others, EPA is adding information requirements for site addresses (see Table 3 and Table 5 in Ref. 6). For submitter-controlled sites, EPA is also adding requirements for a description of whether a particular chemical substance is manufactured or processed via batch or continuous production, as well as the amount of the chemical substance manufactured or processed in each batch and/or timeframe (see Tables 3, 4, and 5 in Ref. 6). These information requirements already have a corresponding form field in the PMN form in CDX because they are each covered by the existing information requirements in 40 CFR 720.45(g)(1) and (2) and (h) for a process description of operations at such sites. Since these information requirements were not specified in the regulations, EPA is finalizing them at 40 CFR 720.45(g)(1) and (2) for sites controlled by the submitter and 40 CFR

720.45(h)(1) and (2) for sites not controlled by the submitter.

EPA is also adding requirements for detailed information about the process diagram or description for each site controlled by the submitter (see Table 4 in Ref. 6) and for each site not controlled by the submitter (see Table 5 in Ref. 6). These data elements were previously required but not expressly included in the list of required data elements in 40 CFR 720.45. They include descriptions of the identity, approximate weight per batch or per day for continuous production, and entry point of all starting materials and feedstocks; the identity, approximate weight per batch or per day for continuous production, and entry point of all products, recycle streams, and wastes, including frequency of any equipment cleaning; the type of containers used for interim storage and transport of the chemical substance; and identification, by number, of any points of release. EPA is finalizing requirements for this information at 40 CFR 720.45(g)(2) and (h)(2) and in new fields in the PMN form to clarify the level of detail needed and to ensure that the regulations and PMN form are consistent.

One commenter noted that an existing data requirement related to manufacturing, processing, use, and disposal of chemical substances subject to section 5 notification is ambiguous in its scope. 40 CFR 720.45(d) requires submitters to describe any byproducts resulting from the manufacture, processing, use, and disposal of a chemical substance, and the commenter requested that EPA clarify whether its definition of byproduct includes “degradation products”. In the Response to Comments document (Ref. 2), EPA notes that byproducts are distinct from degradants and that information on degradants is required under the information requirements outlined in 720.45(j)(2).

d. Worker Exposure

EPA is also finalizing requirements for details about the possible worker exposures at each site controlled by the submitter (see Table 6 in Ref. 6), and at each site not controlled by the submitter (see Table 7 in Ref. 6). These requirements include types of potential worker exposure (e.g., dermal, inhalation), descriptions of any protective equipment and engineering controls in place, the moisture content of the chemical substance (if a solid), and the percentage of the chemical substance in the formulation at the time of exposure. In addition, for sites controlled by others, these requirements

also include worker activities and descriptions of the physical form of the chemical substance (consistent with information requirements for sites controlled by the submitter). Although these details are already covered by the existing information requirements in 40 CFR 720.45(g)(3) and (h) regarding worker exposure information, and some already have a corresponding form field in the PMN form in CDX, EPA is finalizing them as separate, unique information requirements at 40 CFR 720.45(g)(3) and (h)(3) and in new fields in the PMN form to clarify the level of detail needed and to ensure that the regulations and PMN form are consistent. One commenter requested that EPA revise the proposed text at 40 CFR 720.45(g)(3) and (h)(3) to clarify that the worker exposure information required in 40 CFR 720.45(g)(3)(ii)-(viii) and (h)(3)(ii)-(viii) pertains to each worker activity occurring during the manufacturing, processing, and use of the chemical substance, as identified pursuant to 720.45(g)(3)(i) and 720.45(h)(3)(i). EPA has incorporated this suggestion in the final rule because it provides additional clarity to submitters.

Several commenters made requests related to worker exposure that, if accepted by EPA, would affect the structure of and level of detail contained in the PMN form in CDX. For example, one commenter requested that EPA allow submitters to assign a “Letter of Activity” (a field in CDX to link specific worker activities to operations described in the corresponding manufacturing diagram) to activities at submitter-controlled sites; the option to assign a Letter of Activity already exists for activities at sites controlled by others. Another commenter requested that EPA include in the PMN form dropdown options for “Worker Activity” and “Worker Category” for sites controlled by others—dropdown options that currently exist for submitter-controlled sites in the PMN form. EPA is finalizing all of the aforementioned suggestions by making corresponding changes to the CDX interface. EPA, however, also received several additional suggestions related to worker exposures that EPA is choosing not to adopt. More information on the comments received relating to worker exposure and EPA’s responses can be found in the Response to Comments document (Ref. 2).

Additionally, EPA is finalizing proposed amendments to 40 CFR 720.45(g)(3) and (h)(3) to ensure that submitters include worker exposure information from exempt manufacture or related use of the chemical substance under 40 CFR 720.30 (e.g., manufacture

of the chemical substance under the byproduct or impurity exemptions) at each site where the chemical substance will be manufactured, processed, or used, if known or reasonably ascertainable. However, to avoid any confusion occasioned by the abbreviated, non-exhaustive list of exemption examples that appeared in a parenthetical in the proposed regulatory text, the final rule does not include the proposed parenthetical and streamlines the text by simply cross-referencing 40 CFR 720.30.

e. Environmental Releases

EPA is finalizing information requirements concerning the potential environmental releases at each site controlled by the submitter (see Table 8 in Ref. 6) and at each site not controlled by the submitter (see Table 9 in Ref. 6). EPA is requiring descriptions of the type of release (e.g., transport, interim storage, disposal, equipment cleaning), as well as the amount of the chemical substance released directly to the environment or into a control technology. EPA is finalizing an amendment to require a description of the amount of the chemical substance released to the environment after use of a control technology. EPA is also requiring for equipment cleaning releases a description of the frequency of equipment cleaning and what is used to clean equipment. EPA is also requiring for transport and storage releases a description of how the chemical substance or the product containing the chemical substance is transported from the site and stored, as well as information about the containers used. For releases into air, EPA is requiring Clean Air Act operating permit numbers and a description of any Leak Detection and Repair program the site has implemented; one commenter requested that EPA amend the language for this data element to require a description of the type of control technology used to treat stack air releases, which EPA is finalizing. For releases into water, EPA is requiring National Pollutant Discharge Elimination System (NPDES) permit numbers and information on the waterbodies and other destinations into which the release occurs; one commenter requested that EPA also require a description of any outfall numbers associated with the known points of release associated with the NPDES permit number(s), a suggestion that EPA is finalizing. For releases into wastewater treatment plants, EPA is requiring information on the publicly owned treatment works (POTW) into which the release occurs. For the

requirement concerning information on POTW, one commenter requested that EPA amend this data requirement to also specifically request information concerning privately owned treatment works to which releases might occur, the type of wastewater technology employed at any treatment facilities, and the known or estimated treatment efficiency at these facilities—all of which are suggestions that EPA is finalizing. In addition, for sites controlled by others, these requirements also include a description of the media of release consistent with the requirement for sites controlled by the submitter.

Although each of these detailed data elements are already covered by the existing information requirements in 40 CFR 720.45(g)(4) and (h) regarding environmental releases, and some already have a corresponding form field in the PMN form in CDX, EPA is finalizing them as separate, unique information requirements at 40 CFR 720.45(g)(4) and (h)(4) and in new fields in the PMN form to clarify the level of detail needed and to ensure that the regulations and PMN form are consistent.

EPA is finalizing amendments to 40 CFR 720.45(g) and (h) to make their formatting and the information required in both consistent. EPA recognizes that a submitter may not possess such information about sites not controlled by the submitter. As mentioned elsewhere in this preamble and in the Response to Comments document (Ref. 2), submitters are only required to supply information that is known to or reasonably ascertainable by them, as defined at 40 CFR 720.3.

Additionally, EPA is finalizing amendments to 40 CFR 720.45(g)(4) and 720.45(h)(4) to ensure that submitters include environmental release information from exempt manufacture or related use of the chemical substances under 40 CFR 720.30 (*e.g.*, manufacture of the chemical substance under the byproduct or impurity exemptions) at each site where the chemical substance will be manufactured, processed, or used, if known or reasonably ascertainable. However, to avoid any confusion occasioned by the abbreviated, non-exhaustive list of exemption examples that appeared in a parenthetical in the proposed regulatory text, the final rule does not include the proposed parenthetical and streamlines the text by simply cross-referencing 40 CFR 720.30.

f. Pollution Prevention Information

Lastly, EPA is adding optional pollution prevention information at 40 CFR 720.45(k) as proposed. The PMN form in CDX currently includes an optional text field and attachment function for submitters who wish to provide pollution prevention information about the chemical substance, such as information about using alternative fuel sources, reducing the use of water and chemical inputs, modifying a production process to produce less waste, implementing water and energy conservation practices, or substituting for riskier existing products.

3. Other Modifications to the PMN Form in CDX

In addition to the amendments intended to clarify the information requirements for a notice and the corresponding changes to the PMN form in CDX outlined in Unit III.B.1. and 2., EPA is also adding statements with accompanying check boxes to certain screens of the PMN form (such as when transitioning between the various worksheets completed by the submitter) that indicate that information fields can only be left blank if such information is not known to or reasonably ascertainable by the submitter. Additionally, a statement would warn the submitter of the potential consequences of leaving the field blank and later amending the field. If a field is left blank, EPA generally follows the scientifically informed approach to make conservative assumptions and use appropriate default values when assessing risk, which could result in more stringent risk management requirements than might be directed if data were provided showing such assumptions or default values were not necessary to use. If a field that has been left blank is later amended during the review process, EPA may declare the original submission incomplete (see Unit III.C.3. for a more detailed discussion on notice amendments indicating that the original submission was incomplete). Several commenters expressed concerns about the potential burden posed by the inclusion of these check boxes in the CDX workflow, concerns with which EPA disagrees. While the inclusion of check boxes might require submitters to spend slightly more time preparing the PMN form for their section 5 notices, EPA believes that the improved quality of submissions resulting from this, and the other changes being finalized to the CDX environment, will save submitters, as well as EPA, more time, and

resources in the long run. This check box approach does not have a corresponding regulatory change, as it is consistent with the existing requirements to provide all information that is known to or reasonably ascertainable by the submitter and EPA's longstanding practice to use conservative assumptions and default values in the absence of information. The ICR document accompanying this final rule describes the potential modifications to each screen of the PMN form (Ref. 7).

Some commenters made requests related to the CDX enhancements outlined in the proposed rule that EPA is addressing in this final rule. First, two commenters requested that EPA include in the enhancements to the CDX interface an option for submitters to, if data are not provided for a particular data element, explain why this information is not known or reasonably ascertainable, a suggestion that EPA will incorporate. Another commenter requested that EPA allow submitters to access a "beta version" of the enhanced CDX environment before rolling out the changes to the broader CDX environment. EPA will make efforts to do so and plans to share more information with stakeholders via outreach once this final rule is published. The CDX enhancements described in this rulemaking will not be finalized upon publication or effective date of the final rule. The enhancements will take time to develop, and EPA will make the updated CDX interface reflecting these changes publicly available as soon as resources allow. However, submitters are currently able to include all information for the newly specified data elements described in this preamble and the amended regulatory text as generic attachments in the current CDX workflow. EPA will share additional guidance and conduct outreach with stakeholders prior to the rollout of the changes to CDX and will work to extend flexibility to submitters in the event that issues arise related to discrepancies between the regulations and the PMN form before the CDX enhancements can be implemented.

C. Amendments Related To Pre-Screen, Incomplete Submissions, Correcting Errors, and New Information

EPA is finalizing amendments to the regulations regarding how EPA acknowledges the receipt of a notice to account for EPA's pre-screen process and to clarify the start of the applicable review period, particularly when a notice contains errors or is incomplete. EPA is also finalizing amendments to align the process for correcting errors in

the notice with the existing process for incomplete submissions. EPA is further clarifying that an initial notice submission may later be deemed incomplete if the submitter submits additional information at any time during the review period that was known to or reasonably ascertainable by the submitter at the time of initial notice submission. Finally, EPA is promulgating amendments that clarify that new information about a chemical substance under EPA review must be submitted electronically via CDX and that certain notification to EPA of new information may be made by e-mail.

1. Pre-Screening Procedures

EPA is finalizing amendments to 40 CFR 720.65(a) to codify the pre-screen process that EPA conducts prior to moving forward to the risk assessment process. The new language would clarify, for purposes of transparency, EPA's current pre-screen practice as described in Unit III.C.1 of the proposed rule preamble. EPA is also finalizing an amendment to 40 CFR 720.70 to clarify that a notice of receipt will be published in the **Federal Register** after EPA receives a complete notice, rather than merely receiving the notice, to accommodate the pre-screening procedures. Additionally, based on public comments, EPA is amending 40 CFR 723.50(e)(3) to add a description of current pre-screen procedures and update/clarify the process for completing an incomplete LVE or LoREX notice, which will better align with similar changes made to 40 CFR 720.65 and with existing electronic submission requirements.

One comment on the proposal asserted that EPA should include in section 5 prescreen a review of all CBI claims for consistency with sections 14(b) and (c) of TSCA and treat any submission that includes a CBI claim that appears to be inconsistent with the requirements of these sections as "erroneous or incomplete." EPA disagrees with these comments as assuring that every CBI claim is consistent with section 14(b) and (c) of TSCA would require a substantive review of each claim, which is well beyond the CBI review requirements described in TSCA section 14(g). For a more detailed response regarding CBI review during pre-screen, please see the Response to Comments document (Ref. 2).

2. Correcting Errors in Notices

As proposed, EPA is finalizing amendments at 40 CFR 720.65(a) and (b) to state that if EPA receives a notice with errors and EPA requests (as part of

the pre-screen process or, at latest, within 30 days of receipt of the notice) that the submitter remedy such errors, the applicable review period will not begin until EPA receives a corrected notice. This will align the process for correcting errors with the current process in 40 CFR 720.65 for correcting an incomplete notice.

3. Notice Amendments Indicating Original Notice was Incomplete

EPA is finalizing amendments at 40 CFR 720.65(c)(2) and to 40 CFR 720.65(c)(5)(iii) (moved to 720.65(d)(5)(iii)), to clearly communicate and clarify that EPA may deem an original notice incomplete, and restart the review period at Day 1, if a submitter provides required information during the applicable review period without demonstrating that it was not known to or reasonably ascertainable by the submitter at the time of the initial notice submission. Additionally, EPA is updating the reference to 40 CFR 720.80(b)(2) at 40 CFR 720.65(c)(vii) to instead point to 40 CFR 703.5(c) because the 2023 CBI rule (88 FR 37155, June 7, 2023) moved the language that was previously at 720.80(b)(2) to a new section at 40 CFR 703.5.

As stated in the proposal for this rule (88 FR 34100, May 26, 2023), EPA is changing the longstanding practice of accepting amendments that contain required information that was known or reasonably ascertainable at the time of the original submission and then accepting a request to suspend the review period under 40 CFR 720.75(b).

As explained in Unit II.B., the 2016 Lautenberg Amendments impose additional obligations on EPA. EPA believes that exercising its discretionary authority under the existing regulations to declare an original submission incomplete and restart the applicable review period upon submission of the complete notice (e.g., when an amendment is submitted that makes a notice complete) is appropriate in order for EPA to efficiently meet current statutory requirements. Several comments on the proposed rule objected to these amendments, stating that submitters often are prompted to generate new or additional information during the review period to rebut unforeseen or conservative assumptions made by EPA. To address this comment and assist with efficient review, EPA is also amending the notice information requirements at 40 CFR 720.45 to specify the level of detail needed to perform refined risk assessments, as well as building that additional detail into the CDX user interface, which is detailed in Unit III.B of both the

proposed rule (88 FR 34100, May 26, 2023) and this final rule. By specifying more detailed information requirements in 40 CFR 720.45 and data fields in the CDX user interface, EPA should receive more complete submissions upfront and help to minimize the need for EPA to use default values and conservative assumptions in its risk assessment due to a lack of available data. The Agency, however, reiterates that the submitter is required to provide all required information that is known or reasonably ascertainable at the time of the initial submission and not in reaction to risk assessment findings. Submitters must provide all information required by 40 CFR 720.45 and 720.50 upfront to satisfy the requirement of submitting a complete notice.

In response to the proposal, EPA received a comment asking that the Agency provide submitters with an opportunity to explain why information submitted as part of an amendment should not result in restarting the applicable review period. Under the amendment to 40 CFR 720.65(c)(2) being finalized in this action, the submitter of additional or revised information during the review period must demonstrate to EPA's satisfaction that the information was not known to or reasonably ascertainable by the submitter at the time of the original submission to preclude an EPA determination that the original notice was incomplete. Amendments to a notice that will not be considered as amendments indicating that the original notice was incomplete are: (1) Amendments based on new data (as described at 40 CFR 720.40(f) and 720.50(a)(4)); (2) Administrative, non-substantive amendments (e.g., submitter contact information); and (3) Amendments made at the request of EPA. EPA, however, will take case-by-case facts into consideration when determining whether a late submission of information indicates that a notice was incomplete when originally submitted. If a submitter disagrees with EPA's determination that the original notice submission was incomplete, the submitter may object according to the existing procedures at 40 CFR 720.65(c)(4) and (5), as amended in this final rule, which updates and moves these provisions to 40 CFR 720.65(d)(4) and (5).

As explained in the proposed rule, a notice submitted under TSCA section 5(a)(1) is statutorily required to include the information described in TSCA section 5(d)(1) insofar as it is known to the submitter or reasonably ascertainable. In response to various procedural amendments proposed in

this rulemaking, EPA received comments asking the Agency to further define “known to or reasonably ascertainable by” beyond the current definition at 40 CFR 720.3. While EPA understands and recognizes the desire to have a more explicitly defined list of criteria or more detailed definition of “known to or reasonably ascertainable by,” EPA believes that it is not possible to define “known to or reasonably ascertainable by” more explicitly—as was stated in the 1983 final rule entitled “Premanufacture Notification; Premanufacture Notice Requirements and Review Procedures” (Ref. 8) and restated in the May 2023 proposed rule (88 FR 34100). EPA has not, in this rulemaking, proposed or finalized any amendment to or undertaken any substantive reconsideration, reexamination, or reinterpretation of the existing definition at 40 CFR 720.3. That said, to assist submitters, EPA has provided additional discussion and examples as to what is meant by “known to or reasonably ascertainable by” in the Response to Comments document (Ref. 2).

4. Notifying EPA of the Receipt of New Information on a Chemical Substance Under Review

EPA is finalizing amendments to 40 CFR 720.40(f), 40 CFR 720.50(a)(4)(ii), and 40 CFR 723.50(i) to clarify that new information about a chemical substance under EPA review must be submitted electronically via CDX, consistent with the general electronic submission requirements in 40 CFR 720.40(a). In addition, when submitters receive new information within five days of the end of the review period, EPA is amending the regulations to allow submitters to notify EPA by e-mail of the receipt of new information. Although the regulatory text in 40 CFR 720.40(f) and 40 CFR 723.50(i) are similar, the regulatory text provided along with the proposed rule erroneously showed only the proposed changes to 40 CFR 720.40(f) and did not show proposed changes to 40 CFR 723.50(i). This was an oversight and the regulatory text accompanying this final rule consistently amends both 40 CFR 720.40(f) and 40 CFR 723.50(i).

D. Amendments to Low Volume Exemptions and Low Release and Exposure Exemptions

EPA is promulgating several amendments to the current LVE and LoREX regulations. Specifically, EPA is finalizing amendments so that: (1) submitters may not commence manufacture until EPA has approved the LVE or LoREX notice; (2) EPA may

proactively inform LVE and LoREX holders if the chemical substance that is the subject of the LVE or LoREX becomes subject to a SNUR and the chemical identity is CBI, or if it is listed on the confidential portion of the TSCA Inventory; (3) PFAS are categorically ineligible for these exemptions; and (4) certain PBT chemical substances are ineligible for these exemptions.

LVE and LoREX regulations are promulgated under the statutory authority of TSCA section 5(h)(4), 15 U.S.C. 2604(h)(4), which provides that EPA may, upon application and by rule, exempt the manufacturer of any new chemical substance from all or part of the requirements of TSCA section 5 if EPA determines that the manufacture, processing, distribution in commerce, use, or disposal of such chemical substance, or that any combination of such activities, “will not present an unreasonable risk of injury to health or the environment, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified by [EPA] under the conditions of use.”

1. Amendments to Expiration of LVE and LoREX Review Period

EPA is finalizing, as proposed, amendments to the LVE and LoREX regulations at 40 CFR 723.50(g) to require a notification of approval of an LVE or LoREX from EPA prior to commencement of manufacture of the chemical substance under the exemption. Prior to the promulgation of this amendment, 40 CFR 723.50(g)(2) provided that the submitter may begin manufacture of a chemical substance under an LVE or LoREX upon expiration of the 30-day review period if EPA had taken no action. As described in Unit III.A., EPA is also amending the regulations that allow submitters to begin manufacture or processing of chemical substances for which a PMN, MCAN, or SNUN was submitted upon expiration of the review period, so that those regulations would require a determination from EPA prior to commencement of manufacture or processing of such substances. As discussed in Unit III.A., these changes to 40 CFR 720.75, 721.25(d), and 725.170 are being made to conform those regulations to the 2016 Lautenberg Amendments. EPA is finalizing similar amendments to the LVE and LoREX regulations at 40 CFR 723.50 to align with the amendments to the PMN, SNUN, and MCAN regulations and with the statutory framework and to better ensure that chemical substances manufactured under LVEs and LoREXs will not present an unreasonable risk.

2. Notification of LVE and LoREX Holders if the Chemical Substance is Subject to a SNUR or Listed on the Confidential Portion of the TSCA Inventory

EPA is finalizing amendments to 40 CFR 723.50 to allow EPA to inform an LVE or LoREX holder whenever the chemical substance that is the subject of that LVE or LoREX becomes subject to a proposed or final SNUR that describes the chemical substance by a generic chemical name due to a confidentiality claim for its specific chemical identity. This amendment would, as a courtesy, help inform LVE and LoREX holders of regulatory requirements that they may have otherwise been unable to determine on their own without submitting an inquiry to EPA (also known as a *bona fide* notice) pursuant to 40 CFR 721.11. In the proposed rule (88 FR 34100, May 26, 2023), EPA stated that the Agency did not intend to proactively inform current LVE and LoREX holders about SNURs that predate this rule and that EPA would only start the practice of notifying LVE and LoREX holders subject to this amendment after the date of the final rule. However, upon consideration of public comments in support of notifying current exemption holders of preexisting SNURs, EPA intends, subject to availability of resources, to notify current LVE and LoREX holders about preexisting SNURs that describe the chemical substance by a generic chemical name. Given current resource constraints, however, EPA is unable to provide a timeline for when it will begin and complete this notification effort. A lack of receipt of this courtesy notice that a chemical substance is subject to a SNUR does not excuse chemical manufactures and processors from complying with any existing regulations. LVE and LoREX holders who wish to determine whether their chemical substance is subject to a SNUR may always submit an inquiry to EPA (also known as a *bona fide* notice) pursuant to 40 CFR 721.11.

In response to public comments, in addition to notifying LVE and LoREX holders when they are subject to a SNUR, EPA also intends, subject to availability of resources, to begin notifying LVE or LoREX submitters if a substance is added to the confidential portion of the TSCA Inventory as a result of filings by a different submitter that claimed the specific chemical identity of the substance as confidential. As of February 7, 2024, more than 460 LVEs and LoREXs that were granted by EPA pertain to chemical substances that are now listed on the TSCA Inventory.

Once on the Inventory, a chemical substance may be subject to additional requirements under TSCA. Of the more than 390 chemical substances covered by these LVE and LoREX, approximately 125 are on the confidential portion of the TSCA Inventory. Without notice by EPA or by submitting a *bona fide* notice, a submitter is unlikely to know their substance is listed on the confidential portion of the Inventory, unless they also submitted the PMN and subsequent Notice of Commencement that led to the Inventory listing of the substance. While EPA intends to begin providing notice to exemption holders whose chemical substance now appears on the confidential portion of the TSCA Inventory, EPA does not intend to provide notice to those who hold granted LVEs or LoREXs pertaining to chemical substances whose specific chemical identities are added to the public portion of the TSCA Inventory due to the additional resources this would require and to the fact this information is publicly available.

In response to public comment, EPA affirms that once a chemical substance is added to the Inventory, an LVE or LoREX (or any other exemption from PMN requirements) is no longer necessary to manufacture the chemical substance and thus any approved LVE or LoREX is no longer binding on the manufacturer. The premanufacture notice requirements of TSCA section 5(a)(1), the relevant statutory exemption authority at TSCA section 5(h)(4), and the LVE/LoREX regulations at 40 CFR 723.50 all apply to manufacturers of new chemical substances, yet a chemical substance is no longer a “new chemical substance” as defined in TSCA section 3(11) once it is added to the Inventory. While EPA intends to begin providing notice to LVE and LoREX submitters once their substance is listed on the confidential portion of the Inventory, EPA does not intend to formally revoke these exemptions under the process described in 40 CFR 723.50(h)(2), as that process pertains to new chemical substances for which manufacture is not otherwise permitted in the absence of a PMN or applicable exemption.

The amendments to the regulations at 40 CFR 723.50 establish that a granted LVE or LoREX notice demonstrates a *bona fide* intent to manufacture the substance, such that a disclosure to an LVE or LoREX holder that the substance is the subject of a proposed or final rule under Part 721 or similarly that the substance is on the confidential portion of the TSCA Inventory will not be considered public disclosure of confidential business information under

section 14 of the Act. EPA is not amending the procedures in 40 CFR 723.50(l) for asserting and protecting confidential business information.

3. Making PFAS Categorically Ineligible for LVEs and LoREXs

EPA is finalizing amendments to limit the scope of the LVE and LoREX exemptions that were first promulgated in accordance with TSCA 5(h)(4) in 1985 and 1995 respectively (50 FR 16477 (April 26, 1985) and 60 FR 16346 (March 29, 1995)). TSCA 5(h)(4) allows, but does not require, the Administrator to exempt the manufacturer of any new chemical substance from all or part of the requirements of TSCA section 5 in certain circumstances. The statute does not specify any circumstances under which the Administrator would be required to provide an exemption and EPA’s action here is consistent with its authority under 5(h)(4) to create and/or define the scope of exemptions. These amendments make PFAS categorically ineligible for LVEs and LoREXs going forward, using a structural definition of PFAS for purposes of the LVE and LoREX regulations. Upon the effective date of this rule, any LVE or LoREX notice for a PFAS that is submitted to the Agency will be denied upon receipt without substantive review. This includes any chemical substance where any of the reasonably anticipated metabolites, environmental transformation products, byproducts, or reasonably anticipated impurities are a PFAS. Persons who wish to manufacture a PFAS not on the TSCA Inventory will be required to submit a PMN at least 90 days prior to commencing manufacture for a non-exempt commercial purpose. The definition for PFAS that EPA is finalizing is aligned with the recently finalized TSCA section 8(a)(7) rule (88 FR 70516, October 11, 2023) and the Inactive PFAS SNUR (89 FR 1822, January 11, 2024). Although PFAS would no longer be eligible for LVE or LoREX, there may be case-specific circumstances where a use of a new PFAS or a new use of an existing PFAS may be needed by a federal agency to meet its mission or is required in order to meet another critical need. EPA will work with other federal agencies to expedite review of such cases. Furthermore, EPA recognizes the critical role that many new chemicals play, including some PFAS, in the manufacture of semiconductors. The new chemicals program now prioritizes notices for chemicals used in sectors supported by the Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act and the

Inflation Reduction Act’s (IRA) climate goals. Since beginning the process of prioritizing CHIPS and Science Act and IRA related chemicals, EPA now reviews these new chemicals in a third of the time compared to other sectors. The Agency believes these key sectors are important to growing new jobs as part of the Biden-Harris Administration’s domestic manufacturing initiatives. For some new chemicals needed by the semiconductor sector, such as photo-acid generators, EPA’s multi-year collaborative effort with the sector has resulted in a regulatory pathway for dozens of these chemicals, and recent submittals have had review timeframes of under 90 days.

As noted in the proposed rule, EPA’s New Chemicals Program began implementing a new policy for reviewing and managing LVE notices for PFAS in April 2021. In an April 27, 2021, press release announcing the new PFAS LVE policy (Ref. 9), the Agency stated that “[g]iven the complexity of PFAS chemistry, potential health effects, and their longevity and persistence in the environment, an LVE notice for a PFAS is unlikely to be eligible for this kind of exemption under the regulations.” Since 2021, EPA has reviewed 8 LVE notices for PFAS, which were each reviewed on a case-by-case basis. Each of the 8 PFAS were determined to be ineligible for an LVE due to the risks identified and/or an inability to complete the review in 30 days as a result of the complexities of the review or uncertainties in the assessment. EPA has never received or approved any PFAS LoREX notices.

Each of the 8 PFAS that were the subject of LVE notices reviewed since 2021, or the reasonably anticipated metabolites and environmental transformation products of those PFAS, was determined to be a PBT chemical substance. In 5 of the 8 cases, however, the PBT designation included noted uncertainties for each of the substances reviewed. If EPA is unable to score a characteristic (e.g., B “unknown” for bioaccumulation), the characteristic is still considered to be potentially a 2 or higher for the purposes of identifying potential PBTs (Ref. 10). In many cases, additional uncertainties were identified for the potential routes of exposure, which included exposures to workers, the general population, a potentially exposed or susceptible subpopulation (e.g., consumers, infants), or the environment. PFAS present a challenge for EPA to evaluate because there is often insufficient information to quantify the risk they may pose and consequently make effective decisions

about how to regulate them (Ref. 11). As currently described in the regulations, EPA may determine that a new chemical substance is ineligible for an LVE or LoREX if there are issues concerning toxicity or exposure that require further review which cannot be accomplished within the 30-day review period. EPA notes that the shortened 30-day review period for LVEs and LoREX is one of the major benefits of these exemptions as it allows companies to introduce new chemical substances more quickly into commerce. The 30-day review period provides a screen for EPA to identify any new chemical substances with issues that require more detailed and comprehensive review and analysis, such as that available in a full PMN review. See 60 FR 16336. Given the shortened 30-day review of an LVE along with the inability to require testing or impose additional restrictions under a section 5(e) or 5(f) order, EPA was unable to address those uncertainties which would be necessary to conclude that the substance would not present an unreasonable risk. Since all of the 8 PFAS that were the subject of LVE notices were deemed ineligible for the exemption, the submitters were required to submit a PMN if they wanted to move forward with the manufacture of the new chemical substances.

For the purpose of making PFAS ineligible for LVEs and LoREXs, EPA is defining "PFAS" using a structural definition. In this rule, EPA defines PFAS to mean a chemical substance that contains at least one of these three structures:

(1) R-(CF₂)_n-CF(R')R'', where both the CF₂ and CF moieties are saturated carbons;

(2) R-CF₂OCF₂-R', where R and R' can either be F, O, or saturated carbons; or

(3) CF₃C(CF₃)R'R'', where R' and R'' can either be F or saturated carbons.

Manufacturers of substances that do not meet this structural definition and of substances where any of the reasonably anticipated metabolites, environmental transformation products, byproducts, or reasonably anticipated impurities do not meet this structural definition remain eligible to submit an LVE or LoREX notice.

In opposition to these amendments, EPA received comments asserting that because PFAS are a broad category of chemicals, any proposed regulatory action on PFAS should not group PFAS into a single category. Comments also asserted that there was no scientific basis or risk-based evidence for making PFAS ineligible for LVEs and LoREXs. EPA agrees with the comments that PFAS are a broad category of chemical

substances with common toxicological properties, exposures, or uses, and notes that the assessment and management of these substances for regulatory purposes should generally be done on a case-by-case basis or as groups of substances with common toxicological properties, exposures, or uses. Furthermore, EPA believes that any assessment of PFAS should be done in line with the scientific standards, weight of scientific evidence, and consideration of any reasonably available information as outlined in section 26 of TSCA. The amendment to make PFAS ineligible for LVEs and LoREXs, however, is not based on an assessment of all PFAS or any PFAS and does not impose risk management restrictions on any PFAS substance. The decision to make PFAS ineligible for LVEs and LoREXs is not a determination of risk for all or any PFAS. While the current state of science and EPA's understanding of PFAS has motivated the decision to make all PFAS ineligible for LVEs and LoREXs, these amendments are not based on EPA findings that particular PFAS chemicals, or all chemicals qualifying as PFAS under this rule, may present unreasonable risks of injury to human health or the environment under the conditions of use due to levels of hazards and exposures identified and evaluated by EPA. Rather, due to the scientific complexities or uncertainties associated with assessing PFAS and the lack of data on most PFAS with regards to toxicity and exposure to human health and the environment, EPA expects in most cases to be unable to determine pursuant to TSCA section 5(h)(4) that a PFAS "will not present an unreasonable risk" under the conditions of use within the 30-day review period provided for LVE and LoREX notices. This action is a procedural action based on EPA's experience administering TSCA and reviewing LVEs for PFAS.

Additionally, making PFAS ineligible for the LVE and LoREX exemptions may in fact reduce burden in many instances by avoiding the submission and review of LVEs that are ultimately denied and required to be resubmitted and reviewed anew through the PMN review process. Furthermore, the New Chemicals Program developed the PFAS Framework to help ensure that the Program effectively and efficiently reviews and makes appropriate decisions on new PFAS or significant new uses of existing PFAS reviewed through PMNs and SNUNs. The PFAS Framework will guide EPA's review of PFAS under TSCA section 5, ensuring consistency and efficiency in its review of incoming submissions while

advancing the Agency's goals to ensure protection of public health and the environment. Please see the Response to Comments document that accompanies this rule for a more detailed discussion of and response to the comments received on the amendments to make PFAS categorically ineligible for LVEs and LoREXs (Ref. 2).

The definition for PFAS promulgated at 40 CFR 723.50 does not include substances that only have a single fluorinated carbon or unsaturated fluorinated moieties (e.g., fluorinated aromatic rings and olefins), which are more susceptible to chemical transformation than their saturated counterparts, and therefore less likely to persist in the environment. These potentially degradable substances, if submitted to EPA in a LVE or LoREX notice, would still be evaluated by EPA and a decision made to either deny or grant the exemption.

The three-part structural definition for PFAS includes fluoropolymers. Fluoropolymers are made using fluorinated monomers, and often fluorinated processing aides, which contributes to the release of PFAS. In addition, the disposal of fluoropolymers may also result in PFAS releases. EPA has been concerned about potential risks of fluoropolymers for more than a decade. On January 27, 2010 (75 FR 4295, 1/27/2010), EPA amended the 'polymer exemption rule,' to exclude from eligibility polymers containing as an integral part of their composition, except as impurities, certain perfluoroalkyl moieties consisting of a CF₃- or longer chain length. EPA issued this amendment because, based on information at the time, EPA could no longer conclude that these polymers will not present an unreasonable risk to human health or the environment under the terms of the polymer exemption rule, which is the determination necessary to support an exemption under section 5(h)(4) of TSCA. While some comments stated that fluoropolymers are safe, there remains debate on the toxicity of fluoropolymers especially when considering their entire life cycle (Ref. 12). EPA's decision to include fluoropolymers as part of the amendment to make PFAS ineligible for LVEs and LoREXs, however, was not based on hazard, exposure, or risk. Fluoropolymers are no less complicated to review than nonpolymeric PFAS, and the Agency expects it would need the longer 90-day review for a PMN.

At the time of finalizing this rulemaking, EPA is not revoking previously granted LVEs for PFAS. EPA, however, may take future action on a case-by-case basis to revoke previously

granted LVEs for PFAS, which would be done in accordance with the existing regulations at 40 CFR 723.50(h)(2). EPA believes that the revocation of any existing LVE should be done on a case-by-case basis. While there are well identified hazards for many PFAS and PFAS studies have repeatedly found harm to human health, EPA has not determined that PFAS as an entire category of chemical substances do not meet the “will not present unreasonable risk of injury to health or the environment” standard of TSCA section 5(h)(4). As noted previously, EPA’s decision to make future PFAS ineligible for LVEs is not based on hazard or risk but is instead based on EPA’s experience administering TSCA and reviewing LVEs for PFAS (please see the Response to Comments document for a more detailed discussion (Ref. 2)).

As EPA continues to consider previously granted PFAS LVEs, EPA will take into consideration the concerns raised about the potential impacts to domestic semiconductor and electric vehicle industry, national defense, or other critical applications. The Biden-Harris Administration is committed to restoring U.S. leadership in semiconductor and electric vehicle manufacturing, supporting good-paying jobs across those supply chains, and advancing U.S. economic and national security. EPA’s Framework for Addressing New PFAS and New Uses of PFAS (PFAS Framework) (Ref. 10) outlines EPA’s planned approach when reviewing new PFAS and new uses of existing PFAS. The application of the PFAS Framework will help ensure that new PFAS won’t harm human health and the environment and allows that certain PFAS be used when exposures and releases can be mitigated, which is critical for important sectors like semiconductors. Under the framework, EPA expects that some PBT PFAS will not result in worker, general population or consumer exposure and are not expected to result in releases to the environment, such as when PFAS are used in a closed system with occupational protections as is generally the practice in the manufacture of some semiconductors and other electronic components. Additionally, EPA continues to work cooperatively with companies who wish to voluntarily withdraw previously granted LVEs for PFAS. As of April 1, 2024, 56 LVEs have been withdrawn through EPA’s PFAS Low Volume Exemption Stewardship Program.

4. Codifying EPA’s Policy Concerning PBT Chemicals and LVEs and LoREXs

EPA is finalizing amendments to 40 CFR 723.50(d) that would codify EPA’s long-standing practice that, whenever EPA identifies a chemical substance under LVE or LoREX review (or any reasonably anticipated metabolites, environmental transformation products, or byproducts of the substance, or any reasonably anticipated impurities in the substance) as PBT with anticipated environmental releases and potentially unreasonable exposures to humans or environmental organisms, that substance would be ineligible for the LVE or LoREX. As noted in Unit III.D.3., the LVE and LoREX exemptions were first promulgated in accordance with TSCA section 5(h)(4) in 1985 and 1995 respectively (50 FR 16477, April 26, 1985 (FRL–2742–1) and 60 FR 16346, March 29, 1995 (FRL–4923–1)). TSCA section 5(h)(4) allows, but does not require, the Administrator to exempt the manufacturer of any new chemical substance from all or part of the requirements of TSCA section 5 in certain circumstances. The statute does not specify any circumstances under which the Administrator would be required to provide an exemption and EPA’s action here is consistent with both its long-standing practice and with its authority under TSCA section 5(h)(4) to create and/or define the scope of exemptions.

On November 4, 1999, EPA issued its policy statement identifying a category for PBT new chemical substances (Ref. 13). The 1999 policy statement formally acknowledged PBT chemical substances as a category based on shared characteristics to facilitate premanufacture assessment and regulation. In response to the proposed amendment to the LVE and LoREX regulations, EPA received comment asserting that the Agency cannot categorically make all PBT chemicals ineligible for LVEs and LoREXs. EPA did not propose to categorically make all PBT chemicals ineligible for LVEs and LoREXs and is not doing so in this final rule. Rather, EPA proposed and is finalizing amendments to 40 CFR 723.50(d) to codify that whenever EPA identifies a chemical substance under LVE or LoREX review (or any reasonably anticipated metabolites, environmental transformation products, or byproducts of the substance, or any reasonably anticipated impurities in the substance) as PBT with anticipated environmental releases and potentially unreasonable exposures to humans or environmental organisms, that substance would be ineligible for the

LVE or LoREX. In order to effectuate these amendments for individual exemption notices, EPA would first need to review the exemption notice to determine if the substance is a PBT and then review the environmental releases and exposures to humans or environmental organisms to determine if releases and exposures are expected. Only after EPA has reviewed the hazards and exposures, will EPA make a decision to either grant or deny an LVE or LoREX for a PBT chemical substance.

Based on EPA’s experience administering LVEs and LoREXs, EPA expects that most exemptions for PBT chemical substances will not be granted. However, EPA agrees that there are instances where PBT chemical substances can be managed under an exemption. EPA may receive an exemption notice for a PBT chemical substance that will not result in worker, general population, or consumer exposure and that is not expected to result in releases to the environment, such as chemical substances used in a closed system to make semiconductors or other electronic components. In such a negligible exposure and environmental release scenario where worker exposure is fully mitigated and general population exposures are not expected, if EPA has sufficient information on the substance and the conditions of use to ensure that such PBT chemical substances can be disposed of properly and no consumer exposure is expected, EPA generally expects to grant the exemption.

EPA is defining “PBT chemical substance” for purposes of 40 CFR 723.50 as “a chemical substance possessing characteristics of persistence (P) in the environment, accumulation in biological organisms (bioaccumulation (B)), and toxicity (T) resulting in potential risks to humans and ecosystems. For more information on EPA’s Policy on new chemical substances that are PBT, see EPA’s 1999 policy statement (64 FR 60194; November 4, 1999).”

E. Amendments Related to Suspensions of the Review Period

As proposed, EPA is finalizing amendments to 40 CFR 720.75(b)(2) to allow PMN, SNUN, LVE, and LoREX submitters to request a suspension of the notice review period for up to 30 days orally or in writing, including by e-mail, without the need for a formal, written request submitted to EPA via CDX using e-PMN software. EPA is similarly finalizing amendments to 40 CFR 725.54(c) to permit MCAN submitters to request suspensions for up

to 30 days orally or in writing, including by e-mail, without the need for a formal, written request submitted to EPA via CDX using e-PMN software. Some comments to the proposal took issue with increasing the number of suspension days made through oral or e-mail communication from 15 to 30 days. These comments suggested such an amendment would result in less frequent communication from EPA regarding the status of a new chemical review. EPA disagrees with these comments, as the amendments would allow the submitter to request *up to* a 30-day suspension through oral or e-mail communication; however, submitters will still be allowed to suspend the review period for a shorter amount of time if preferred. For a more detailed response to the comments regarding the amendments relating to suspensions of the review period, please see the Response to Comments document (Ref. 2).

F. Severability

As explained in this preamble, EPA is finalizing several different types of amendments in this rule, including amendments related to: commencement of manufacture or processing; required determinations and associated actions; terminology and definitions; notice information requirements; pre-screening procedures; correcting errors in notices; incomplete notices; notification of the receipt of new information; expiration of the LVE and LoREX review period; notification of LVE and LoREX holders regarding certain other actions involving their chemical substance; PFAS ineligibility for LVE and LoREX exemptions; certain PBT ineligibility for LVE and LoREX exemptions; and suspensions of the review period. Each type of amendment functions independently, serves a discrete purpose, and is intended to be severable from the other amendments. In the event of litigation staying, remanding, or invalidating a portion of EPA's amendments in this rule, EPA intends to preserve all other amendments in this rule to the fullest extent possible. For example, the amendment to the LVE and LoREX regulations making PFAS ineligible for such exemptions functions independently from the amendment to those regulations making certain PBTs ineligible for the exemptions, such that if either ineligibility provision were stayed or invalidated, it would have no effect on the other, and EPA intends that the other would remain effective. Similarly, any stay or invalidation of the amendment making PFAS ineligible for the LVE and LoREX exemptions would have no effect on amendments related to

incomplete notices, and vice versa. These specific examples are not intended to be exhaustive, but rather illustrative of scenarios that reflect EPA's overarching intent that each type of amendment be severable.

Furthermore, within the broader category of amendments to notice information requirements, the rule includes a number of discrete amendments pertaining to different types of information. Each of these specific amendments to notice information requirements functions independently and is intended to be severable from the others. As an example, if amended information requirements regarding the categories of use of the chemical substance were to be stayed or invalidated, it would have no effect on amended information requirements regarding worker exposure, and vice versa.

The limited circumstance in which severability is not intended is where a single type of amendment involved changes to multiple paragraphs or sections of the regulations. For example, in cases where EPA is finalizing the same or similar amendment in multiple parts of the CFR for conformity (e.g., where an amendment to part 721, 723, or 725 is intended merely to conform to the same or similar amendment in part 720), severability is not intended between those provisions. In addition, where the amendment making PFAS ineligible for LVE and LoREX exemptions to be invalidated, the related amendment defining PFAS for purposes of that ineligibility provision would no longer be necessary or helpful. However, EPA does intend severability in the inverse scenario: if the definition of PFAS were stayed or invalidated, EPA intends severability of all other amendments, including the amendment making PFAS ineligible for LVEs and LoREX.

IV. References

The following is a listing of the documents that are specifically referenced in this **Federal Register** notice. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Economic Analysis for the Final Rule: Updates to New Chemicals Regulations under the Toxic Substances Control Act. December 2024.

2. EPA. Response to Comments on the Proposed Rule Updates to New Chemicals Regulations Under the Toxic Substances Control Act (TSCA). December 2024.
3. EPA. Central Data Exchange Online User Guide. Accessible at: <https://cdx.epa.gov/About/UserGuide>.
4. EPA. Points to Consider When Preparing TSCA New Chemical Notification. OMB Control No.: 2070-0012. June 2018. Accessible at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/points-consider-when-preparing-tsca>.
5. EPA. TSCA New Chemical Engineering Initiative to Increase Transparency and Reduce Rework. Accessible at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/tsca-new-chemical-engineering>.
6. EPA. Tables Detailing the Final Amendments to Add Details to 40 CFR 720.45 Reporting Requirements and Enhancements to the CDX Reporting Form. December 2024.
7. EPA. Supporting Statement for an Information Collection Request (ICR) Under the Paperwork Reduction Act (PRA); TSCA Section 5 Premanufacture Review of New Chemical Substances and Significant New Use Rules for New and Existing Chemical Substances (Revision); EPA ICR No. 1188.15; OMB Control No. 2070-0038]. December 2024.
8. EPA. Premanufacture Notification; Premanufacture Notice Requirements and Review Procedures; Final Rule. **Federal Register**. 48 FR 21722; May 13, 1983 (TSH-FRL 2998-5).
9. EPA. Press Release: EPA Announces Changes to Prevent Unsafe New PFAS from Entering the Market. April 27, 2021.
10. EPA. Framework for TSCA New Chemicals Review of PFAS Premanufacture Notices (PMNs) and Significant New Use Notices (SNUNs). June 2023.
11. Executive Office of the President of the United States. Per- and Polyfluoroalkyl Substances Report. March 2023.
12. Lohmann, Rainer, *et al.* Are fluoropolymers really of low concern for human and environmental health and separate from other PFAS? *Environmental science & technology* 54.20 (2020): 12820-12828.
13. EPA. Policy Statement on Category for Persistent, Bioaccumulative, and Toxic New Chemical Substances. **Federal Register**. (64 FR 60194, November 4, 1999) (FRL-6097-7).

V. Statutory and Executive Order Reviews

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

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

This action is a "significant regulatory action" as defined in Executive Order

12866, as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. The EPA prepared an economic analysis of the potential impacts associated with this action. This analysis, “Economic Analysis for the Final Rule: Updates to New Chemicals Regulations under the Toxic Substances Control Act” (Ref. 1), is also available in the docket.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted to OMB for review and approval under the PRA (44 U.S.C. 3501 *et seq.*). The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 1188.15 (Ref. 7). This ICR represents a revision to the currently approved ICR that covers the information collection activities contained in the existing regulations. The Economic Analysis covers the incremental changes from this action. You can find copies of the Economic Analysis and ICR in the docket, and the ICR is briefly summarized here.

Respondents/affected entities: Certain chemical manufacturers (including importers) and processors (see Unit I.A.).

Respondent's obligation to respond: Mandatory under TSCA section 5.

Estimated number of respondents: 560.

Frequency of response: On occasion.

Total estimated incremental burden: Estimates show that this rule will decrease existing approved ICR burden by 4,528 hours per year. Burden is defined at 5 CFR 1320.3(b).

Total estimated incremental cost: Estimates show that this rule will increase existing approved ICR costs by \$203,150 per year. This includes \$0 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

EPA did not receive any comments on the ICR revision that was posted with

the proposed rule. EPA prepared a Response to Comments document (Ref. 2) that summarizes all the comments relevant to the proposal, including comments affecting the Agency's burden estimates related to the rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The Agency's basis is briefly summarized here and is detailed in the Economic Analysis (Ref. 1).

The majority of firms that submit a TSCA section 5 notice will realize either no change or a decrease in costs associated with form submission. However, EPA expects that firms that submit LVE notices for PFAS will incur an estimated cost of approximately \$61,049 per notice due to the greater burden and non-labor costs associated with submitting a PMN form. EPA estimates that 98 percent of small firms (184 firms) will have cost impacts of less than 1 percent of revenues, less than 1 percent (1 firm) will have cost impacts between 1 and 3 percent of revenues, and 1 percent (2 firms) will have cost impacts greater than 3 percent of revenues.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million (adjusted annually for inflation) or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. EPA has concluded that this action imposes no enforceable duty on any state, local or Tribal governments because, based on EPA's experience with reviewing TSCA section 5 actions, state, local and Tribal governments have not been impacted and EPA does not have any reasons to believe that any state, local, or Tribal government would engage in the activities such that they would be impacted by this rulemaking.

In addition, given that the estimated incremental cost on the private sector is expected to be less than \$50,000 (Ref. 1), EPA has concluded that this rulemaking is not expected to result in expenditures by the private sector of \$183 million or more in any one year (\$100 million in 1995\$ adjusted for inflation using the CDP implicit price deflator).

E. Executive Order 13132: Federalism

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it will not have substantial direct effects on the states,

on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–201 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health risks, EPA's Policy on Children's Health also does not apply. This procedural rule would align the implementing regulations codified at 40 CFR parts 720, 721, and 725 with amended TSCA and make additional updates based on existing policies or lessons learned from administering the New Chemicals Program since TSCA was amended in 2016.

Although this procedural rule itself would not directly affect the level of protection provided to human health or the environment, EPA expects that the rule would improve the Agency's consideration of risks to children—in furtherance of EPA's Policy on Children's Health—and other PESS. In turn, EPA anticipates that the amendments would help better inform the Agency's determinations for each new chemical substance or significant new use for which it received a notice under TSCA section 5(a)(1), pertaining to the likelihood of unreasonable risk to human health or the environment under known, intended or reasonably foreseen conditions of use. EPA uses an integrated approach that draws on knowledge and experience across disciplinary and organizational lines to

identify and evaluate concerns regarding health and environmental effects, and exposure and release.

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

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards under the NTTAA section 12(d), 15 U.S.C. 272.

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

EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on communities with environmental justice concerns in accordance with Executive Orders 12898 (59 FR 7629, February 16, 1994) and 14096 (88 FR 25251, April 26, 2023). This action is procedural in nature. Therefore, EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. Although this action does not concern human health or environmental conditions, EPA identifies and addresses environmental justice concerns by finalizing, among other things, the regulatory definition of PESS to include overburdened communities, the Agency believes that this action would assist EPA and others in determining the potential exposures, hazards and risks to overburdened communities associated with the manufacture, processing, distribution in commerce, use, or disposal of the new chemical substances and significant new uses of chemical substances subject to this rulemaking. EPA anticipates that the inclusion of overburdened communities among the PESS considered in the Agency’s review of a TSCA section 5 submission would also enable the Agency, if necessary, to design appropriate future risk

management actions to address an unreasonable risk that the Agency may determine is presented by that chemical substance and to consider how such risk management actions would affect communities with environmental justice concerns.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 68

Administrative practice and procedure, Air pollution control, Chemicals, Environmental protection, Hazardous substances.

40 CFR Part 372

Environmental protection, Reporting and recordkeeping requirements, Toxic substances.

40 CFR Part 703

Chemicals, Confidential business information, Environmental protection, Exports, Hazardous substances, Imports, Reporting and recordkeeping requirements.

40 CFR Parts 720, 721, 723, and 725

Environmental protection, Chemicals, Hazardous materials, Reporting and recordkeeping requirements.

Dated: December 3, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

Therefore, for the reasons set forth in the preamble, 40 CFR chapter I is amended as follows:

PART 68—CHEMICAL ACCIDENT PREVENTION PROVISIONS

- 1. The authority citation for part 68 continues to read as follows:

Authority: 42 U.S.C. 7412(r), 7601(a)(1), 7661–7661f.

§ 68.115 Threshold determination.

- 2. Amend § 68.115(b)(5) by revising the citation “§ 720.3(ee)” to read “§ 720.3.”

PART 372—TOXIC CHEMICAL RELEASE REPORTING: COMMUNITY RIGHT-TO-KNOW

- 3. The authority citation for part 372 continues to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

§ 372.38 Exemptions.

- 4. Amend § 372.38(d) by revising the citation “§ 720.3(ee)” to read “§ 720.3.”

PART 703—CONFIDENTIALITY CLAIMS

- 5. The authority citation for part 703 continues to read as follows:

Authority: 15 U.S.C. 2613.

§ 703.3 Definitions.

- 6. Amend § 703.3 by:
 - a. Revising in the introductory text the citation “§ 720.3(ff)” to read “§ 720.3;”
 - b. Revising in the definition for “*Health and safety study*” the citation “§ 720.3(k)” to read “§ 720.3.”

PART 720—PREMANUFACTURE NOTIFICATION

- 7. The authority citation for part 720 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2613.

§ 720.1 Scope.

- 8. Amend § 720.1 by removing the phrase “The rule” and adding in its place the phrase “This part” wherever it appears.
- 9. Revise and republish § 720.3 to read as follows:

§ 720.3 Definitions.

In addition to the definitions under section 3 of the Act, 15 U.S.C. 2602, the following definitions apply to this part.

Act means the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*

Applicable review period means the period starting on the date EPA receives a complete notice under section 5(a)(1) of the Act and ending 90 days after that date or on such date as is provided for in sections 5(b)(1) or 5(c) of the Act.

Article means a manufactured item:

- (1) Which is formed to a specific shape or design during manufacture;
- (2) Which has end use function(s) dependent in whole or in part upon its shape or design during end use; and
- (3) Which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article and that may occur as described in § 720.30(h)(5), except that fluids and particles are not considered articles regardless of shape or design.

Byproduct means a chemical substance produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance or mixture.

Byproduct material, source material, and special nuclear material have the

meanings contained in the Atomic Energy Act of 1954, 42 U.S.C. 2014 *et seq.* and the regulations issued under it.

Central Data Exchange or CDX means EPA's centralized electronic document receiving system, or its successors.

Chemical substance means any organic or inorganic substance of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any chemical element or uncombined radical, except that "chemical substance" does not include:

- (1) Any mixture;
- (2) Any pesticide when manufactured, processed, or distributed in commerce for use as a pesticide;
- (3) Tobacco or any tobacco product;
- (4) Any source material, special nuclear material, or byproduct material;
- (5) Any pistol, firearm, revolver, shells, or cartridges; or
- (6) Any food, food additive, drug, cosmetic, or device, when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device.

Commerce means trade, traffic, transportation, or other commerce:

- (1) Between a place in a State and any place outside of such State; or
- (2) Which affects trade, traffic, transportation, or commerce between a place in a State and any place outside of such State.

Cosmetic, device, drug, food, and food additive have the meanings contained in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321 *et seq.*, and the regulations issued under it. In addition, the term "food" includes poultry and poultry products, as defined in the Poultry Products Inspection Act, 21 U.S.C. 453 *et seq.*; meats and meat food products, as defined in the Federal Meat Inspection Act, 21 U.S.C. 60 *et seq.*; and eggs and egg products, as defined in the Egg Products Inspection Act, 21 U.S.C. 1033 *et seq.*

Customs territory of the United States means the 50 States, Puerto Rico, and the District of Columbia.

Director means the Director of the EPA Office of Pollution Prevention and Toxics (OPPT).

Distribute in commerce means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold after introduction into commerce.

EPA means the U.S. Environmental Protection Agency.

e-PMN software means electronic-PMN software created by EPA for use in preparing and submitting Premanufacture Notices (PMNs) and other TSCA section 5 notices and support documents electronically to the Agency.

Health and safety study or study means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological, or other studies of a chemical substance or mixture, and any test performed under the Act. Chemical identity is always part of a health and safety study.

(1) Not only is information which arises as a result of a formal, disciplined study included, but other information relating to the effects of a chemical substance or mixture on health or the environment is also included. Any data that bear on the effects of a chemical substance on health or the environment would be included.

(2) Examples include:

(i) Long- and short-term tests of mutagenicity, carcinogenicity, or teratogenicity; data on behavioral disorders; dermatotoxicity; pharmacological effects; mammalian absorption, distribution, metabolism, and excretion; cumulative, additive, and synergistic effects; acute, subchronic, and chronic effects; and structure/activity analyses.

(ii) Tests for ecological or other environmental effects on invertebrates, fish, or other animals, and plants, including acute toxicity tests, chronic toxicity tests, critical life stage tests, behavioral tests, algal growth tests, seed germination tests, plant growth or damage tests, microbial function tests, bioconcentration or bioaccumulation tests, and model ecosystem (microcosm) studies.

(iii) Assessments of human and environmental exposure, including workplace exposure, and impacts of a particular chemical substance or mixture on the environment, including surveys, tests, and studies of: Biological, photochemical, and chemical degradation; air, water, and soil transport; biomagnification and bioconcentration; and chemical and physical properties, *e.g.*, boiling point, vapor pressure, evaporation rates from soil and water, octanol/water partition coefficient, and water solubility.

(iv) Monitoring data, when they have been aggregated and analyzed to measure the exposure of humans or the environment to a chemical substance or mixture.

(v) Any assessments of risk to health and the environment resulting from the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance.

Importer means any person who imports a chemical substance, including a chemical substance as part of a mixture or article, into the customs territory of the United States.

"Importer" includes the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf. The term also includes, as appropriate:

- (1) The consignee.
- (2) The importer of record.
- (3) The actual owner if an actual

owner's declaration and superseding bond has been filed in accordance with 19 CFR 141.20; or

(4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred in accordance with 19 CFR part 144, subpart C. (See "principal importer.")

Impurity means a chemical substance which is unintentionally present with another chemical substance.

Intermediate means any chemical substance that is consumed, in whole or in part, in chemical reactions used for the intentional manufacture of another chemical substance(s) or mixture(s), or that is intentionally present for the purpose of altering the rates of such chemical reactions.

Inventory means the list of chemical substances manufactured or processed in the United States that EPA compiled and keeps current under section 8(b) of the Act.

Known to or reasonably ascertainable by means all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.

Manufacture means to produce or manufacture in the United States or import into the customs territory of the United States.

Manufacture for commercial purposes means:

(1) To manufacture with the purpose of obtaining an immediate or eventual commercial advantage for the manufacturer, and includes, among other things, "manufacture" of any amount of a chemical substance or mixture.

(2) The term also applies to substances that are produced coincidentally during the manufacture, processing, use, or disposal of another substance or mixture, including byproducts that are separated from that other substance or mixture and impurities that remain in that substance or mixture. Byproducts and impurities without separate commercial value are nonetheless produced for the purpose of obtaining a commercial advantage, since

they are part of the manufacture of a chemical substance for commercial purposes.

Manufacture solely for export means to manufacture for commercial purposes a chemical substance solely for export from the United States under the following restrictions on activities in the United States:

(1) Distribution in commerce is limited to purposes of export or processing solely for export as defined in § 721.3 of this chapter.

(2) The manufacturer and any person to whom the substance is distributed for purposes of export or processing solely for export (as defined in § 721.3 of this chapter), may not use the substance except in small quantities solely for research and development in accordance with § 720.36.

Manufacturer means a person who imports, produces, or manufactures a chemical substance. A person who extracts a component chemical substance from a previously existing chemical substance or a complex combination of substances is a manufacturer of that component chemical substance. A person who contracts with a manufacturer to manufacture or produce a chemical substance is also a manufacturer if:

(1) The manufacturer manufactures or produces the substance exclusively for that person; and

(2) That person specifies the identity of the substance and controls the total amount produced and the basic technology for the plant process.

Mixture means any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except “mixture” does include:

(1) Any combination which occurs, in whole or in part, as a result of a chemical reaction if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined, and if all of the chemical substances comprising the combination are not new chemical substances; and

(2) Hydrates of a chemical substance or hydrated ions formed by association of a chemical substance with water, so long as the nonhydrated form is itself not a new chemical substance.

New chemical substance means any chemical substance which is not included on the Inventory.

Nonisolated intermediate means any intermediate that is not intentionally removed from the equipment in which it is manufactured, including the

reaction vessel in which it is manufactured, equipment which is ancillary to the reaction vessel, and any equipment through which the chemical substance passes during a continuous flow process, but not including tanks or other vessels in which the substance is stored after its manufacture.

Person means any natural person, firm, company, corporation, joint-venture, partnership, sole proprietorship, association, or any other business entity, any State or political subdivision thereof, any municipality, any interstate body, and any department, agency or instrumentality of the Federal Government.

Pesticide has the meaning contained in the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.* and the regulations issued under it.

Possession or control means in possession or control of the submitter, or of any subsidiary, partnership in which the submitter is a general partner, parent company, or any company or partnership which the parent company owns or controls, if the subsidiary, parent company, or other company or partnership is associated with the submitter in the research, development, test marketing, or commercial marketing of the chemical substance in question. (A parent company owns or controls another company if the parent owns or controls 50 percent or more of the other company's voting stock. A parent company owns or controls any partnership in which it is a general partner). Information is included within this definition if it is:

(1) In files maintained by submitter's employees who are:

(i) Associated with research, development, test marketing, or commercial marketing of the chemical substance in question.

(ii) Reasonably likely to have such data.

(2) Maintained in the files of other agents of the submitter who are associated with research, development, test marketing, or commercial marketing of the chemical substance in question in the course of their employment as such agents.

Potentially exposed or susceptible subpopulation means a group of individuals within the general population identified by EPA who, due to either greater susceptibility or greater exposure, may be at greater risk than the general population of adverse health effects from exposure to a chemical substance or mixture, such as infants, children, pregnant women, workers, the elderly, or overburdened communities.

Principal importer means the first importer who, knowing that a new

chemical substance will be imported rather than manufactured domestically, specifies the identity of the chemical substance and the total amount to be imported. Only persons who are incorporated, licensed, or doing business in the United States may be principal importers.

Process means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce:

(1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or

(2) As part of a mixture or article containing the chemical substance or mixture.

Processor means any person who processes a chemical substance or mixture.

Small quantities solely for research and development (or “small quantities solely for purposes of scientific experimentation or analysis or chemical research on, or analysis of, such substance or another substance, including such research or analysis for the development of a product”) means quantities of a chemical substance manufactured or processed or proposed to be manufactured or processed solely for research and development that are not greater than reasonably necessary for such purposes.

State means any State of the United States and the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States.

Support documents means material and information submitted to EPA in support of a TSCA section 5 notice, including but not limited to, correspondence, amendments (if notices for these amendments were submitted prior to January 19, 2016), and test data. The term “support documents” does not include orders under TSCA section 5(e) (either consent orders or orders imposed pursuant to TSCA section 5(e)(2)(B)).

Technically qualified individual means a person or persons:

(1) Who, because of education, training, or experience, or a combination of these factors, is capable of understanding the health and environmental risks associated with the chemical substance which is used under his or her supervision;

(2) Who is responsible for enforcing appropriate methods of conducting scientific experimentation, analysis, or chemical research to minimize such risks; and

(3) Who is responsible for the safety assessments and clearances related to the procurement, storage, use, and disposal of the chemical substance as may be appropriate or required within the scope of conducting a research and development activity.

Test data means data from a formal or informal test or experiment, including information concerning the objectives, experimental methods and materials, protocols, results, data analyses, recorded observations, monitoring data, measurements, and conclusions from a test or experiment.

Test marketing means the distribution in commerce of no more than a predetermined amount of a chemical substance, mixture, or article containing that chemical substance or mixture, by a manufacturer or processor, to no more than a defined number of potential customers to explore market capability in a competitive situation during a predetermined testing period prior to the broader distribution of that chemical substance, mixture, or article in commerce.

United States, when used in the geographic sense, means all of the States.

§ 720.30 [Amended]

■ 10. Amend § 720.30 by revising the citations “§ 720.3(e)” in paragraph (a) and “720.3(u)” in paragraph (b) to both read “§ 720.3.”

■ 11. Amend § 720.40 by revising paragraph (f) to read as follows:

§ 720.40 General.

* * * *

(f) *New information.* During the applicable review period, if the submitter possesses, controls, or knows of new information that materially adds to or changes the information included in the notice, the submitter must submit that information to EPA within ten days of receiving the new information, but no later than five days before the end of the applicable review period. The new information must be submitted electronically to EPA via CDX and must clearly identify the submitter and the notice to which the new information is related. If the new information becomes

available during the last five days of the applicable review period, the submitter must immediately inform its EPA contact for that notice by telephone or e-mail and submit the new information electronically to EPA via CDX.

* * * *

■ 12. Amend § 720.45 by:

■ a. Revising paragraphs (a)(4) and (5), and (f) through (h); and

■ b. Adding paragraphs (j) and (k).

The revisions and additions read as follows:

§ 720.45 Information that must be included in the notice form.

* * * *

(a) * * *

(4) If an importer submitting the notice cannot provide all the information specified in paragraphs (a)(1) and (2) of this section because it is claimed as confidential by the foreign supplier of the substance, the importer must have the foreign supplier follow the procedures in paragraph (a)(3) of this section and provide the correct chemical identity information specified in paragraphs (a)(1) and (2) of this section directly to EPA in a joint submission or as a letter of support to the notice, which clearly references the importer’s notice and PMN User Fee Identification Number. The applicable review period will commence upon receipt of both the notice and the complete, correct information, in accordance with § 720.65.

(5) If a manufacturer cannot provide all the information specified in paragraphs (a)(1) and (2) of this section because the new chemical substance is manufactured using a reactant having a specific chemical identity claimed as confidential by its supplier, the manufacturer must submit a notice directly to EPA containing all the information known by the manufacturer about the chemical identity of the reported substance and its proprietary reactant. In addition, the manufacturer must ensure that the supplier of the confidential reactant submit a letter of support directly to EPA providing the specific chemical identity of the confidential reactant, including the

CASRN, if available, and the appropriate PMN or exemption number, if applicable. The letter of support must reference the manufacturer’s name and PMN Fee Identification Number. The applicable review period will commence upon receipt of the notice, the letter of support, and the complete, correct information, in accordance with § 720.65.

* * * *

(f)(1) A description of the intended category or categories of consumer or commercial use by function and application, which includes a description of the following:

(i) The estimated percent of production volume devoted to each category of use.

(ii) The percent of the new chemical substance in the formulation for each commercial or consumer use.

(iii) The types of products or articles that would incorporate the new chemical substance (*e.g.*, household cleaners, plastic articles).

(iv) Information related to the use of products or articles containing the new chemical substance by potentially exposed or susceptible subpopulations.

(v) How and where a product or article containing the new chemical substance would be used (*e.g.*, spray applied indoors, brushed on outdoor surfaces).

(vi) Consumption rates and frequency and duration of use of products or articles containing the new chemical substance.

(2) Using the applicable codes listed in Table 1 to paragraph (f)(2), submitters must designate the consumer and commercial product category or categories that best describe the consumer and commercial products in which the new chemical substance is intended or known to be used. When more than 10 codes apply to the consumer or commercial products in which the new chemical substance is intended or known to be used, submitters should only designate the 10 product categories that represent the highest proportion of the anticipated production volume.

TABLE 1 TO PARAGRAPH (f)(2)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES

Code	Category
Chemical Substances in Furnishing, Cleaning, Treatment Care Products	
CC101	Construction and building materials covering large surface areas including stone, plaster, cement, glass and ceramic articles; fabrics, textiles, and apparel.
CC102	Furniture & furnishings including plastic articles (soft); leather articles.
CC103	Furniture & furnishings including stone, plaster, cement, glass, and ceramic articles; metal articles; or rubber articles.
CC104	Leather conditioner.
CC105	Leather tanning, dye, finishing, impregnation, and care products.

TABLE 1 TO PARAGRAPH (f)(2)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—
Continued

Code	Category
CC106	Textile (fabric) dyes.
CC107	Textile finishing and impregnating/surface treatment products.
CC108	All-purpose foam spray cleaner.
CC109	All-purpose liquid cleaner/polish.
CC110	All-purpose liquid spray cleaner.
CC111	All-purpose waxes and polishes.
CC112	Appliance cleaners.
CC113	Drain and toilet cleaners (liquid).
CC114	Powder cleaners (floors).
CC115	Powder cleaners (porcelain).
CC116	Dishwashing detergent (liquid/gel).
CC117	Dishwashing detergent (unit dose/granule).
CC118	Dishwashing detergent liquid (hand-wash).
CC119	Dry cleaning and associated products.
CC120	Fabric enhancers.
CC121	Laundry detergent (unit-dose/granule).
CC122	Laundry detergent (liquid).
CC123	Stain removers.
CC124	Ion exchangers.
CC125	Liquid water treatment products.
CC126	Solid/Powder water treatment products.
CC127	Liquid body soap.
CC128	Liquid hand soap.
CC129	Solid bar soap.
CC130	Air fresheners for motor vehicles.
CC131	Continuous action air fresheners.
CC132	Instant action air fresheners.
CC133	Anti-static spray.
CC134	Apparel finishing, and impregnating/surface treatment products.
CC135	Insect repellent treatment.
CC136	Pre-market waxes, stains, and polishes applied to footwear.
CC137	Post-market waxes, and polishes applied to footwear (shoe polish).
CC138	Waterproofing and water-resistant sprays.
Chemical Substances in Construction, Paint, Electrical, and Metal Products	
CC201	Fillers and putties.
CC202	Hot-melt adhesives.
CC203	One-component caulks.
CC204	Solder.
CC205	Single-component glues and adhesives.
CC206	Two-component caulks.
CC207	Two-component glues and adhesives.
CC208	Adhesive/Caulk removers.
CC209	Aerosol spray paints.
CC210	Lacquers, stains, varnishes, and floor finishes.
CC211	Paint strippers/removers.
CC212	Powder coatings.
CC213	Radiation curable coatings.
CC214	Solvent-based paint.
CC215	Thinners.
CC216	Water-based paint.
CC217	Construction and building materials covering large surface areas, including wood articles.
CC218	Construction and building materials covering large surface areas, including paper articles; metal articles; stone, plaster, cement, glass, and ceramic articles.
CC219	Machinery, mechanical appliances, electrical/electronic articles.
CC220	Other machinery, mechanical appliances, electronic/electronic articles.
CC221	Construction and building materials covering large surface areas, including metal articles.
CC222	Electrical batteries and accumulators.
Chemical Substances in Packaging, Paper, Plastic, Toys, Hobby Products	
CC301	Packaging (excluding food packaging), including paper articles.
CC302	Other articles with routine direct contact during normal use, including paper articles.
CC303	Packaging (excluding food packaging), including rubber articles; plastic articles (hard); plastic articles (soft).
CC304	Other articles with routine direct contact during normal use including rubber articles; plastic articles (hard).
CC305	Toys intended for children's use (and child dedicated articles), including fabrics, textiles, and apparel; or plastic articles (hard).
CC306	Adhesives applied at elevated temperatures.
CC307	Cement/concrete.
CC308	Crafting glue.
CC309	Crafting paint (applied to body).

TABLE 1 TO PARAGRAPH (f)(2)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

Code	Category
CC310	Crafting paint (applied to craft).
CC311	Fixatives and finishing spray coatings.
CC312	Modelling clay.
CC313	Correction fluid/tape.
CC314	Inks in writing equipment (liquid).
CC315	Inks used for stamps.
CC316	Toner/Printer cartridge.
CC317	Liquid photographic processing solutions.
Chemical Substances in Automotive, Fuel, Agriculture, Outdoor Use Products	
CC401	Exterior car washes and soaps.
CC402	Exterior car waxes, polishes, and coatings.
CC403	Interior car care.
CC404	Touch up auto paint.
CC405	Degreasers.
CC406	Liquid lubricants and greases.
CC407	Paste lubricants and greases.
CC408	Spray lubricants and greases.
CC409	Anti-freeze liquids.
CC410	De-icing liquids.
CC411	De-icing solids.
CC412	Lock deicers/releasers.
CC413	Cooking and heating fuels.
CC414	Fuel additives.
CC415	Vehicular or appliance fuels.
CC416	Explosive materials.
CC417	Agricultural non-pesticidal products.
CC418	Lawn and garden care products.
Chemical Substances in Products not Described by Other Codes	
CC980	Other (specify).
CC990	Non-TSCA use.

(g) For sites controlled by the submitter:

(1) The identity and address of each site where the new chemical substance will be manufactured, processed, or used.

(2) A process description of each manufacture, processing, and use operation which includes a diagram of the major unit operations and chemical conversions; indication of whether batch or continuous manufacturing or processing occurs at the site, and the amount manufactured or processed per batch or per day if continuous and per year; the identity, approximate weight per batch or per day for continuous production, and entry point of all starting materials and feedstocks (including reactants, solvents, catalysts, etc.); the identity, approximate weight per batch or per day for continuous production, and entry point of all products, recycle streams, and wastes, including frequency of any equipment cleaning; the type of interim storage and transport containers used; and the points of release of the new chemical substance numbered. If the new chemical substance is released to two media at the same step in the process,

assign a second number for the second medium.

(3) Worker exposure information for each worker activity anticipated or known to occur during manufacture, processing, or use of the new chemical substance, including worker exposure information from exempt manufacture or related use of the new chemical substance under § 720.30. This information includes:

(i) A description of each worker activity.

(ii) Type of potential worker exposure (e.g., dermal, inhalation).

(iii) Protective equipment in place, if any, including a description of the kind of gloves, protective clothing, goggles, or respirator that limit worker exposure.

(iv) Engineering controls in place, if any.

(v) Physical form of the new chemical substance to which workers may be exposed and moisture content if physical form is solid.

(vi) The percent of new chemical substance in formulation at time of worker exposure.

(vii) The number of workers reasonably likely to be exposed.

(viii) The duration of activities.

(4) Information on known or anticipated release of the new chemical substance to the environment, including releases from the exempt manufacture or related use of the new chemical substance under § 720.30. This information includes the type of release (e.g., transport, interim storage, disposal, equipment cleaning), the quantity of the new chemical substance released directly to the environment, the quantity of the new chemical substance released into control technology, the quantity of the new chemical substance released to the environment after control technology, the media of release, the type of control technology used, and the following additional information based on the type of release:

(i) For equipment cleaning releases, frequency of equipment cleaning and what is used to clean the equipment.

(ii) For transport and storage releases, how the new chemical substance or product containing the new chemical substance is transported from the site and stored, whether dedicated containers are used, whether the cleaning and disposal of the containers is under the submitter's control, the container cleaning method, the

frequency of container cleaning, and the amount of release per container cleaning.

(iii) For releases into air, Clean Air Act operating permit numbers, a description of any Leak Detection and Repair program in accordance with 40 CFR parts 60, 61, 63, 65, 264 or 265 (related to the monitoring and management of fugitive releases) the site has implemented, and the type of air pollution control technologies used at the site to treat the stack releases that will contain the new chemical substance.

(iv) For releases into water, the National Pollutant Discharge Elimination System (NPDES) permit number(s), outfall numbers, the name(s) of the waterbody into which the release occurs, and other destination(s) into which the release occurs.

(v) For releases into wastewater treatment plants, the name(s) of the publicly owned treatment works (POTW) or privately owned treatment works into which the release occurs and the corresponding NPDES permit number(s), the type of wastewater treatment technology or technologies employed, and a description of the known or expected treatment efficiency.

(h) For sites not controlled by the submitter:

(1) The identity and address of each site where the new chemical substance will be manufactured, processed, or used.

(2) A description of each type of processing and use operation involving the new chemical substance, including identification of the estimated number of processing or use sites; a process description of each operation which includes a diagram of the major unit operations and chemical conversions; the identity, approximate weight per batch or per day for continuous production, and entry point of all starting materials and feedstocks (including reactants, solvents, catalysts, etc.); the identity, approximate weight per batch or per day for continuous production, and entry point of all products, recycle streams, and wastes, including frequency of any equipment cleaning; the type of interim storage and transport containers used; and the points of release of the new chemical substance numbered. If the new chemical substance is released to two media at the same step in the process, assign a second number for the second medium.

(3) Worker exposure information for each worker activity anticipated or known to occur during manufacture, processing, or use of the new chemical substance, including worker exposure

information from exempt manufacture or related use of the new chemical substance under § 720.30. This information includes:

(i) A description of each worker activity.

(ii) Type of potential worker exposure (e.g., dermal, inhalation).

(iii) Protective equipment in place, if any, including a description of the kind of gloves, protective clothing, goggles, or respirator that limit worker exposure, if any.

(iv) Engineering controls in place if any.

(v) Physical form of the new chemical substance to which workers may be exposed and moisture content if physical form is solid.

(vi) The percent of the new chemical substance in formulation at time of worker exposure.

(vii) The number of workers reasonably likely to be exposed.

(viii) The duration of activities.

(4) Information on known or anticipated release of the new chemical substance to the environment, including releases from the exempt manufacture or related use of the new chemical substance under § 720.30. This information includes the type of release (e.g., transport, interim storage, disposal, equipment cleaning), the quantity of the new chemical substance released directly to the environment, the quantity of the new chemical substance released into control technology, the quantity of the new chemical substance released to the environment after control technology, the media of release, the type of control technology used, and the following additional information based on the type of release:

(i) For equipment cleaning releases, frequency of equipment cleaning and what is used to clean the equipment.

(ii) For transport and storage releases, how the new chemical substance or product containing the new chemical substance will be transported from the site and stored, whether dedicated containers are used, whether the cleaning and disposal of the containers is under the submitter's control, the container cleaning method, the frequency of container cleaning, and the amount of release of the new chemical substance per container cleaning.

(iii) For releases into air, Clean Air Act operating permit numbers, a description of any Leak Detection and Repair program in accordance with 40 CFR parts 60, 61, 63, 65, 264 or 265 (related to the monitoring and management of fugitive releases) the site has implemented, and the type of air pollution control technologies used at the site to treat the stack releases that

will contain the new chemical substance.

(iv) For releases into water, the National Pollutant Discharge Elimination System (NPDES) permit number(s), outfall numbers, the name(s) of the waterbody into which the release occurs, and other destination(s) into which the release occurs.

(v) For releases into wastewater treatment plants, the name(s) of the publicly owned treatment works (POTW) or privately owned treatment works into which the release occurs and the corresponding NPDES permit number(s), the type of wastewater treatment technology or technologies employed, and a description of the known or expected treatment efficiency.

* * * * *

(j) The physical and chemical properties and environmental fate characteristics of the new chemical substance, which include the following:

(1) For physical and chemical properties, such information includes boiling point, sublimation, density/relative density, dissociation constant, explosibility, flammability, melting point, octanol/water partition coefficient, particle size distribution, particle size distribution analysis (i.e., analysis method and data used to develop the particle size distribution), the physical state of the neat substance, pH, solubility, vapor pressure, volatilization from water, volatilization from soil, spectra, UV-VIS absorption data, and surface tension.

(2) For environmental fate characteristics, such information includes hydrolysis, photolysis, aerobic and anaerobic biodegradation, atmospheric oxidation half-lives, Henry's law constant, adsorption/desorption coefficient, bioaccumulation or bioconcentration factor, Incineration Removal Efficiency (Destruction and Removal Efficiencies or DREs), and Sewage Treatment (WWTP) Removals.

(k) Information about pollution prevention efforts, such as using alternative fuel sources, reducing the use of water and chemical inputs, modifying a production process to produce less waste, or implementing water and energy conservation practices, or substituting for riskier existing products. Inclusion of this information is optional.

■ 13. Amend § 720.50 by revising paragraphs (a)(4)(ii) and adding paragraph (c) to read as follows:

§ 720.50 Submission of test data and other data concerning the health and environmental effects of a substance.

(a) * * *

(4) * * *

(ii) If a test or experiment is completed before the applicable review period ends, the person must submit the study, report, or test data electronically to EPA via CDX, as specified in paragraph (a)(3)(i) of this section, within ten days of receiving it, but no later than five days before the end of the review period. If the test or experiment is completed during the last five days of the review period, the submitter must inform its EPA contact for that notice by telephone or e-mail prior to the end of the review period and submit the study, report, or test data electronically to EPA via CDX.

* * * * *

(c) *Other information.* A person may submit other information, not otherwise required in this section, to facilitate EPA's review of the notice.

* * * * *

■ 14. Revise § 720.65 to read as follows:

§ 720.65 Acknowledgement of receipt of a notice; errors in the notice; incomplete submissions; and false and misleading statements.

(a) *Notification to the submitter.* (1) EPA will acknowledge receipt of each notice by sending a letter via CDX or U.S. mail to the submitter that identifies the premanufacture notice number assigned to the new chemical substance and date on which the applicable review period begins as described in paragraph (a)(2) of this section.

(2) Before EPA sends an acknowledgement of receipt of a notice pursuant to paragraph (a)(1) of this section, EPA will conduct a pre-screen of the notice, typically taking 2–3 days and according to the criteria under paragraphs (b)(1) and (c)(1) of this section.

(i) If EPA concludes that the notice contains errors warranting remedy or is incomplete, EPA will notify the submitter according to paragraph (d)(3) of this section. The applicable review period will not begin. Once the submitter corrects the errors or incomplete submission according to the requirements provided by EPA and re-submits the notice to EPA, EPA will follow the procedures of paragraph (a)(2) of this section.

(ii) If EPA does not identify errors or determine the notice to be incomplete during screening, EPA will notify the submitter according to paragraph (a)(1) of this section. The applicable review period will begin on the date EPA received the complete notice.

(b) *Errors in the notice.* (1) Within 30 days of receipt of the notice, EPA may request that the submitter remedy errors in the notice. The following are examples of such errors:

(i) Typographical errors that cause data to be misleading or answers to any questions to be unclear.

(ii) Contradictory information.

(iii) Ambiguous statements or information.

(2) The applicable review period does not begin for notices containing errors that EPA asks the submitter to remedy until corrections are made following the procedures of paragraph (d) of this section.

(c) *Incomplete submissions.* (1) A submission is not complete, and the applicable review period does not begin, if:

(i) The wrong person submits the notice form.

(ii) The submitter does not sign the notice form.

(iii) Some or all of the information in the notice or the attachments are not in English, except for published scientific literature.

(iv) The submitter does not submit the notice in the manner set forth in § 720.40(a)(2).

(v) The submitter does not provide information that is required by section 5(d)(1)(B) and (C) of the Act and § 720.50.

(vi) The submitter does not provide information required by § 720.45 or indicate that it is not known to or reasonably ascertainable by the submitter.

(vii) The submitter does not submit a second copy of the submission with all confidential information deleted for the public file, as required by § 703.5(c).

(viii) The submitter does not include any information required by section 5(b)(1) of the Act and pursuant to a rule promulgated under section 4 of the Act, as required by § 720.40(g).

(ix) The submitter does not submit data which the submitter believes show that the chemical substance will not present an unreasonable risk of injury to health or the environment, if EPA has listed the chemical substance under section 5(b)(4) of the Act, as required in § 720.40(h).

(x) The submitter does not include an identifying number and a payment identity number as required by § 700.45(e)(3).

(2) The submission may be declared incomplete if at any time during the applicable review period the submitter submits additional or revised information without demonstrating to EPA's satisfaction that the additional or revised information in the amended notice was not known to or reasonably ascertainable by the submitter at the time of initial notice submission (e.g., new information as described in § 720.40(f) or information from testing

in progress at the time of the original submission, as described in § 720.50(a)(4)), unless it relates to administrative or non-substantive amendments (e.g., changing the technical point of contact) or amendments made at the request of EPA.

(d) *Corrections to errors in the notice or incomplete submissions.* (1) If EPA receives an incomplete submission or seeks remedy of errors identified in a notice, EPA will notify the submitter within 30 days of receipt that the submission contains errors or is incomplete and that the applicable review period will not begin until EPA receives a correct and complete notice.

(2) If EPA obtains additional information during the applicable review period that indicates the original submission was incomplete, EPA may declare the submission incomplete within 30 days after EPA obtains the additional information and so notify the submitter.

(3) The notification that a submission contains errors or is incomplete under paragraph (d)(1) or (2) of this section will include:

(i) A statement of the basis of EPA's determination that the submission contains errors or is incomplete.

(ii) The requirements for correcting the errors or incomplete submission.

(iii) Information on procedures under paragraph (d)(4) of this section for filing objections to the determination or requesting modification of the requirements for completing the submission.

(4) Within ten days after receipt of notification by EPA that a submission contains errors or is incomplete, the submitter may file written objections requesting that EPA accept the submission as a complete notice or modify the requirements necessary to complete the submission.

(5) EPA will consider the objections filed by the submitter and determine:

(i) Whether the submission was complete or incomplete, or whether to modify the requirements for completing the submission. EPA will notify the submitter in writing of EPA's response within ten days of receiving the objections.

(ii) If EPA determines, in response to the objection, that the submission was complete, the applicable review period will be deemed suspended on the date EPA declared the notice incomplete and will resume on the date that the notice is declared complete. The submitter need not correct the notice as EPA originally requested. If EPA can complete its review within 90 days from the date of the original submission, EPA

may inform the submitter that the running of the review period will resume on the date EPA originally declared it incomplete.

(iii) If EPA modifies the requirements for completing the submission or affirms its original determination that the submission contains errors or is incomplete, or if no objections are filed, the applicable review period will begin (or if previously begun, will restart at Day 1) when EPA receives a complete notice.

(e) *Materially false or misleading statements.* If EPA discovers at any time that a person submitted materially false or misleading statements in the notice, EPA may find that the notice was incomplete from the date it was submitted and take any other appropriate action.

■ 15. Amend § 720.70 by revising paragraphs (a) and (b)(3) to read as follows:

§ 720.70 Notice in the Federal Register.

(a) *Filing notice of receipt.* In accordance with section 5(d)(2) of the Act, after EPA has received a complete notice, EPA will file a notice of receipt with the Office of the Federal Register including the information specified in paragraph (b) of this section.

(b) * * *

(3) For test data submitted in accordance with § 720.40(g), a summary of the data received will be published.

* * *

■ 16. Amend § 720.75 by:

- a. Revising the section heading;
- b. Removing the phrase “notice review period” and adding in its place the phrase “applicable review period,” wherever it appears; and
- c. Revising paragraphs (a), (b), (c)(4) introductory text, (c)(4)(iii), and (d).

The revisions read as follows:

§ 720.75 Applicable review period and determination.

(a) *Length of applicable review period.* The applicable review period specified in section 5(a) of the Act runs for 90 days from the date EPA receives a complete notice, or the date EPA determines the notice is complete under § 720.65(d), unless the Agency extends the applicable review period under section 5(c) of the Act and paragraph (c) of this section.

(b) *Suspension of the running of the applicable review period.* (1) A submitter may voluntarily suspend the running of the applicable review period if EPA agrees. If EPA does not agree, the review period will continue to run, and EPA will notify the submitter. A submitter may request a suspension at any time during the applicable review

period. The suspension must be for a specified period of time.

(2) *Requests for suspensions.* (i) A request for a suspension of 30 days or less may be made orally, including by telephone, or in writing, including by e-mail, to the submitter's EPA contact for that notice. Any request for a suspension exceeding 30 days must be submitted in the manner set forth in paragraph (b)(2)(ii) of this section. The running of the applicable review period will be suspended upon approval of the oral or written request by EPA.

(ii) Requests for suspensions exceeding 30 days must be submitted electronically to EPA via CDX using e-PMN software. Requests for suspensions of 30 days or less may also be submitted electronically to EPA via CDX using e-PMN software. See § 720.40(a)(2)(ii) for information on how to access the e-PMN software. The running of the applicable review period will be suspended upon approval of the request submitted electronically to EPA via CDX using e-PMN software by EPA.

(c) * * *

(4) The following are examples of situations in which EPA may find that good cause exists for extending the applicable review period:

* * *

(iii) EPA has received significant additional information during the applicable review period, which was not known to or reasonably ascertainable by the submitter at the time of initial notice submission.

(d) *Determinations.* (1) Within the applicable review period, EPA will make one of the following five determinations, as set forth in section 5(a)(3) of the Act:

(i) The chemical substance presents an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(A) of the Act.

(ii) Information available to EPA is insufficient to permit a reasoned evaluation of the health and the environmental effects of the relevant chemical substance, as set forth in section 5(a)(3)(B)(i) of the Act.

(iii) In the absence of sufficient information to permit EPA to make such an evaluation, the chemical substance may present an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(B)(ii)(I) of the Act.

(iv) The chemical substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the

substance, as set forth in section 5(a)(3)(B)(ii)(II) of the Act.

(v) The chemical substance is not likely to present an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(C) of the Act.

(2) EPA will take the following actions required in association with the determination:

(i) For determinations described in paragraph (d)(1)(i) of this section, EPA will issue the submitter an order to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance, or any combination of such activities, to the extent necessary to protect against an unreasonable risk of injury to health or the environment, as set forth in section 5(f) of the Act, or will issue a proposed rule under section 6(a) of the Act, as set forth in section 5(f) of the Act.

(ii) For determinations described in paragraphs (d)(1)(ii), (iii), or (iv) of this section, EPA will issue the submitter an order to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance, or any combination of such activities, to the extent necessary to protect against an unreasonable risk of injury to health or the environment, as set forth in section 5(e) of the Act. EPA may issue an order under section 5(e) of the Act that requires certain testing to be conducted and presented to EPA after the applicable review period has concluded.

(iii) For determinations described in paragraph (d)(1)(v) of this section, EPA will issue the submitter a document containing EPA's final determination and will submit for publication in the **Federal Register** a statement of the finding, as set forth in section 5(g) of the Act. Upon EPA's issuance of the determination document, the submitter may commence the manufacture of the chemical substance without waiting for the end of the applicable review period.

(3) EPA may modify or revoke the prohibitions and limitations in an order issued under paragraph (d)(2)(i) or (ii) of this section after the applicable review period has ended if EPA receives additional testing, studies, reports, or other information that EPA determines, upon review, demonstrate that such prohibitions or limitations are no longer necessary to protect against an unreasonable risk of injury to health or the environment. Where such information demonstrates that the prohibitions or limitations of the order are not sufficient to protect against an unreasonable risk of injury to health or the environment, EPA may modify the order or take other action, as

appropriate, to the extent necessary to protect against such risk.

(4) No person submitting a notice in response to the requirements of this part may manufacture a chemical substance subject to this part until EPA has issued a determination in accordance with paragraph (d)(1) of this section and taken the associated action required under paragraph (d)(2) of this section.

* * * * *

PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES

■ 17. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 18. Amend § 721.25 by:

- a. Revising paragraph (d); and
- b. Adding paragraph (e).

The revisions and additions read as follows:

§ 721.25 Notice requirements and procedures.

* * * * *

(d) Any person submitting a significant new use notice in response to the requirements of this part shall not manufacture or process a chemical substance identified in subpart E of this part for a significant new use until EPA has issued a determination with respect to the significant new use and taken the actions required in association with that determination in accordance with the procedures for new chemical substances at § 720.75(d) of this chapter.

(e) When submitting a significant new use notice, in addition to providing a description of the intended categories of consumer or commercial use by function and application as required by § 720.45(f)(1) of this chapter, the submitter must also provide, to the extent known to or reasonably ascertainable by the submitter, a description of known categories of consumer or commercial use by function and application.

■ 19. Amend §§ 721.10647(a)(1), 721.10844(a)(1), 721.10929(a)(1), 721.11149(a)(1), 721.11179(a)(1), 721.11361(a)(1)(iii), and 721.11712(a)(1) by revising the citation “720.3(c)” to read “720.3.”

■ 20. Amend § 721.11777(b) by revising the citations “720.3(w)” and “720.3(d)” to read “720.3.”

PART 723—PREMANUFACTURE NOTIFICATION EXEMPTIONS

■ 21. The authority citation for part 723 continues to read as follows:

Authority: 15 U.S.C. 2604.

■ 22. Amend § 723.50 by:

- a. Revising paragraphs (a)(1);
- b. Adding paragraphs (b)(11) and (12);
- c. Revising paragraphs (d);
- d. Adding paragraphs (e)(2)(xiv);
- e. Revising paragraphs (e)(3), (g), (h)(2)(v), and (i); and
- f. Adding paragraph and (p).

The revisions and additions read as follows:

§ 723.50 Chemical substances manufactured in quantities of 10,000 kilograms or less per year, and chemical substances with low environmental releases and human exposures.

(a) * * *

(1) This section grants an exemption from the premanufacture notice requirements of section 5(a)(1)(A)(i) of the Toxic Substances Control Act (15 U.S.C. 2604(a)(1)(A)) for the manufacture of:

* * * * *

(b) * * *

(11) *PFAS or per- and poly-fluoroalkyl substance* means a chemical substance that contains at least one of these three structures:

(i) R–(CF₂)–CF(R′)R″, where both the CF₂ and CF moieties are saturated carbons;

(ii) R–CF₂OCF₂–R′, where R and R′ can either be F, O, or saturated carbons; or

(iii) CF₃C(CF₃)R′R″, where R′ and R″ can either be F or saturated carbons.

(12) *PBT chemical substance* means a chemical substance possessing characteristics of persistence (P) in the environment, accumulation in biological organisms (bioaccumulation (B)), and toxicity (T) resulting in potential risks to humans and ecosystems. For more information on EPA’s Policy on new chemical substances that are PBTs, see EPA’s 1999 policy statement (64 FR 60194, November 4, 1999 (FRL–6097–7)).

* * * * *

(d) *Chemical substances that cannot be manufactured under this exemption.* A new chemical substance cannot be manufactured under this section, notwithstanding satisfaction of the criterion of paragraph (c)(1) or (2) of this section, if EPA determines, in accordance with paragraph (g) of this section, that the substance, any reasonably anticipated metabolites, environmental transformation products, or byproducts of the substance, or any reasonably anticipated impurities in the substance, under anticipated conditions of manufacture, processing, distribution in commerce, use, or disposal of the new chemical substance:

(1) May cause:

(i) Serious acute (lethal or sublethal) effects;

(ii) Serious chronic (including carcinogenic and teratogenic) effects; or

(ii) Significant environmental effects.

(2) Or is:

(i) A PFAS.

(ii) A PBT chemical substance with anticipated environmental releases and potentially unreasonable exposures to humans or environmental organisms.

* * * * *

(e) * * *

(2) * * *

(xiv) Physical and chemical properties and environmental fate characteristics (§ 720.45(j)).

(3) *Incomplete notices.* EPA will conduct a pre-screen of the notice, typically taking 2–3 days and according to the criteria under paragraph (e)(2) of this section. If EPA concludes that the notice is incomplete, EPA will notify the submitter and the review period will not begin. Once the submitter corrects the errors or incomplete submission according to the requirements provided by EPA and re-submits the notice to EPA, the review period will begin. If EPA does not identify errors or determine the notice to be incomplete during screening, the review period will begin on the date EPA received the complete notice.

* * * * *

(g) *Review period.* (1) EPA will review the notice submitted under paragraph (e) of this section to determine whether manufacture of the new chemical substance is eligible for the exemption. The review period will run for 30 days from the date EPA receives a complete notice. To provide additional time to address any unresolved issues concerning an exemption application, the exemption applicant may, at any time during the review period, request a suspension of the review period pursuant to the provisions of § 720.75(b) of this chapter.

(2) No person submitting a notice under paragraph (e) of this section may manufacture the new chemical substance until EPA notifies the submitter that the new chemical substance meets the terms of this section.

(h) * * *

(2) * * *

(v) If the Agency determines that manufacture of the new chemical substance does not meet the terms of this section and that the manufacturer did not act with due diligence and in good faith to meet the terms of this section, the manufacturer must cease any continuing manufacture, processing, distribution in commerce, and use of the new chemical substance within 7 days of the written notification

under paragraph (h)(2)(iii) of this section. The manufacturer may not resume manufacture, processing, distribution in commerce, and use of the new chemical substance until it submits a notice under section 5(a)(1) of the Act and part 720 of this chapter and EPA has made one of the five determinations as set forth in section 5(a)(3) of the Act and taken the action required in association with that determination.

* * * * *

(i) *Additional information.* If the manufacturer of a new chemical substance under the terms of this exemption obtains test data or other information indicating that the new chemical substance may not qualify under terms of this section, the manufacturer must submit these data or information to EPA within 15 working days of receipt of the information. If, during the notice review period specified in paragraph (g) of this section, the submitter obtains possession, control, or knowledge of new information that materially adds to, changes, or otherwise makes significantly more complete the information included in the notice, the submitter must submit that information to EPA within ten days of receiving the new information, but no later than five days before the end of the applicable review period. The new information must be submitted electronically to EPA via CDX and must clearly identify the submitter and the exemption notice to which the new information is related. If the new information becomes available during the last 5 days of the notice review period, the submitter must immediately inform its EPA contact for that notice by telephone or e-mail and submit the new information electronically to EPA via CDX.

* * * * *

(p) *Subject to a significant new use rule or listed on TSCA Inventory.* If a significant new use rule is proposed or finalized in part 721 of this chapter for a chemical substance described by a generic chemical name or if the specific chemical identity of a chemical substance is listed on the confidential portion of the TSCA Inventory, EPA may make reasonable efforts to notify any persons who may also manufacture the same chemical substance under the terms of this section. A disclosure to a person with an approved exemption under this section that the chemical substance is subject to a proposed or final rule in part 721 of this chapter or is listed on the confidential portion of the TSCA Inventory will not be considered public disclosure of confidential business information under

section 14 of the Act. The notification will inform manufacturers subject to the terms of this section that the chemical substance is subject to a proposed or final significant new use rule under section 5(a)(2) of the Act or is listed on the TSCA Inventory, and identify the proposed or final section in subpart E of part 721 of this chapter that pertains to the chemical substance or the generic name for that substance listed on the public portion of the TSCA Inventory, as applicable.

PART 725—REPORTING REQUIREMENTS AND REVIEW PROCESSES FOR MICROORGANISMS

■ 23. The authority citation for part 725 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, 2613, and 2625.

■ 24. Amend § 725.8(c)(1) by revising the citation “720.3(e)” to read “720.3.”

■ 25. Amend § 725.54 by revising paragraphs (b)(1), (c) and (d) to read as follows:

§ 725.54 Suspension of the review period.

* * * * *

(b)(1) *Request for suspension.* A request for suspension may only be submitted in a manner set forth in this paragraph. The request for suspension also may be made orally, including by telephone, or in writing, including by e-mail, to the submitter's EPA contact for that notice, subject to paragraph (c) of this section.

* * * * *

(c) An oral or written request for suspension may be granted by EPA for a maximum of 30 days only. Requests for longer suspension must only be submitted in the manner set forth in paragraph (b)(2) of this section.

(d) If the submitter has not made a previous oral or written request, the running of the applicable review period is suspended as of the date of receipt of the CDX submission by EPA.

■ 26. Amend § 725.60 by revising paragraph (a)(1) to read as follows:

§ 725.60 Withdrawal of submission by the submitter.

(a)(1) *Withdrawal of notice by the submitter.* A submitter may withdraw a notice during the applicable review period by submitting a statement of withdrawal in a manner set forth in this paragraph. The withdrawal is effective upon receipt of the CDX submission by EPA.

* * * * *

■ 27. Amend § 725.170 by:

- a. Revising paragraphs (a) and (b); and
- b. Removing paragraph (c).

The revisions read as follows.

§ 725.170 EPA review of the MCAN.

* * * * *

(a) *Length of the review period.* The MCAN review period specified in section 5(a) of the Act runs for 90 days from the date EPA receives a complete MCAN, or the date EPA determines the MCAN is complete under § 725.33, unless the Agency extends the period under section 5(c) of the Act and § 725.56.

(b) *Determinations.* (1) Within the applicable review period, EPA will make one of the following five determinations on the microorganism, as set forth in section 5(a)(3) of the Act:

(i) The microorganism presents an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(A) of the Act.

(ii) Information available to EPA is insufficient to permit a reasoned evaluation of the health and the environmental effects of the microorganism, as set forth in section 5(a)(3)(B)(i) of the Act.

(iii) In the absence of sufficient information to permit EPA to make such an evaluation, the microorganism may present an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(B)(ii)(I) of the Act.

(iv) The microorganism is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance, as set forth in section 5(a)(3)(B)(ii)(II) of the Act.

(v) The microorganism is not likely to present an unreasonable risk of injury to health or the environment, as set forth in section 5(a)(3)(C) of the Act.

(2) EPA will take the following actions required in association with the determination.

(i) For determinations described in paragraph (b)(1)(i) of this section, EPA will issue the submitter an order to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of the microorganism, or any combination of such activities, to the extent necessary to protect against an unreasonable risk of injury to health or the environment, as set forth in section 5(f) of the Act, or will issue a proposed rule under section 6(a) of the Act, as set forth in section 5(f) of the Act.

(ii) For determinations described in paragraphs (b)(1)(ii), (iii), or (iv), EPA will issue the submitter an order to prohibit or limit the manufacture, processing, distribution in commerce,

use, or disposal of the microorganism, or any combination of such activities, to the extent necessary to protect against an unreasonable risk of injury to health or the environment, as set forth in section 5(e) of the Act. EPA may issue an order under section 5(e) of the Act that requires certain testing to be conducted and presented to EPA after the applicable review period has concluded.

(iii) Following determinations described in paragraph (b)(1)(v) of this section, EPA will issue the submitter a document containing EPA's final determination and will submit for publication in the *Federal Register* a statement of the finding, as set forth in section 5(g) of the Act. Upon EPA's issuance of the determination document, the submitter may commence the manufacture of the microorganism without waiting for the end of the applicable review period.

(3) EPA may modify or revoke the prohibitions and limitations in an order issued under paragraph (b)(2)(i) or (ii) of this section after the applicable review period has ended if EPA receives additional information, testing, studies, or reports that EPA determines, upon review, demonstrate that such prohibitions or limitations are no longer necessary to protect against an unreasonable risk of injury to health or the environment. Where such information demonstrates that the prohibitions or limitations of the order are not sufficient to protect against an unreasonable risk of injury to health or the environment, EPA may modify the order or take other action, as appropriate, to the extent necessary to protect against such risk.

(4) No person submitting an MCAN in response to the requirements of this subpart may manufacture a microorganism subject to this subpart until EPA has issued a determination in accordance with paragraph (b)(1) of this section and taken the associated action required under paragraph (b)(2) of this section.

* * * * *

PART 761—POLYCHLORINATED BIPHENYLS (PCBs) MANUFACTURING, PROCESSING, DISTRIBUTION IN COMMERCE, AND USE PROHIBITIONS

■ 28. The authority citation for part 761 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, 2611, 2614, and 2616.

■ 29. In § 761.3 amend the definition for "Importer" by removing the citation

"§ 720.3(l)" and adding in its place "§ 720.3."

* * * * *

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BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 37

[Docket No. DOT–OST–2024–0090]

RIN 2105–AF05

Transportation for Individuals With Disabilities; Adoption of Accessibility Standards for Pedestrian Facilities in the Public Right-of-Way

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT or the Department).

ACTION: Final rule.

SUMMARY: The Department of Transportation (DOT or the Department) is amending its Americans with Disabilities Act regulations to adopt, without modification, the Architectural and Transportation Barriers Compliance Board's Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way (PROWAG) as DOT's regulatory standards for new construction and alterations of transit stops in the public right-of-way.

DATES: This rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: For general questions, Holly Ceasar-Fox, Office of the General Counsel, U.S. Department of Transportation, (202) 366–7420, holly.ceasarfox@dot.gov. For legal questions related to PROWAG, James T. Esselman, Office of Chief Counsel, Federal Highway Administration, (202) 366–6181, james.esselman@dot.gov. For legal questions related to transit, Diane Alexander, Office of Chief Counsel, Federal Transit Administration, (202) 366–3101, diane.alexander@dot.gov. For questions related to intercity or high-speed rail, Linda Martin, Federal Railroad Administration, Office of Chief Counsel, 202–689–9408, Linda.Martin@dot.gov.

Electronic Access and Filing: This document, the notice of proposed rulemaking (NPRM), all comments received, and all background material may be viewed online at www.regulations.gov using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic

copy of this document may also be downloaded from the Office of the Federal Register's website at www.federalregister.gov and the Government Publishing Office's website at www.GovInfo.gov.

SUPPLEMENTARY INFORMATION: The Americans with Disabilities Act (ADA) directs the Architectural and Transportation Barriers Compliance Board (U.S. Access Board, or the Board) to issue minimum guidelines for accessible design to guide the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT) in the development of ADA accessibility standards. *See* 42 U.S.C. 12204(a). On August 8, 2023, the Board issued its final rule on Public Rights-of-Way Accessibility Guidelines (PROWAG). (88 FR 53604).

Title II of the ADA sets forth accessibility requirements applicable to public entities. Under Title II, Part B, DOT is authorized to implement the ADA relating to nondiscrimination in the provision of public transportation services. *See* 42 U.S.C. 12149(a). The ADA directs DOT to adopt standards for accessible public transportation facilities that are "consistent with" final minimum accessibility guidelines issued by the Board. *Id.* at section 12149(b). Similarly, Title III of the ADA directs DOT to adopt regulations implementing the transportation provisions of Title III, applicable to private entities that provide specified public transportation services and provides that any standards adopted under such regulations must be "consistent with" final minimum accessibility guidelines adopted by the Access Board. *Id.* at sections 12186(a), (c).

Under these authorities, DOT issued a notice of proposed rulemaking (NPRM) to adopt the PROWAG into DOT's ADA regulations on August 22, 2024 (89 FR 67922). The NPRM proposed to adopt the entirety of the PROWAG into DOT's ADA regulations but noted that DOT's independent regulatory authority under the ADA extends only to the accessibility of public transportation facilities. *See* 42 U.S.C. 12149(a), 12186(a), (c). As a result, the NPRM proposed that in adopting the PROWAG into DOT's ADA regulations, DOT will apply only those provisions applicable to new construction and alterations of transit stops in the public right-of-way. PROWAG R210 requires transit stops and transit shelters to comply with technical requirements set forth in PROWAG R309. Elements required to be accessible under PROWAG R309 include the boarding and alighting area

at a sidewalk or street-level transit stop or the boarding platform, pedestrian access routes (PARs) that connect altered boarding and alighting areas or altered boarding platforms with existing pedestrian circulation paths, and, if provided, transit shelters and PARs connecting transit shelters with boarding and alighting areas or boarding platforms. Other PROWAG provisions applicable to transit stops in the public right-of-way include: fare vending machines (R210); operable parts of other fixed elements (R210); detectable warnings for boarding platforms (R205.5) and sidewalk and street-level rail boarding and alighting areas (R205.6); pedestrian signs (R208); PARs between newly constructed transit stops and accessible elements, spaces, and pedestrian facilities required to be accessible (R203.2.1); alternate transit stops (R204.2); and benches (R209.6.1).

Because DOT's independent regulatory authority under the ADA extends only to the accessibility of public transportation facilities, DOT's authority does not extend to regulating the accessibility of other separate elements of the public right-of-way, such as on-street parking spaces, crosswalks, or sidewalks, with the exception of the elements mentioned above, as applied to transit stops. Such other elements in the public right-of-way fall under the jurisdiction of the Department of Justice under Title II, Part A, of the ADA.

In addition to seeking comments on DOT's proposal to adopt PROWAG into its ADA regulations, DOT also requested comments on specific issues. First, noting that DOT's ADA standards must be "consistent with" the Access Board's PROWAG, the Department asked whether its accessibility standards should differ from the Access Board's PROWAG by adopting modifications that provide greater accessibility than the PROWAG or that clarify application of certain PROWAG provisions. Specifically, DOT requested comments on whether it should add restrictions on certain transit stop designs that locate the transit boarding and alighting area so that it coincides with vehicular lanes, including bicycle facilities. The Department expressed concern that these types of transit stop designs may impede accessibility for individuals with disabilities.

The NPRM proposed, as well, to add definitions of "transit stop," "public right-of-way," and "alteration of a transit stop" to 49 CFR 37.3. The Department also proposed that a transit stop project located in the public right-of-way on which construction has begun, or for which all approvals for

final design have been received, before the effective date of the final rule, would not be required to comply with DOT's PROWAG standards, but would otherwise be required to be readily accessible to and usable by individuals with disabilities. The Department also proposed an effective date of the final rule of 30 days after publication of the final rule.

As discussed in further detail below, DOT is proceeding with adopting the PROWAG into DOT's ADA regulations at 49 CFR part 37, without modification, as standards applicable to transit stops in the public right-of-way. In order to avoid duplication, since the entire text of the PROWAG is available in materials published by the Access Board, the Department is adopting the PROWAG into § 37.9 of the Department's ADA regulations at 49 CFR part 37 by cross-reference to 36 CFR part 1190.

Comments to the NPRM

DOT published its NPRM proposing to adopt the PROWAG into DOT's ADA regulations at 49 CFR part 37 on August 22, 2024. The comment period ended on September 23, 2024.

DOT received 88 comments in response to the NPRM. Out of the 88 comments considered, 61 commenters expressed general support for the proposed rule, while 27 commenters did not provide a general opinion but rather focused their comments on specific issues. No commenters expressed general opposition to the proposed rule.

1. *Overlapping Boarding Areas With Vehicular Lanes*

Comments

The greatest number of comments on the NPRM concerned DOT's request for comments on whether DOT should consider adding restrictions on certain transit stop designs that locate the transit boarding and alighting area so that it coincides with vehicular lanes, including bicycle facilities. The PROWAG does not currently address such designs, and DOT expressed concern that co-location of the boarding area with a vehicular lane, including a bicycle lane, may put a transit user with disabilities at risk of being struck while waiting to board or while alighting from a transit vehicle. The Department sought comment on whether allowing boarding and alighting areas to overlap vehicular lanes presents accessibility concerns, and whether it should consider adding a provision to R309.1 when it adopts the PROWAG into its standards restricting such co-location. DOT also sought comment on whether there are solutions short of prohibiting co-location that

would address accessibility concerns, such as alternative designs that prevent vehicular passage when riders are boarding or alighting from a transit vehicle.

DOT received comments from forty-four entities opposed to adding restrictions on transit stop designs that provide for overlap between boarding and alighting areas and bicycle lanes. Those entities included ten State departments of transportation (State DOTs), fourteen local public entities, four public transit providers, three disability advocacy groups, eight transportation-related organizations, two consultant groups, and three individuals. Arguments against adding restrictions on these types of transit stop designs included the following: (1) several entities that have used such designs reported no or minor instances of conflicts between cyclists or micromobility users (e.g., scooters) and transit users; (2) even if such conflict does exist, numerous design guidelines have been developed that minimize the potential for conflicts between transit riders and vehicles while retaining the key design features of multimodal transit boarding and alighting areas; (3) such designs are an emerging area of practice that would benefit from increased coordination and research; (4) the addition of restrictions would impact the scope of currently active bike lane projects and create additional barriers to their completion; and (5) prohibition of co-location would add more complexity to future active transportation projects, especially in constrained environments, and negatively impact the ability of entities to meet environmental and Vision Zero goals. Commenters also expressed opposition to DOT taking any action in this area in the absence of proposing specific regulatory language.

More specifically, several entities, acknowledging the potential for transit user—vehicular conflicts where transit stop designs provide overlap between vehicle lanes and the boarding and alighting area, argued that restricting such designs would deprive entities of necessary flexibility to accommodate all users of limited right-of-way and pointed to existing design guidelines from around the country that they contend effectively mitigate conflict concerns. One transit agency commented that it undertook its own design process for transit stops that could safely accommodate pedestrians, transit users, and cyclists and that, working alongside accessibility advocates, transit experts, and active transportation advocates, arrived at a design that has been implemented in

thirty locations. The entity reported few incidents between cyclists, micromobility users, and transit riders at these locations.

One local public entity reported using an overlapping transit stop/bike lane design at over forty locations with no record of reported pedestrian-cyclist accidents at such locations. The entity noted that through monitoring and evaluation, as well as consultation with the local disability community, it has continued to refine shared stop designs to promote safe and predictable interactions between bicyclists and bus customers. Other entities commented that research should continue to better inform the conversation before any regulatory action might be taken. The three disability advocacy groups that opposed regulatory restrictions at this time encouraged DOT to monitor ongoing research.

DOT received comments from fifteen entities in favor of adding restrictions on the co-location of boarding and alighting areas with vehicular lanes. These entities include ten disability advocacy groups, one State DOT, three local public entities, and one public transit provider. These entities generally contended that designs that allow overlap of boarding areas with vehicular lanes (e.g., bike lanes) present significant accessibility and safety concerns for people with disabilities, including those who are blind or have low vision, warranting restrictions through this rulemaking.

One disability advocacy group shared the concerns that DOT had noted about co-located boarding and alighting areas and bicycle lanes and noted that there was at least one instance in their community of a cyclist colliding with and injuring a transit rider alighting from a bus. This commenter emphasized that shared transit stop areas are becoming increasingly dangerous as bike lanes are used more frequently by individuals using electric bikes, electric scooters, and motor scooters, which can travel at much greater speeds. Another disability advocacy group added that although many cyclists and micromobility users act responsibly at conflict points, the personal experiences of members is that many cyclists and micromobility users do not reliably yield to pedestrians or transit riders at shared transit stop locations. Another commenter noted that shared transit stop designs can cause confusion for individuals with vision disabilities and increase safety concerns which may encourage some individuals with disabilities to avoid certain transit stops or shift their mode of travel to curb-to-curb service.

Many of the same commenters who encouraged DOT to add regulatory restrictions on shared or overlapping transit stops also encouraged DOT to restrict or provide further guidance on “floating” transit stop islands, a design in which the transit stop is set away from the sidewalk with a bike lane channel in between the sidewalk and the transit stop island. Commenters noted that in addition to transit stops that overlap with vehicular lanes, transit stop islands also present challenges and safety concerns for individuals with disabilities, particularly those who are blind or have low vision, who must cross the bicycle lane to reach the transit stop. Commenters stated that individuals with vision disabilities struggle to detect approaching cyclists at such locations and lack customary physical cues signaling the presence of a bus stop.

DOT Response

DOT continues to have concerns, as expressed in the NPRM, about the accessibility of transit stop designs that locate the transit boarding and alighting area so that it coincides with vehicular lanes, including bicycle facilities. These concerns were echoed primarily by disability advocacy groups, but also by commenters that opposed DOT taking any regulatory action at this time. In fact, most commenters who opposed regulatory restrictions recognize the inherent conflict that exists by allowing vehicular lanes to overlap with boarding and alighting areas but argue that allowance of design flexibility, particularly in constrained right-of-way environments common predominantly to dense urban areas, is vital to allow safe accommodation of travelers as a whole. They note that there is little data showing that the use of overlapping transit stop designs has led to major conflicts between transit riders and cyclists or micromobility users and point to existing design guides that have been developed to minimize the potential for major conflicts at such locations.

Despite DOT’s ongoing concerns about transit stop designs that locate the transit boarding and alighting area so that it coincides with vehicular lanes, DOT will not add any regulatory restrictions on such designs at this time. DOT recognizes the relatively recent development of these types of designs and the ongoing research taking place to identify the impact of such designs on transportation in general, including efforts to develop safe multimodal networks, but also more specifically on individuals with disabilities. DOT is encouraged by the number of comments

that reflected public entities working with individuals with disabilities to address safety and accessibility concerns in the design of transit stops and encourages continued coordination among all transportation stakeholders on these issues.

DOT also recognizes the concerns expressed by many commenters about the accessibility and safety of floating transit stop islands, including comments that urged further research on the use of wayfinding aids, such as tactile warning surface indicators, tactile directional indicators, and tactile warning delineators. DOT declines to take any action in this final rule with respect to floating transit stop islands but encourages further research on the accessibility of such designs.

2. Definition of “Transit Stop”

Comments

DOT received seven comments regarding the proposed definition of transit stop. Three disability advocacy groups commented that DOT should remove the language in the definition limiting its application to stops used by transportation vehicles that operate on a fixed route or scheduled route. These groups argued that by focusing only on stops used by vehicles that operate on a fixed or scheduled route, the definition does not account for pick-up and drop-off locations used by demand responsive public transportation services. These commenters noted that many public transportation providers have begun and are likely to continue to deploy a wide range of demand-responsive transit models beyond paratransit service that should be addressed by DOT’s rule. Two transportation organizations commented that the definition of transit stop should expressly include the need for a pedestrian access route connecting to existing pedestrian circulation paths. One State DOT supported the proposed definition of transit stop, and one local public entity suggested that the definition of transit stop should include all elements required to be accessible at a transit stop.

DOT Response

As DOT explained in the NPRM, the ADA directs DOT to adopt standards for accessible public transportation facilities that are “consistent with” final minimum accessibility guidelines issued by the Board. *Id.* at section 12149(b). Similarly, Title III of the ADA directs DOT to adopt regulations implementing the transportation provisions of Title III, applicable to private entities that

provide specified public transportation services and provides that any standards adopted under such regulations must be “consistent with” final minimum accessibility guidelines adopted by the Access Board. *Id.* at sections 12186(a), (c).

Public transportation facilities subject to Title II of the ADA and DOT’s ADA regulations at 49 CFR part 37 are those facilities used in the provision of designated public transportation, which is defined in DOT’s ADA regulations as “transportation provided by a public entity (other than public school transportation) by bus, rail, or other conveyance (other than transportation by aircraft or intercity or commuter rail transportation) that provides the general public with general or special service, including charter service, on a regular and continuing basis.” 49 CFR 37.3. These facilities include bus and other transit stops in the public right-of-way operated by public transit agencies.

Public transportation facilities subject to Title III of the ADA and DOT’s ADA regulations at 49 CFR part 37 include those facilities located in the public right-of-way used in the provision of specified public transportation, which is defined in DOT’s ADA regulations as “transportation by bus, rail, or any other conveyance (other than aircraft) provided by a private entity to the general public, with general or special service (including charter service) on a regular and continuing basis.” 49 CFR 37.3.

DOT’s intent in the NPRM was to bridge the gap between the language used in its current regulations at 49 CFR part 37 regarding designated and specified public transportation and the language in the PROWAG, which does not refer to designated and specified public transportation but contains provisions specific to transit stops. To bridge this gap, DOT proposed adopting a definition of “transit stop” that mirrors the definition of transit stop in the PROWAG but also seeks to clarify that a transit stop is a transportation facility used in the provision of designated or specified public transportation.

The PROWAG defines “transit stop” as: “An area that is designated for passengers to board or alight from buses, rail cars, and other transportation vehicles that operate on a fixed route or scheduled route, including bus stops and boarding platforms. This definition does not include intercity rail except where a stop is located in the public right-of-way.” PROWAG R104. DOT proposed adding a sentence to the end of this definition as follows: “A facility used in the provision of designated or

specified public transportation in the public right-of-way is a transit stop.”

As noted above, three disability advocacy groups commented that DOT’s proposed definition of “transit stop,” by focusing only on stops used by transportation vehicles that operate on a fixed route or schedule route, does not address stops in the public right-of-way that may be used by providers of demand responsive designated or specified public transportation. In response, DOT notes that the definition of “transit stop” in the PROWAG is intended only to cover those stops used by public transportation vehicles that serve fixed or scheduled routes. The bus boarding and alighting area dimensions, boarding platform requirements, and other elements included at R309 of the PROWAG were all developed to address the accessibility of stops used by public transportation vehicles that serve fixed or scheduled routes. Those specific requirements are not intended to apply to other locations in the public right-of-way that may be used by demand responsive designated or specified public transportation vehicles.

The PROWAG, however, includes provisions for other pick-up and drop-off locations in the public right-of-way. The PROWAG defines a “passenger loading zone” as “[a]n area that is specifically designed or designated for loading and unloading passengers, but that does not primarily serve vehicles on a fixed or scheduled route.” By noting that a passenger loading zone does not primarily serve vehicles on a fixed or scheduled route, the PROWAG distinguishes a passenger loading zone from a transit stop. The PROWAG further provides that “permanently designated passenger loading zones” other than transit stops, must comply with accessibility requirements. PROWAG at R212. The Access Board described the application of section R212 in further detail in the preamble to its final PROWAG rule: “Often, permanent passenger loading zones in the public right-of-way are comprised of a sidewalk cut out so that vehicles can pull out of the traveled way to unload passengers. However, a permanently affixed sign designating a passenger loading zone is sufficient to bring the loading zone under coverage of this rule. Passenger loading zones that vary with the time of day or the occupancy of a particular retail space, such as valet stands that are provided only during certain hours, are not considered permanently designated and are therefore not subject to PROWAG.”

DOT acknowledges that demand responsive designated or specified public transportation vehicles may use

passenger loading zones in the public right-of-way, but such loading zones are not necessarily exclusively designed for use by such vehicles; rather, they may often be used by individual, private vehicles. In developing its NPRM to adopt PROWAG into its ADA regulations, DOT viewed the scope of “passenger loading zones” as falling under DOJ’s ADA jurisdiction over all other pedestrian facilities in the public right-of-way, and, thus, DOT did not propose covering such facilities under its ADA rule. While DOT declines to finalize standards at this time concerning coverage of passenger loading zones applicable to providers of designated or specified transportation, DOT recognizes that this is an area of overlapping jurisdiction with DOJ and may consider proposing standards in this area in a future rulemaking. Even in the absence of enforceable standards, the ADA requires new and altered facilities, including facilities used in the provision of public transportation, to be accessible to and usable by individuals with disabilities. *See* 42 U.S.C. 12146, 12147. DOT encourages entities to follow the PROWAG guidelines applicable to passenger loading zones.

In response to these comments, however, DOT also acknowledges that a portion of its proposed definition of “transit stop” should be removed. The sentence reading “[a] facility used in the provision of designated or specified public transportation in the public right-of-way is a transit stop” is overbroad and unnecessary. A transit stop is a facility used in the provision of designated or specified public transportation, but not all facilities used in the provision of designated or specified public transportation are transit stops. As discussed above, a passenger loading zone may be used in the provision of designated or specified public transportation. As a result, DOT will remove this sentence from its definition of “transit stop.”

Regarding other aspects of the proposed definition of transit stop, two transportation organizations commented that the definition of transit stop should expressly include the need for a pedestrian access route connecting to existing pedestrian circulation paths, and one local public entity suggested that the definition of transit stop should include all elements required to be accessible at a transit stop. Both of these concerns derive from DOT’s proposed definition of transit stop identifying some but not all elements of transit stops for which PROWAG accessibility requirements would apply under DOT’s final rule. As noted previously, the PROWAG defines “transit stop” as “[a]n

area that is designated for passengers to board or alight from buses, rail cars, and other transportation vehicles that operate on a fixed route or scheduled route, including bus stops and boarding platforms. This definition does not include intercity rail except where a stop is located in the public right-of-way." DOT proposed adopting a definition of "transit stop" into its regulations mirroring the PROWAG definition but adding that "[t]ransit stops include, if provided, transit shelters and pedestrian circulation connections between transit shelters and bus boarding and alighting areas or boarding platforms they serve." The local public entity commenter expressed that by adding a sentence that includes transit shelters and pedestrian circulation connections in the definition of transit stop but excludes other elements that must be accessible if provided at transit stops, such as fare vending machines and benches, may confuse the public. Similarly, the two transportation organizations that commented on this aspect of the definition of transit stop felt that the definition should make clear the need for a pedestrian access route connecting to existing pedestrian circulation paths.

Upon consideration of these comments, DOT has decided to remove the additional sentence about transit shelters and pedestrian circulation connections from the definition of "transit stop" in DOT's final rule. In this way, the definition of "transit stop" in DOT's final rule tracks more closely with the definition of "transit stop" in the PROWAG. Other elements required to be accessible if provided at a transit stop are set forth clearly in the PROWAG itself, which is adopted into DOT's regulation by reference. As set forth in the NPRM, elements required to be accessible at a transit stop in the public right-of-way under PROWAG R309 include the boarding and alighting area at a sidewalk or street-level transit stop or the boarding platform, pedestrian access routes (PARs) that connect altered boarding and alighting areas or altered boarding platforms with existing pedestrian circulation paths, and, if provided, transit shelters and PARs connecting transit shelters with boarding and alighting areas or boarding platforms. The PROWAG contains other provisions applicable to transit stops in the public right-of-way that would be subject to DOT enforcement under this rule: fare vending machines (R210); operable parts of other fixed elements (R210); detectable warnings for boarding platforms (R205.5) and sidewalk and street-level rail boarding and alighting

areas (R205.6); pedestrian signs (R208); PARs between newly constructed transit stops and accessible elements, spaces, and pedestrian facilities required to be accessible (R203.2.1); alternate transit stops (R204.2); and benches (R209.6.1).

3. Alteration of a Transit Stop

Comments

DOT proposed to adopt a definition of "alteration of a transit stop" providing: "*Alteration of a transit stop* means a change to or an addition of a transit stop in an existing, developed public right-of-way that affects or could affect pedestrian access, circulation, or usability." DOT received eight comments regarding the proposed definition. Four State DOTs and one local public entity commented that DOT should further clarify specific activities that would constitute an "alteration of a transit stop." One public transit provider commented that DOT should clarify that an "alteration of a transit stop" only includes activity that involves concrete work. One disability advocacy group commented that the definition of "alteration of a transit stop" should be consistent with the existing definition of "alteration" in DOT's regulations at 49 CFR part 37. And, last, one local public entity commented that the definition of "alteration of a transit stop" should be revised to read "alteration or addition of a transit stop" to ensure that practitioners understand that an addition of a transit stop to existing developed right-of-way is considered an alteration under PROWAG and not new construction.

More specifically, with respect to the types of activities that would be considered an alteration of a transit stop under the rule, one commenter asked whether resurfacing a road adjacent to a transit stop would be considered an alteration of the transit stop requiring the entire transit stop to be brought into compliance, to the maximum extent feasible, with PROWAG transit stop requirements. Similarly, another commenter asked if activities such as repairing a broken post, or fixing or replacing a sign, would trigger an obligation to bring the entire transit stop into compliance with PROWAG requirements. Commenters expressed concern that if small changes to individual elements at a transit stop triggered an obligation to ensure that the entire transit stop meets PROWAG standards, entities may choose to remove particular stops altogether rather than improve them.

DOT Response

DOT agrees with the commenters that the public needs clarification on what activities explicitly constitute an "alteration" under the proposed definition of "alteration of a transit stop" and the scope of improvements that would be required when a transit stop or part of a transit stop is altered. DOT specifically proposed a definition of "alteration of a transit stop" to distinguish alterations of such facilities from the definition of "alteration" in DOT's current ADA regulations at 49 CFR 37.3, which applies to alterations of facilities that are buildings or on sites. Thus, to the extent that one commenter suggested that the definition of "alteration of a transit stop" should be harmonized with the existing definition of "alteration," DOT declines to take that step because the definition of "alteration" that applies to buildings or sites contains language that is specific to those types of facilities. A separate definition of "alteration of a transit stop" is necessary.

DOT notes that the existing definition of "alteration" at 49 CFR 37.3 contains much more detail about the types of activities considered to be alterations of buildings or sites than DOT proposed for the definition of "alteration of a transit stop." Specifically, the existing definition of alteration is: "Alteration means a change to an existing facility, including, but not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical or electrical systems are not alterations unless they affect the usability of the building or facility." This definition is a modification of the definition of "alteration" in the Access Board's 2004 ADA Accessibility Guidelines, which provided examples of the types of modifications to a facility that would constitute an alteration.

Similarly, DOT adopted its proposed definition of "alteration of a transit stop" from the PROWAG's definition of "alteration," which provides that an alteration or the term altered means: "A change to or an addition of a pedestrian facility in an existing, developed public right-of-way that affects or could affect pedestrian access, circulation, or usability." In adopting the PROWAG, the Access Board deliberately chose to omit detailed examples of the types of activities that would be considered

alterations, choosing instead to allow DOT and DOJ, the ADA enforcement agencies, to provide necessary clarification. See Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way, 88 FR 53604, 53608 (Aug. 8, 2023). Because the term “alteration of a transit stop” narrows the scope of the types of activities that could be covered as compared with the general definition of “alteration” in the PROWAG, DOT believes it is appropriate to provide clarification of the scope of covered alterations and more detailed examples of “alteration of a transit stop” in the regulatory text as opposed to relying on the issuance of guidance statements at some future date, while not precluding the possibility of issuing further clarifying guidance.

Accordingly, DOT is adopting the following definition of “alteration of a transit stop” in this final rule: “*Alteration of a transit stop* means a change to or an addition of a transit stop, or a part thereof, in an existing, developed public right-of-way that affects or could affect pedestrian access, circulation, or usability. Alterations include, but are not limited to, the reconstruction of an existing transit stop, the addition of a new transit shelter, the addition of a new bench, fare vending machine, or transit sign that identifies a stop or route, reconfiguring the interface of a transit stop with the street or sidewalk network, such as adding floating bus stops, adding a prepared surface for boarding and alighting, and rearrangement of transit stop elements, such as benches or fare vending machines. Normal maintenance such as painting transit shelters, replacing damaged transit shelter windows or screens, repairing a fare vending machine, replacing damaged sign posts, repairing existing curb, or repairing damaged benches or trash cans, are not alterations unless they affect the usability of the transit stop. Permanent closure of a transit stop due to service changes is also not an alteration of a transit stop.”

It is not possible to provide examples of all potential modifications to a transit stop in the regulatory definition of “alteration of a transit stop,” but DOT believes that the examples provided in this final rule illustrate the way particular modifications should be addressed. In addition, in response to comments regarding whether an alteration of an element of a transit stop necessarily triggers the need to bring the entire transit stop into compliance with PROWAG standards at the same time, DOT is modifying the definition of “alteration to a transit stop” to mean “a

change to or an addition of a transit stop, or a part thereof” (emphasis added). In making this revision, DOT intends to focus compliance efforts in the first instance on the part of the transit stop that is being altered. This phrasing is consistent with language in the ADA statute, which provides that alterations to an existing facility, or part thereof, must be made in such a manner that to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12147(a). For example, should a public entity add a new bench at a transit stop, which is included as an example of an “alteration of a transit stop,” only those provisions of PROWAG applicable to benches added to an existing right-of-way would be required to be made accessible at the transit stop to the maximum extent feasible where existing physical constraints make compliance with applicable requirements technically infeasible. This would include the requirements for benches at transit stops set forth at R209.6.1 but would also include the provisions at R202.2 which require pedestrian access routes to connect altered pedestrian facilities to an existing pedestrian circulation path (a transitional segment may be used in the connection). Addition of a new bench at a bus stop would require the bench to be connected by a PAR to an existing pedestrian circulation path but would not trigger the requirement to bring the bus boarding and alighting area into compliance with PROWAG standards.

Similar approaches would be taken to other alterations of elements of a transit stop. If an entity adds a bus boarding and alighting area with a prepared surface to a bus stop that previously did not include a prepared surface (e.g., a stop identified only by a sign in the ground), the bus boarding and alighting area would be required to be made accessible to the maximum extent feasible where existing physical constraints make compliance with applicable requirements technically infeasible. The entity adding the new bus boarding and alighting area would be required to provide necessary PARs connecting the new bus boarding and alighting area to existing pedestrian circulation paths under PROWAG R309.1.3.2, which provides that “[i]n alterations, boarding and alighting areas and boarding platforms shall be connected to existing pedestrian circulation paths by pedestrian access routes complying with R302.”

4. Compliance Exception for Projects in Construction Phase or Through Final Design

Comments

DOT proposed to include an exception in the regulation that would exempt from compliance with the final rule those transit stop projects located in the public right-of-way on which construction has begun or for which all approvals for final design have been received before the effective date of the final rule. DOT received two comments from State DOTs and one comment from a local public entity that urged DOT to exempt from compliance with the final rule all transit projects in the planning stage at the time the final rule becomes effective. One of the State DOTs commented that projects in the planning and design stages, but which have not yet completed final design, may have already completed right-of-way acquisition or signed contracts with utility companies and that the requirement to comply with newly adopted standards could result in delays to such projects.

DOT Response

DOT disagrees with the commenters’ recommendation to exempt transit projects in the planning and design stages from compliance with the newly adopted PROWAG standards at the time of the effective date of the final rule. The exemption for projects on which construction has begun or for which final design has been completed before the effective date of the rule strikes an appropriate balance for entities affected by the rule by recognizing the investment of resources in projects that have advanced to final design or construction versus ensuring that the benefits of the newly adopted standards are realized for projects that remain only in the planning or design phase. DOT followed this same approach with respect to compliance with the revised ADA Accessibility Guidelines that DOT adopted in 2006. DOT will adopt the exemption as proposed in the NPRM. DOT notes, however, that projects for which all final design approvals have been received or for which construction has begun at the time of the effective date of the final rule still must ensure that the elements of the transit stop affected by the transit project (either new construction or alteration) are accessible to and usable by individuals with disabilities even if they are not required to comply with the specific standards adopted by DOT in this final rule. See, e.g., 42 U.S.C. 12147(a).

5. Effective Date

Comments

DOT proposed in the NPRM that its final rule adopting PROWAG into its ADA regulations at 49 CFR part 37 would become effective 30 days after issuance of the final rule. In support of this proposal, DOT noted the public and regulated entities have been aware of the proposed PROWAG's provisions related to transit stops since 2011, which are generally unchanged in the PROWAG, and that many entities have relied on the Department of Justice's similar 2010 ADA Standards and DOT's 2006 ADA Standards for boarding and alighting areas or boarding platforms as references for transit stops in the public right-of-way. As a result, DOT stated that it did not anticipate entities requiring additional time to become familiar with the Department's ADA public right-of-way standards before compliance is required for new construction and alterations.

DOT received twelve comments in favor of its proposed 30-day effective date. Five of those commenters favored the 30-day effective date outright, including one disability advocacy group, three local public entities, and one transportation organization. Seven other commenters endorsed the 30-day effective date provided that DOT did not adopt any modifications to the PROWAG, particularly with respect to placing restrictions on the use of transit stop designs that place the bus boarding and alighting area so that it overlaps with vehicular lanes, including bicycle lanes.

DOT received six comments opposed to the 30-day effective date. One State DOT proposed setting a 90-day effective date. One State DOT, one local public entity, one transportation organization, and one public transit provider proposed a 12-month effective date. Last, one State DOT expressed opposition to the 30-day effective date but did not propose an alternative. The commenters opposed to the 30-day effective date generally expressed that although the Access Board's PROWAG NPRM was issued in 2011 and similar standards for transit stops at sites under the ADA Accessibility Guidelines (ADAAG) have been in place since 1991, the length of time since the 2011 PROWAG NPRM to the present has created ambiguity over how entities should approach the accessibility of transit stops in the public right-of-way.

DOT Response

DOT disagrees with commenters who proposed a later effective date than the 30-day effective date in the proposed

rule. The Access Board issued its final PROWAG rule in August 2023, setting minimum guidelines for the accessibility of pedestrian facilities in the public right-of-way, including transit stops, and the ADA requires DOT to adopt standards for accessible public transportation facilities that are "consistent with" the Access Board's minimum guidelines. So, covered entities have been aware for more than a year that DOT's accessibility standards for transit stops would provide accessibility requirements no less than the guidelines in PROWAG. Moreover, as reflected in the Regulatory Impact Analysis accompanying this final rule, even in the absence of enforceable standards before issuance of this final rule, public entities have had a general obligation to ensure that their facilities are readily accessible to and usable by individuals with disabilities, and to otherwise not discriminate against individuals on the basis of disability. As such, covered entities have generally looked to the Department of Justice's 2010 ADA Standards,¹ the Federal Transit Administration's ADA Circular,² or other references for guidance on how to meet that general accessibility requirement. A review of these sources shows that they provide specifications substantially similar to the final PROWAG rule. In addition, guidance from some of the largest transit agencies indicated that these transit agencies either cite DOT's or DOJ's existing ADA standards applicable to facilities on sites (2004 ADAAG) with regard to accessibility of transit stops or otherwise refer to ADA accessibility requirements in their publications. For more information and analysis on the current state of industry practice, please see the Regulatory Impact Analysis, which is available in the docket for this rulemaking.

Entities have had sufficient time to anticipate the standards that DOT is adopting in the final rule. This is especially the case as DOT is not proposing any modifications to PROWAG in adopting PROWAG in this final rule. The majority of entities that commented on this issue support this approach, and the rule retains an exception from compliance with the PROWAG standards for those projects

¹ 2010 ADA Standards for Accessible Design, U.S. Department of Justice (2010), accessed July 14, 2022 from <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm> (applicable primarily to facilities on sites).

² FTA Circular 4710.1—Americans With Disabilities Act Guidance, Federal Transit Administration (2015), accessed July 18, 2022 from https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/Final_FTA_ADA_Circular_C_4710.1.pdf.

on which construction has begun, or all approvals for final design have been received before the effective date. DOT is adopting a 30-day effective date from the date of publication of this rule.

6. Other Comments

Comments

DOT received several comments requesting that DOT make revisions to various PROWAG provisions that are unrelated to the accessibility of transit stops in the public right-of-way. For instance, one individual and one consulting firm requested clarification about the change of grade requirements at PROWAG R304.5.2 for curb ramps and blended transitions at gutters or streets. Another individual commented on the pedestrian signal phase timing requirements at PROWAG R306.2. Two disability advocacy groups and one State DOT commented on PROWAG provisions related to roundabouts. These and other similar comments pertain to provisions of PROWAG that fall within DOJ's ADA jurisdiction and fall outside of DOT's limited ADA jurisdiction over facilities related to the delivery of designated or specified public transportation. These PROWAG provisions will become enforceable once they are adopted, with or without modifications, as mandatory standards under the ADA by DOJ.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The Office of Management and Budget (OMB) has determined that this rulemaking is not a significant regulatory action within the meaning of E.O. 12866, as amended by E.O. 14094 ("Modernizing Regulatory Review"). The rule will not have an annual effect on the economy of \$200 million or more. The rule will not adversely affect in a material way the economy, any sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities. In addition, the changes will not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

DOT estimates that this rulemaking will have minimal implementation costs, due to the close alignment between the requirements of the rule and existing guidance and industry practices for transit stops in the public

right-of-way. This is presented in further detail in the accompanying Regulatory Impact Analysis (RIA) document.

The rule benefits pedestrians with disabilities by establishing a clear set of accessible design and construction standards for transit stops in the public right-of-way with which public entities would be required to comply. The rule will ensure a more uniformly accessible public transportation system, which facilitates independent living and economic self-sufficiency. Other pedestrians may experience ancillary benefits as well if facilities are easier to use. These benefits are unlikely to be quantified or monetized. The full RIA is available in the docket.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), DOT has reviewed the analysis conducted by the Access Board and published with the final rule (88 FR 53604, August 8, 2023), and evaluated the effects of this rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. DOT estimates that this rulemaking will have minimal implementation costs, due to the close alignment between the requirements of the rule and existing guidance and industry practices for transit stops in the public right-of-way. In addition, many small governmental jurisdictions are located in rural areas and do not have transit facilities that will be impacted by this rulemaking. This is presented in further detail in the accompanying RIA document. Therefore, the Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act does not apply to proposed or final rules that enforce constitutional rights of individuals or enforce statutory rights that prohibit discrimination on the basis of race, color, sex, national origin, age, handicap, or disability. Since DOT's adoption of the 2023 Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way Guidelines is done pursuant to the ADA, which prohibits discrimination on the basis of disability, an assessment of the rule's effect on State, local, and Tribal governments, and the private sector is not required.

Executive Order 13132 (Federalism Assessment)

DOT's rule will be applicable to public entities, including State and local governments, but any federalism implications are not significant. Public entities have been subject to the ADA since 1991, and the many public entities that receive Federal financial assistance have also been required to comply with the requirements of section 504 of the Rehabilitation Act of 1973. Both statutes have required accessibility of transit stops, even in the absence of enforceable standards. Many public entities, in fact, have independently applied the proposed 2011 PROWAG or similar transit stop provisions in DOT's 2006 ADA Standards or DOJ's 2010 ADA Standards. Thus, the adoption of PROWAG into DOT's ADA regulations, enforceable only with respect to transit stops, will not significantly alter existing practice. In addition, public entities previously had the opportunity to provide input and feedback during the development of the Access Board's PROWAG rule. As a result, DOT has determined that this rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. This final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. DOT has determined that this final rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or

environmental impact statement (EIS). See 40 CFR 1501.4(a). Paragraph 4(c)(5) of DOT Order 5610.1C adopts by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Transit Administration's implementing procedures, "[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . ." 23 CFR 771.118(c)(4) and Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20).

In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. 40 CFR 1501.4(b). This rulemaking concerns civil rights protection for individuals with disabilities. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Executive Order 13175 (Tribal Consultation)

DOT has analyzed this rule in accordance with the principles and criteria contained in E.O. 13175, "Consultation and Coordination with Indian Tribal Governments." The rule establishes a regulation on the accessibility of transit stops in the public right-of-way.

This measure applies to public entities, as defined under the ADA, which does not include Tribal governments or other Tribal entities, and it will not have substantial direct effects on one or more Indian Tribes, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal laws. Accordingly, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

Executive Order 12898 (Environmental Justice)

E.O. 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. DOT has determined that this rule does not raise any environmental justice issues.

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 37

Civil Rights, Individuals with disabilities, Transportation.

Issued in Washington, DC, under authority delegated in 49 CFR 1.27(a).

Subash Iyer,

Acting General Counsel, U.S. Department of Transportation.

For the reasons set forth in the preamble, DOT amends 49 CFR part 37, as follows:

PART 37—TRANSPORTATION SERVICES FOR INDIVIDUALS WITH DISABILITIES (ADA)

■ 1. The authority citation for part 37 continues to read as follows:

Authority: 42 U.S.C. 12101–12213; 49 U.S.C. 322.

■ 2. Amend § 37.3 by adding, in alphabetical order, the definitions for “Alteration of a transit stop”, “Public right-of-way”, and “Transit stop” to read as follows:

§ 37.3 Definitions.

* * * * *

Alteration of a transit stop means a change to or an addition of a transit stop, or a part thereof, in an existing, developed public right-of-way that affects or could affect pedestrian access, circulation, or usability. Alterations include, but are not limited to, the reconstruction of an existing transit stop, the addition of a new transit shelter, the addition of a new bench, fare vending machine, or transit sign that identifies a stop or route, reconfiguring the interface of a transit stop with the street or sidewalk network such as adding floating bus stops, adding a prepared surface for boarding and alighting, and rearrangement of transit stop elements, such as benches or fare vending machines. Normal maintenance such as painting transit shelters, replacing damaged transit shelter windows or screens, repairing a fare vending machine, replacing damaged sign posts, repairing existing curb, or repairing damaged benches or trash cans, are not alterations unless they affect the usability of the transit stop. Permanent closure of a transit stop

due to service changes is also not an alteration of a transit stop.

* * * * *

Public right-of-way means public land acquired for or dedicated to transportation purposes, or other land where there is a legally established right for use by the public for transportation purposes.

* * * * *

Transit stop means an area that is designated for passengers to board or alight from buses, rail cars, and other transportation vehicles that operate on a fixed route or scheduled route, including bus stops and boarding platforms. This definition does not include intercity rail except where a stop is located in the public right-of-way.

* * * * *

■ 3. Revise § 37.9 to read as follows:

§ 37.9 Standards for accessible transportation facilities.

(a) *Transportation facilities other than transit stops in the public right-of-way.*

(1) For purposes of this part, a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of this part and the requirements set forth in appendices B and D to 36 CFR part 1191, which apply to buildings and facilities covered by the Americans with Disabilities Act, as modified by appendix A to this part.

(2) Facility alterations begun before January 26, 1992, in a good faith effort to make a facility accessible to individuals with disabilities may be used to meet the key station requirements set forth in §§ 37.47 and 37.51, even if these alterations are not consistent with the requirements set forth in appendices B and D to 36 CFR part 1191 and appendix A to this part, if the modifications complied with the Uniform Federal Accessibility Standards (UFAS) or ANSI A117.1(1980) (American National Standards Specification for Making Buildings and Facilities Accessible to and Usable by the Physically Handicapped). This paragraph applies only to alterations of individual elements and spaces and only to the extent that provisions covering those elements or spaces are contained in UFAS or ANSI A117.1, as applicable.

(3)(i) New construction or alterations of buildings or facilities on which construction has begun, or all approvals for final design have been received, before November 29, 2006, are not required to be consistent with the requirements set forth in appendices B

and D to 36 CFR part 1191 and appendix A to this part, if the construction or alterations comply with the former appendix A to this part, as codified in the October 1, 2006, edition of the Code of Federal Regulations.

(ii) Existing buildings and facilities that are not altered after November 29, 2006, and which comply with the former appendix A to this part, are not required to be retrofitted to comply with the requirements set forth in appendices B and D to 36 CFR part 1191 and appendix A to this part.

(4)(i) For purposes of implementing the equivalent facilitation provision in ADA chapter 1, section 103, of appendix B to 36 CFR part 1191, the following parties may submit to the Administrator of the applicable operating administration a request for a determination of equivalent facilitation:

(A)(1) A public or private entity that provides transportation facilities subject to the provisions of subpart C of this part, or other appropriate party with the concurrence of the Administrator.

(2) With respect to airport facilities, an entity that is an airport operator subject to the requirements of part 27 of this title or regulations implementing the Americans with Disabilities Act, an air carrier subject to the requirements of 14 CFR part 382, or other appropriate party with the concurrence of the Administrator.

(B) The manufacturer of a product or accessibility feature to be used in a transportation facility or facilities.

(ii) The requesting party shall provide the following information with its request:

(A) Entity name, address, contact person and telephone;

(B) Specific provision(s) of appendices B and D to 36 CFR part 1191 or appendix A to this part concerning which the entity is seeking a determination of equivalent facilitation;

(C) [Reserved]

(D) Alternative method of compliance, with demonstration of how the alternative meets or exceeds the level of accessibility or usability provided in appendices B and D to 36 CFR part 1191 or appendix A to this part; and

(E) Documentation of the public participation used in developing an alternative method of compliance.

(iii) In the case of a request by a public entity that provides transportation facilities (including an airport operator), or a request by an air carrier with respect to airport facilities, the required public participation shall include the following:

(A) The entity shall contact individuals with disabilities and groups representing them in the community.

Consultation with these individuals and groups shall take place at all stages of the development of the request for equivalent facilitation. All documents and other information concerning the request shall be available, upon request, to Department of Transportation officials and members of the public.

(B) The entity shall make its proposed request available for public comment before the request is made final or transmitted to DOT. In making the request available for public review, the entity shall ensure that it is available, upon request, in accessible formats.

(C) The entity shall sponsor at least one public hearing on the request and shall provide adequate notice of the hearing, including advertisement in appropriate media, such as newspapers of general and special interest circulation and radio announcements.

(iv) In the case of a request by a manufacturer or a private entity other than an air carrier, the manufacturer or private entity shall consult, in person, in writing, or by other appropriate means, with representatives of national and local organizations representing people with those disabilities who would be affected by the request.

(v) A determination of compliance will be made by the Administrator of the concerned operating administration on a case-by-case basis, with the concurrence of the Assistant Secretary for Transportation Policy.

(vi)(A) Determinations of equivalent facilitation are made only with respect to transportation facilities, and pertain only to the specific situation concerning which the determination is made. Provided, however, that with respect to a product or accessibility feature that the Administrator determines can provide an equivalent facilitation in a class of situations, the Administrator may make an equivalent facilitation determination applying to that class of situations.

(B) Entities shall not cite these determinations as indicating that a product or method constitutes equivalent facilitation in situations, or classes of situations, other than those to which the determinations specifically pertain.

(C) Entities shall not claim that a determination of equivalent facilitation indicates approval or endorsement of any product or method by the Federal Government, the Department of Transportation, or any of its operating administrations.

(b) *Transportation facilities (transit stops) in the public right-of-way.* (1) Except as set forth in paragraph (b)(2) of

this section, if new construction or alterations of a transit stop located in the public right-of-way commence after January 17, 2025, the new construction or alterations of the transit stop shall comply with the requirements set forth in the appendix to 36 CFR part 1190, which apply to pedestrian facilities located in the public right-of-way covered by the Americans with Disabilities Act.

(2) New construction or alterations of transit stops located in the public right-of-way on which construction has begun, or all approvals for final design have been received, before January 17, 2025, are not required to be consistent with the requirements set forth in the appendix to 36 CFR part 1190, but are otherwise required to be readily accessible to and usable by individuals with disabilities.

(3)(i) For purposes of implementing the equivalent facilitation provision in chapter 1, section R102.1, of the appendix to 36 CFR part 1190, the following parties may submit to the Administrator of the applicable operating administration a request for a determination of equivalent facilitation:

(A) A public or private entity that provides transit stops in the public right-of-way subject to the provisions of subpart C of this part, or other appropriate party with the concurrence of the Administrator.

(B) The manufacturer of a product or accessibility feature to be used in a transit stop in the public right-of-way.

(ii) The requesting party shall provide the following information with its request:

(A) Entity name, address, contact person and telephone;

(B) Specific provision(s) of the appendix to 36 CFR part 1190 concerning which the entity is seeking a determination of equivalent facilitation;

(C) Alternative method of compliance, with demonstration of how the alternative meets or exceeds the level of accessibility or usability provided in the appendix to 36 CFR part 1190; and

(D) Documentation of the public participation used in developing an alternative method of compliance.

(iii) In the case of a request by a public entity that provides transit stops in the public right-of-way, the required public participation shall include the following:

(A) The entity shall contact individuals with disabilities and groups representing them in the community. Consultation with these individuals and groups shall take place at all stages of

the development of the request for equivalent facilitation. All documents and other information concerning the request shall be available, upon request, to Department of Transportation officials and members of the public.

(B) The entity shall make its proposed request available for public comment before the request is made final or transmitted to DOT. In making the request available for public review, the entity shall ensure that it is available, upon request, in accessible formats.

(C) The entity shall sponsor at least one public hearing on the request and shall provide adequate notice of the hearing, including advertisement in appropriate media, such as newspapers of general and special interest circulation and radio announcements.

(iv) In the case of a request by a manufacturer or a private entity, the manufacturer or private entity shall consult, in person, in writing, or by other appropriate means, with representatives of national and local organizations representing people with those disabilities who would be affected by the request.

(v) A determination of compliance will be made by the Administrator of the concerned operating administration on a case-by-case basis, with the concurrence of the Assistant Secretary for Transportation Policy.

(vi)(A) Determinations of equivalent facilitation are made only with respect to transit stops in the public right-of-way, and pertain only to the specific situation concerning which the determination is made. Provided, however, that with respect to a product or accessibility feature that the Administrator determines can provide an equivalent facilitation in a class of situations, the Administrator may make an equivalent facilitation determination applying to that class of situations.

(B) Entities shall not cite these determinations as indicating that a product or method constitutes equivalent facilitation in situations, or classes of situations, other than those to which the determinations specifically pertain.

(C) Entities shall not claim that a determination of equivalent facilitation indicates approval or endorsement of any product or method by the Federal Government, the Department of Transportation, or any of its operating administrations.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety
Administration

49 CFR Part 563

[Docket No. NHTSA–2024–0084]

RIN 2127–AM12

Event Data Recorders

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule amends regulations regarding event data recorders (EDRs) to extend the EDR recording period for timed data metrics from 5 seconds of pre-crash data at a frequency of 2 Hz to 20 seconds of pre-crash data at a frequency of 10 Hz. This final rule responds to the mandate of the Fixing America's Surface Transportation Act (FAST Act) to establish the appropriate recording period in NHTSA's EDR regulation.

DATES: *Effective Date:* This rule is effective January 17, 2025.

Compliance Dates: The compliance date is September 1, 2027. Vehicles produced by small-volume or limited-line manufacturers must comply with this final rule on or after September 1, 2029. Altered vehicles and vehicles manufactured in two or more stages must comply with this final rule if manufactured on or after September 1, 2030.

Petition for reconsideration: Petitions for reconsideration of this final rule must be received not later than February 3, 2025.

ADDRESSES: Petitions for reconsideration of this final rule must refer to the docket number set forth above (NHTSA–2024–0084) and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Note that all petitions received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to Docket Management at

the address given above. When you send a submission containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512). Please see further information in the Regulatory Notices and Analyses section of this preamble.

Privacy Act: The petition will be placed in the docket. Anyone is able to search the electronic form of all documents received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notice>.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov, or the street address listed above. Follow the online instructions for accessing the dockets.

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SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Executive Summary
- II. Background
 - A. Overview of the Event Data Recorder Technology and Regulatory History
 - B. The Fixing America's Surface Transportation Act
- III. Notice of Proposed Rulemaking
 - A. Developments Culminating in the NPRM
 - B. Summary of the NPRM
 - C. Requirements of the Final Rule
 - D. Lead Time
- IV. Final Rule and Response to Comments
 - A. Recording Duration and Sampling Rate
 - B. EDR Components
 - C. Additional Data Elements
 - D. Privacy Considerations
 - E. International Harmonization
 - F. Other Considerations
- V. Summary of Estimated Costs and Benefits
 - A. Benefits
 - B. Costs
- VI. Rulemaking Analyses and Notices

I. Executive Summary

NHTSA established 49 CFR part 563 (part 563) in 2006, setting forth requirements for data elements, data capture and format, data retrieval, and data crash survivability of EDRs.¹ Part 563 does not mandate EDRs on vehicles, but is instead an “if equipped” standard applying only to light vehicles required to have frontal air bags that a manufacturer chooses to voluntarily equip with EDRs.² Part 563 ensures all EDRs subject to the regulation capture the same core set of data elements in a crash, standardizes the parameters (format, duration, etc.) of captured data elements, and sets minimum requirements for data survivability.³ Part 563 further requires that manufacturers of vehicles with EDRs subject to part 563 make commercially available a tool for the purpose of downloading⁴ the data collected by the EDR.

This rulemaking amends current NHTSA regulations regarding EDRs under part 563 by extending the capture and recording period for timed data metrics from 5 seconds of pre-crash data at a sample rate of 2 Hz to 20 seconds of pre-crash data at a sample rate of 10 Hz (*i.e.*, an increase from 2 samples per second to 10 samples per second). The objective of this amendment is to capture and record the appropriate amount of data to provide sufficient vehicle-related data to assist investigations of the cause of motor vehicle crashes. This rulemaking is issued in response to a statutory mandate under section 24303 of the Fixing America's Surface Transportation Act (FAST Act), Pub. L. 119–14 (Dec. 4, 2015).

The increased sample rate required by this final rule will provide crash investigators a better understanding of the sequence of pre-crash actions, and

¹ 71 FR 50998 (Aug. 28, 2006).

² In 2012, NHTSA proposed to convert part 563's “if equipped” requirements for EDRs into a new Federal Motor Vehicle Safety Standard (FMVSS) mandating the installation of EDRs in most light vehicles. The NPRM did not propose making any changes to the current EDR regulation's performance requirements, including those for the required data elements (77 FR 74144 (Dec. 13, 2012)). In 2019, NHTSA withdrew that proposal due to the near universal installation of EDRs on light vehicles (84 FR 2804 (Feb. 8, 2019)).

³ Part 563 requires EDR data to survive the crash tests in FMVSS Nos. 208, “Occupant crash protection,” and 214, “Side impact protection.”

⁴ For the purposes herein, we are using the term “downloading” to refer to the process by which data are retrieved from an EDR. When downloading the data on an EDR, the original data set remains intact and unchanged in the memory banks of the EDR. NHTSA has also used the term “imaging” in other documents to refer to the same process. NHTSA uses imaging and downloading interchangeably.

the increased recording duration will provide more details on actions taken prior to crashes. Specifically, with the implementation of this final rule's increased recording duration, actions such as running a stop sign or red light could be captured in full and included in crash reconstruction when supplemented with roadway and traffic control information. The increased recorded duration could also help capture any corrective maneuvers taken by a vehicle prior to an initial road departure. The increased data recording frequency required by this final rule will help clarify the interpretation of recorded pre-crash information, including braking and steering actions taken by a vehicle. It will also help reduce potential uncertainty related to the relative timing of recorded data elements, and assist with the identification of potential pedal misapplication.

II. Background

A. Overview of the Event Data Recorder Technology and Regulatory History

Event data recorders are devices installed in a vehicle to capture and record technical information immediately before and during a crash on the status and operation of vehicle systems. An EDR reserves a random access memory (RAM) buffer the size of one EDR record to locally store data before the data are written to memory. The data are typically stored using Electrically Erasable Programmable Read-Only Memory (EEPROM) or data flash memory,⁵ both of which are types of non-volatile memory. The RAM buffer is typically embedded in the microprocessor, a component of the EDR that may require an upgrade if the processing capabilities are insufficient to meet the new EDR data capture requirements. During a crash, one or more capacitors are used as backup power (energy reserve) to power the EDR, as the main battery is assumed to be cut off. The capacitor(s) must have sufficient energy to power the entire transfer of data. These components are housed in packaging and manufacturer development and validation stages are aimed at ensuring the EDR functions as intended.

EDR event data are permanently recorded at the end of a specified event. In most cases, data are captured during events meeting a pre-determined threshold of severity or in events severe enough to cause air bag deployment.

This information can aid crash investigators in assessing the performance of specific safety equipment, including event air bag deployment strategies, air bag operation, and event severity. Captured information can also help NHTSA and others identify potential opportunities for safety improvements in current and future vehicles and implement more effective safety regulations. It may also help first responders assess the severity of a crash, estimate the probability of serious injury in vehicles equipped with Advanced Automatic Crash Notification (AACN) systems, and improve defect investigations and crash data collection quality.

NHTSA established 49 CFR part 563 (part 563) on August 28, 2006, setting forth requirements for the accuracy, collection, storage, survivability, and retrievability of data in vehicles equipped with EDRs.⁶ Tables I and II of part 563 detail the various data elements covered under the standard. Table I lists 15 data elements all EDRs subject to part 563 are required to record, along with the recording interval (duration) and sampling frequency. Table II lists data elements that EDRs subject to part 563 are not required to record, but that are subject to part 563 if they are recorded. Two data elements in Table II are listed as "if equipped," meaning if a vehicle has the specified equipment, the specified information must be recorded. Table II also provides the recording interval (duration) and sampling frequency for each listed data element. In addition, all data elements in Tables I and II must be reported according to the range, accuracy, and resolution in Table III of part 563. Relevant to this final rule, there are currently seven data elements in Table I and Table II that must be captured for a duration of 5 seconds prior to the crash (speed, engine throttle, service brake, engine RPM, ABS activity, stability control, and steering input). NHTSA established this 5-second duration after concluding this length would ensure the usefulness of the data in crash reconstruction while minimizing the risk of overtaxing an EDR's microprocessor during the data capture process, which could cause a malfunction resulting in data loss.⁷

Part 563 became fully effective on September 1, 2012. Since this time, the adoption of EDRs has been nearly universal, as NHTSA's internal analysis

estimates 99.5 percent of model year 2021 passenger cars and other vehicles with a gross vehicle weight rating (GVWR) of 3,855 kilograms (kg) (8,500 pounds) or less are equipped with part 563 compliant EDRs.⁸

B. The Fixing America's Surface Transportation Act

This rulemaking addresses a statutory mandate under section 24303 of the FAST Act, which requires NHTSA to "submit to Congress a report that contains the results of a study conducted by the Administrator to determine the amount of time event data recorders installed in passenger motor vehicles should capture and record for retrieval vehicle-related data in conjunction with an event in order to provide sufficient information to investigate the cause of motor vehicle crashes."⁹ The FAST Act further provides that, within two years of submitting this report to Congress, NHTSA "shall promulgate regulations to establish the appropriate period during which event data recorders installed in passenger motor vehicles may capture and record for retrieval vehicle-related data to the time necessary to provide accident investigators with vehicle-related information pertinent to crashes involving such motor vehicles."¹⁰ This final rule promulgates regulations to establish appropriate EDR data recording durations as mandated under the FAST Act.

III. Notice of Proposed Rulemaking

A. Developments Culminating in the NPRM

To meet the agency's initial obligation under section 24303 of the FAST Act, NHTSA contracted with researchers at Virginia Polytechnic Institute and State University (Virginia Tech) to conduct a study (the "EDR Duration Study") to determine the amount of time EDRs should capture and record information to provide sufficient vehicle-related data to support investigation of the cause of motor vehicle crashes. The study focused on three crash types that could potentially benefit from more than the currently required 5 seconds of pre-crash data: rear-end, intersection, and roadway departure crashes. These three crash modes were selected because they comprised approximately 70 percent of

⁶ 71 FR 50998 (Aug. 28, 2006).

⁷ NHTSA proposed a recording duration of 8 seconds in the NPRM for what became the 2006 final rule (69 FR 32942 (June 14, 2004)). However, NHTSA decided to reduce the duration in response to public comments (71 FR 50998, 51020 (Aug. 28, 2006)).

⁸ 87 FR 37289 (June 22, 2022). See *supra* note 2 and accompanying text. The 2012 NPRM estimated that about 92 percent of model year 2010 light vehicles had some EDR capability.

⁹ Pub. L. 114–94, 129 Stat. 1312, December 4, 2015.

¹⁰ *Id.*

⁵ Flash memory is an electronic computer memory storage medium that can be electrically erased and reprogrammed and can retain stored information even when power is removed.

all passenger vehicle crashes annually,¹¹ require relatively longer maneuvering times, and represent the most prevalent and relatively severe crashes based on fatalities.

The EDR Duration Study¹² took place in two phases. Phase I sought to estimate how frequently EDRs fail to record sufficient pre-crash data. Phase I did not analyze the amount of pre-crash data required to capture crash causation beyond the 5 seconds currently required under part 563. Analyzing cases in the National Automotive Sampling System-Crashworthiness Data System (NASS-CDS) database, Phase I determined part 563's current recording duration of 5 seconds failed to capture the initiation of all driver crash avoidance maneuvers for each of the three crash types studied. Evasive steering initiation represented

the largest percentage of avoidance maneuvers not captured by the 5 second recording duration in all three crash types.¹³ The study concluded the 5-second recording duration may be insufficient in many cases to determine the factors leading to a crash or to capture the pre-crash actions taken by a driver to avoid collision, potentially resulting in crash investigators having insufficient crash-related EDR information to determine crash causation.

Phase II of the EDR Duration Study sought to determine what recording duration would provide crash investigators with sufficient data to determine crash causation. The study analyzed data from naturalistic driving studies (NDS)¹⁴ to understand the complete duration (5 seconds or greater)

of driver pre-crash actions in the following three types of crashes: rear-end, intersection, and road departure. Phase II found that 20 seconds of pre-crash data would encompass the 90th percentile recording duration required for the three crash modes and crash avoidance maneuvers analyzed. This conclusion means that, based on the cumulative distributions for all three crash modes and crash avoidance maneuvers analyzed, 20 seconds of pre-crash data recording captures the driver pre-crash actions in 90 percent of the dataset.¹⁵ Table 1 summarizes the relevant Phase II findings. A more detailed summary of the EDR Duration Study can be found in the NPRM associated with this rulemaking.

TABLE 1—SUMMARY OF RECORDING DURATION NECESSARY TO CAPTURE PRE-CRASH ACTIONS FROM EDR DURATION STUDY

Driver pre-crash maneuver	Duration of pre-crash action (seconds)	
	50th percentile	90th percentile
Rear-End Crash:		
Time to Closest Approach	4.5	12.3
Intersection Crash:		
Approach + Traversal	12.6–15.1	¹⁶ 16.0–18.6
Road Departure Crash: *		
Drift out of lane to Recovery	3.2	6.0

* Lane excursion events were examined in the 100-car NDS.

On September 28, 2018, following completion of the EDR Duration Study, NHTSA submitted a Report to Congress summarizing the study results to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, as required by section 24303 of the FAST Act.¹⁷

B. Summary of the NPRM

On June 22, 2022, pursuant to section 24303 of the FAST Act, NHTSA issued a notice of proposed rulemaking (NPRM) to amend part 563.¹⁸ The NPRM relied on the findings of the EDR Duration Study and information

gathered from NHTSA's defects investigation experience, which has demonstrated EDR data can be used to assist the agency in assessing whether a vehicle operated properly at the time of an event can help detect undesirable operations.¹⁹ Based on these findings and information, the NPRM proposed extending the recording interval and data sample rate of pre-crash data elements under part 563 from 5 seconds of pre-crash data at a frequency of 2 Hz to 20 seconds of pre-crash data at a frequency of 10 Hz (*i.e.*, an increase from 2 samples per second to 10 samples per second). The seven frequency-based pre-crash data elements

affected by the proposed amendments are:

- Three required data elements in Table I of part 563: "Speed, Vehicle Indicated," "Engine throttle, % full (or accelerator pedal, % full)," and "Service brake, on/off,"
- Four "if recorded" data elements in Table II of part 563: "Engine RPM," "ABS activity (engaged, non-engaged)," "Stability control (on, off, engaged)," and "Steering input."

In support of the proposal, the NPRM explained that the EDR Duration Study concluded extending part 563's recording duration from 5 to 20 seconds would help capture critical pre-crash

¹¹ Derived from the NHTSA report "Target Crash Population for Crash Avoidance Technologies in Passenger Vehicles," March 2019, DOT HS 812 653.

¹² Event Data Recorder Duration Study [Appendix to a Report to Congress. Report No. DOT HS 813 082B], 2022, <https://doi.org/10.21949/1530244>.

¹³ From Phase I, the EDR failed to record the initiation of steering in 80% of rear-end crashes, 64% of intersection crashes, and 88% of road departure crashes.

¹⁴ Phase II used data from two previously conducted naturalistic driving studies: a 2002 100-car study conducted by Virginia Tech, and the 2016 Second Strategic Highway Research Program (SHRP-2) NDS conducted by the Transportation Research Board of The National Academies.

¹⁵ This duration is influenced heavily by the inclusion of intersection crashes. Without the inclusion of intersection crashes, 12.3 seconds of data would encompass the 90th percentile recording duration for rear-end and road departure crashes.

¹⁶ The range of time shown for intersection crashes was derived from intersections with different numbers of lanes. The lower bound represents time for 2-lane intersections and the upper bound represents time for 7-lane intersections.

¹⁷ The 2018 report "Event Data Recorder Study" is available at <https://www.nhtsa.gov/reports-to-congress>. An appendix to the report to Congress was later published in March 2022 with more

details on the EDR Duration Study. See "Event Data Recorder Duration Study [Appendix to a Report to Congress. Report No. DOT HS 813 082B]," 2022, <https://doi.org/10.21949/1530244>.

¹⁸ 87 FR 37289 (June 22, 2022)

¹⁹ In 2010, NHTSA began to obtain data from Toyota EDRs as part of its inquiry into allegations of unintended acceleration, and as a follow-up to the recalls of some Toyota models for sticking and entrapped accelerator pedals. The Toyota unintended acceleration study (NHTSA Report No. NHTSA-NVS-2011-ETC, "Technical Assessment of Toyota electronic Throttle Control (ETC) Systems," January 2011) helped determine the root cause of each crash.

data. The NPRM also proposed increasing the EDR sampling frequency of pre-crash data from 2 Hz to 10 Hz,²⁰ explaining that an increased sampling rate, in addition to an increased pre-crash recording duration, is critical in determining crash causation. In support of the proposal, the NPRM explained that in some crash circumstances (*e.g.*, brake application and release or rapid reversals in steering input of less than 0.5 seconds), 2 Hz may be insufficient to identify crash causation factors, as it is possible for an EDR recording at 2 Hz to miss rapid vehicle control inputs. Thus, although more crash causation information would be captured with the proposed 20 second time duration, this data could be misinterpreted without a refinement and increase in the EDR sampling acquisition frequency.

The NPRM further explained an improved data sampling rate is needed because of how fast the sequence of events leading to crashes can happen and how fast the vehicle's systems need to activate in response to such events, such as crash avoidance technologies activation (*e.g.*, antilock braking system and electronic stability control). In support of increasing the EDR sampling frequency of pre-crash data from 2 Hz to 10 Hz, the NPRM noted the current sampling rate of 2 Hz is well below the timing necessary to understand the performance and effectiveness of such systems. Additionally, it explained the EDR output for the pre-crash data elements is not synchronized,²¹ even at the sampling rate of 2 Hz, which could result in uncertainty when comparing data at specific points in time with precision. Finally, the NPRM pointed out a greater sampling rate for the pre-crash data elements would reduce potential uncertainty related to the relative timing of data elements, specifically for correlating the driver's commands and the vehicle's performance.

In discussing the benefits of the proposal, the NPRM stated increasing the recording time for the pre-crash data would help ensure that data on the initiation of pre-crash actions and maneuvers is captured for most crashes. The NPRM further explained that increased data will enhance the usefulness of the recorded information and potentially lead to further improvements in the safety of current and future vehicles. The NPRM acknowledged the proposed changes could add additional costs, as increased EDR memory may be required in some cases. However, the agency explained it believed needed memory changes could be incorporated into the existing or planned memory design in vehicles, based on how slight any increased memory requirements needed to accommodate the added EDR data storage would be. The agency further explained its belief that in most cases the amount of additional memory necessary to comply with the proposed requirements would be less than the unused memory on a vehicle's airbag control module (ACM) chip. Finally, the agency stated it anticipated the proposal would require no additional processor speed or backup power needs, despite the proposed increases in recording duration and frequency.

The NPRM proposed an effective date of the first September 1 one year after the publication of the final rule. The agency explained that a one-year lead time was appropriate because increasing the required pre-crash data recording time should not require any additional hardware or substantial redesign of either the EDR or the vehicle and would likely require only minimal software changes.

NHTSA sought comments on several aspects of the NPRM, including:

1. The need and practicability of increasing the pre-crash recording duration.

2. The need and practicability of increasing the sampling rate.

3. Whether current EDRs will need to increase their memory capacity or change the memory implementation strategy (*i.e.*, short term memory buffer versus long-term storage) to meet the new requirements.

4. Whether the NPRM's cost estimates and assumptions are accurate, including comments on whether there are other costs (*e.g.*, redesign for a larger unit, additional capacity for Random-Access Memory (RAM), etc.), or other factors the agency needs to consider.

5. Any potential impact of the NPRM's proposal on the ACM processor and associated cost.

6. Comments on the proposed lead time.

7. Comments on the DOT's Office of the Secretary's Privacy Office (DOT Privacy Office) tentative determination that the proposed rulemaking does not create privacy risk, as no new or substantially changed technology would collect, maintain, or disseminate information in an identifiable form because of the proposed rule.

The agency received responses from a wide variety of stakeholders and interested persons in response to the NPRM's request for comments. These comments are available in the docket for the NPRM²² and are discussed in detail in the response to comments section below.

C. Requirements of the Final Rule

After careful consideration of comments received and the requirements of the FAST Act, NHTSA is promulgating this final rule to amend regulations regarding EDRs. Under this final rule, the recording duration and data sample rate of 7 data elements in Tables I and II under part 563 will increase to 20 seconds at 10 Hz from the previous requirements of 5 seconds at 2 Hz, as proposed by the NPRM and shown in Table 2.

TABLE 2—NEW EDR REQUIREMENTS UNDER FINAL RULE

Data element	Previous requirements		Requirements under final rule	
	Recording interval/time ¹ (relative to time zero) (sec)	Data sample rate (samples per second)	Recording interval/time (relative to time zero) (sec)	Data sample rate (samples per second)
Recording interval/time (relative to time zero)				
Speed, vehicle indicated	– 5.0 to 0	2	– 20.0 to 0	10

²⁰ Table I in part 563 currently requires an EDR to capture pre-crash data at a sample rate of 2 samples per second (Hz). The same sample rate applies to Table II elements of engine revolutions per minute (RPM), anti-lock braking system (ABS)

status, electronic stability control (ESC) status, and steering input.

²¹ While true time synchronization of data originating from the vehicle network may not be possible, the increased sample rate for pre-crash

data elements may reduce the potential uncertainty related to the relative timing of data elements, specifically for correlating the driver's commands and the vehicle's performance.

²² NHTSA–2022–0021.

TABLE 2—NEW EDR REQUIREMENTS UNDER FINAL RULE—Continued

Data element	Previous requirements		Requirements under final rule	
	Recording interval/time ¹ (relative to time zero) (sec)	Data sample rate (samples per second)	Recording interval/time (relative to time zero) (sec)	Data sample rate (samples per second)
Engine Throttle, % full (or accelerator pedal, % full)	– 5.0 to 0	2	– 20.0 to 0	10
Service brake, on/off	– 5.0 to 0	2	– 20.0 to 0	10
Data Elements Required for Vehicles Under Specified Minimum Conditions ² (Table II)				
Engine rpm	– 5.0 to 0	2	– 20.0 to 0	10
ABS activity (engaged, non-engaged)	– 5.0 to 0	2	– 20.0 to 0	10
Stability control (on, off, or engaged)	– 5.0 to 0	2	– 20.0 to 0	10
Steering input	– 5.0 to 0	2	– 20.0 to 0	10

¹ Pre-crash data and crash data are asynchronous. The sample time accuracy requirement for pre-crash time is – 0.1 to 1.0 sec (e.g., T = – 1 would need to occur between – 1.1 and 0 seconds.)

² If the data for these data elements is recorded in non-volatile memory for the purpose of subsequent downloading, they must meet the recording duration and frequency requirements in part 563.

The approach of this final rule is generally consistent with that of the NPRM. Minor non-substantive changes have been made to the final rule's regulatory text in the interest of simplification and organizational purposes, including by maintaining the current language of § 563.3. Additionally, based on comments received we have adjusted estimated costs and modified the lead time to provide manufacturers the time necessary to make any software, testing, and development changes required to ensure the EDR captures and records pre-crash data without affecting air bag deployment, while still fulfilling the agency's statutory mandate in a reasonable amount of time.

D. Lead Time

The NPRM sought to provide adequate lead time to manufacturers to allow them to incorporate necessary changes as part of their routine production cycles while also limiting the transition costs associated with the standardization of EDR data. To that end, the NPRM proposed an effective date of the first September 1 one year after the publication of the final rule. The NPRM estimated that 99.5 percent of model year 2021 passenger cars and other vehicles with a GVWR of 3,855 kg or less had part 563-compliant EDRs. As discussed in the cost section of the NPRM, the agency believed that increasing the required pre-crash data recording duration and data sample rate would not require additional hardware or substantial redesign of the EDR or vehicle and would likely require only minimal software changes and testing for validation.

Comments

NHTSA received several comments criticizing the agency's proposed one-year lead time, with commenters stating it did not consider the complexity of EDR implementation, along with the time needed for testing and validation to ensure the primary and secondary functionalities of the EDR. Commenters expressed that a lead time of one year could compromise safety and suggested alternative lead times ranging around 3 to 4 years. Several commenters also suggested a phase-in schedule extending out several years following publication of the final rule to allow manufacturers more time to significantly redesign the current software and hardware on their EDRs. The Motor & Equipment Manufacturers Association (MEMA) stated that software for a new vehicle is typically completed 18 months prior to the start of production, and that suppliers also require 18 months to deliver a validated update to manufacturers, along with an additional 18 months to test and certify the new system. Commenters also sought exemptions for vehicle platforms nearing the end of their lifecycle within 1–2 years of the Final Rule.

The Alliance for Automotive Innovation (Auto Innovators) expressed concern that the short lead time, additional memory requirements, and other system resources necessary to meet the proposed increase in pre-crash recording duration and frequency could result in some manufacturers being forced to deactivate the EDR function entirely, or to shift EDR resources by choosing not to record Table II or ADAS system status data elements.

Though supportive of the proposal, the Insurance Institute for Highway Safety and Highway Loss Data Institute

(IIHS–HLDI) commented that if manufacturers were not able to meet the new requirements given the one-year lead time, they may instead choose to disable EDR functionality. IIHS–HLDI indicated support of a longer lead time to avoid the loss of any EDR data before the new requirements can be met.

The National Transportation Safety Board (NTSB) indicated the proposed lead time was reasonable and that the proposed changes from 5 seconds of pre-crash data at 2 Hz to 20 seconds of pre-crash data at 10 Hz should be practical to implement.

Agency Response

NHTSA acknowledges comments from vehicle manufacturers and others stating that the NPRM's proposed lead time would not allow manufacturers to incorporate the proposed changes as part of their regular production cycle. NHTSA agrees with comments received stating that a longer lead time is needed to allow manufacturers the flexibility to better manage the implementation of the final rule and alleviate unnecessary redesign costs for EDRs. Following review of comments received and further analysis, this final rule doubles the proposed lead time to accommodate manufacturer concerns, while also fulfilling the agency's statutory mandate under the FAST Act in a reasonable amount of time. As a result, the revised requirements will be implemented beginning with vehicles manufactured on or after September 1, 2027. Limited line²³ and small-volume

²³ Limited line manufacturer means a manufacturer that sells three or fewer carlines, as that term is defined in 49 CFR 583.4, in the United States during a production year.

manufacturers²⁴ will only need to produce compliant EDRs on or after September 1, 2029. Manufacturers producing altered vehicles or vehicles in two or more stages will have one additional year, until September 1, 2030, for compliance.

Extending the lead time beyond 2 years is not necessary. NHTSA understands that some vehicle models already have sufficient hardware to meet the requirements of this final rule, with one manufacturer indicating that a majority of its vehicle models are already equipped with sufficient hardware. NHTSA acknowledges that those EDRs would still potentially require up to 2 years of software development and testing to ensure their quality meets this final rule's part 563 requirements and that air bag deployment, if the EDR function shares resources with the restraint systems, is not affected by the extended duration and sampling rate of the EDR pre-crash data. Based on NHTSA's internal analysis of EDR records in the Crash Investigation Sampling System (CISS), other manufacturers also have some EDR modules that could meet the requirements of this final rule without hardware changes.

The agency did consider a phase-in period in response to timing concerns raised by manufacturers, but ultimately did not find that compelling reasons were presented to justify a phase-in period. However, in acknowledgment that some EDRs will require changes to meet the requirements of this final rule, the agency is doubling the initially proposed lead time to provide manufacturers with sufficient time to make the minor modifications adopted in this final rule. In support of this decision, NHTSA is aware that manufacturers across the globe can meet much shorter EDR lead times in other markets, such as Europe and Japan. NHTSA is not aware of any peculiarities of the U.S. market that would necessitate lead times double, triple, or quadruple the lead times in other markets.

NHTSA also acknowledges the concern raised by some commenters that manufacturers may choose to deactivate EDRs because of their inability to meet the requirements within the proposed 1-year lead time. NHTSA does not share that concern, and in any event, this final rule's extended lead time, which provides

additional flexibility to manufacturers, should mitigate this concern. However, this final rule does not change the voluntary nature of part 563, and manufacturers remain free to decide if their vehicle will have EDR functionality based on their own considerations. Although the system that activates air bags in a vehicle may share resources with the EDR functionality, we emphasize that the performance of systems that deploy air bags (*e.g.*, supplemental restraint system) to mitigate injuries in a crash should not be negatively affected in order to develop an EDR that meets today's new requirements.

IV. Final Rule and Response to Comments

NHTSA received 21 comments on the proposed rule from a wide variety of commenters, including: advocacy groups, supplier and trade associations, vehicle manufacturers, manufacturer associations, insurance institutes, industry association consultants, engineer organizations, and members of the public.

The safety advocacy groups included the Advocates for Highway & Auto Safety (Advocates) and the Center for Auto Safety (CAS). The supplier and trade associations included Robert Bosch LLC and Bosch Automotive Service Solutions (Bosch) and MEMA. Manufacturers and manufacturer associations included Nissan Motor Co., LTD. (Nissan), Ford Motor Company (Ford), American Honda Motor Co. (Honda), General Motors Company (GM), and Auto Innovators. Insurance institutes and industry associations commenting on the NPRM included the National Association of Mutual Insurance Companies (NAMIC), State Farm Insurance Companies (State Farm), and joint comments from the Insurance Institute for Highway Safety (IIHS) and Highway Loss Data Institute (HLDI). The consultants and engineering organizations included the Event Data Recorder Committee of SAE International (SAE), the Collision Safety Institute (CSI), and QuantivRisk, Inc. NHTSA also received comment from the NTSB, and four comments from members of the public.

Overall, safety advocates (CAS and Advocates), insurance institutes and industry associations (NAMIC, IIHS–HLDI, and State Farm), NTSB, and three public commenters generally supported the proposed amendment. However, they recommended NHTSA consider expanding part 563 requirements through such additions as new data elements for emerging safety systems like advanced driver-assistance systems

(ADAS) and automated driving systems (ADS), increased vehicle weight limits applicable to all newly manufactured passenger vehicles, and a revised trigger threshold to include crashes involving vulnerable road users. These commenters also expressed support for the agency's work with international organizations to harmonize EDR requirements, including groups like the United Nations Economic Commission for Europe (UN ECE), the World Forum for Harmonization of Vehicle Regulations (WP.29), and EDR technical working groups (*e.g.*, SAE International).

Other commenters questioned and criticized some aspects of the NPRM, including the proposed lead time and estimated costs. Commenters in this group included vehicle manufacturers and manufacturer associations, industry suppliers and trade associations (including MEMA), industry experts and engineering organizations (SAE, CSI, and QRI), and one individual member of the public. Several commenters indicated the NPRM's proposed lead time was insufficient and suggested longer lead times.

The following sections address the key issues raised by commenters in response to the NPRM, including concerns related to the recording duration and frequency (or sample rate), the EDR duration study, EDR components, additional data elements, privacy, benefits, costs, and other expressed concerns.

A. Recording Duration and Sampling Rate

The agency sought comment on the NPRM's proposal to increase the EDR pre-crash recording duration and sample rates under part 563. Comments received expressed mixed views, with many comments critical of the proposal and expressing strong concerns with the EDR Duration study, suggesting that the NPRM's extended duration proposal should not have relied upon the study's findings.

General Comments

Several commenters did not support the NPRM's proposal to extend part 563's recording duration requirements, expressing skepticism that recording data beyond current part 563 requirements would improve crash causation investigations. SAE, referencing the agency's technical report on "Characteristics of Fatal Rollover Crashes,"²⁵ acknowledged that rollover

²⁴ Small-volume manufacturer as defined in 49 CFR 571.127, "Automatic emergency braking systems for light vehicles," is an original vehicle manufacturer that produces or assembles fewer than 5,000 vehicles annually for sale in the United States.

²⁵ DOT HS 809 438 (SAE stated the report concluded that EDR data are proven as a valuable
Continued

crashes generally require a longer amount of recorded data but stated they do not justify the added duration of pre-crash data. SAE explained that increasing recording duration will, in almost all cases, merely represent static operating conditions. Ford stated that additional studies on vehicles with active safety features and EDRs compliant with part 563 are necessary to more accurately determine any anticipated safety benefit of extending the pre-crash recording duration at a higher sampling rate.

GM, commenting that it already voluntarily added 3 seconds of pre-crash data to its latest Generation EDR, stated eight seconds of pre-crash data is more than sufficient to understand crash dynamics and vehicle performance based on its experience working with accident reconstructionists, police, and other authorities.

CSI stated there is no need to increase EDR recording duration, but suggested the sample rate could be phased in over a longer lead time to allow for other revisions to part 563. Bosch indicated the current data sample rate of 2 Hz may not capture all data when a multi-impact crash occurs but emphasized that an increased sample rate would require significant changes in EDR hardware and software. Bosch agreed that increased pre-crash data frequency could capture additional events, such as braking interventions, lane change maneuvers, and steering maneuvers.

Ford, seeking to clarify information cited by the agency in the proposal, also stated that although the EDR in the referenced 2007 Ford²⁶ was capable of recording more than 20 seconds of pre-crash data, it did not meet the crash test performance and survivability requirements of part 563. Ford explained that the pre-crash data in the 2007 Ford was stored in the Powertrain Control Module (PCM), which served as a diagnostics tool not equipped with a power energy reserve. Ford stated it later replaced the PCM recording capability with a part 563-compliant EDR that uses the Restraint Control Module (RCM) to record PCM data for 5 seconds prior to a crash event.

Several commenters supported some or all aspects of the proposal, stating it would provide more information for crash investigations and safety data. IIHS-HLDI stated it would provide

researchers with a greater understanding of the role different factors like vehicle, driver, and roadway/environment play leading up to a crash. NAMIC agreed more pre-crash data would help insurers, researchers, manufacturers, and regulators understand and determine crash causation, while also helping crash avoidance research. NAMIC also stated that the benefits of more pre-crash data on vehicle dynamics and system status, driver inputs, vehicle crash signatures, restraint usage/deployment status, and post-crash data, such as the activation of an automatic collision notification system, would provide greater safety value than any associated costs with increased memory capacity and potential EDR unit redesigns. State Farm supported the proposed duration and frequency changes to EDRs, and suggested vehicles should at minimum record all available information relevant to the crash.

Many commenters supported extending recorded categories rather than extending the duration and/or sampling rate of existing part 563 data retention requirements to improve crash analysis. The NTSB stated although the proposed rule addresses data elements currently in part 563, a complete understanding of crashes involving vehicles with ADAS would necessitate more pre-crash data than is currently required. CAS stated that even longer durations and higher sample frequencies could be beneficial for data not currently included in part 563, such as progressive sensor degradation, object event detection, response processing, and performance of sensor and data processing components.

EDR Duration Study

Many commenters criticized the NPRM's reliance on the EDR Duration Study's finding that 20 seconds of pre-crash data encompasses the 90th percentile recording duration necessary to capture the initiation of driver actions. SAE stated the study failed to demonstrate that the recommended 20-second recording duration would improve crash causation investigations. SAE further stated that the study focused on determining the duration necessary to assess driver behavior, rather than crash causation, and reiterated its previous comments critiquing the study.²⁷

Specifically, SAE stated the study should have assessed more than the

speed, braking, and steering actions of the vehicle, noting that engine throttle percentage, accelerator pedal percentage, engine RPM, cruise control status, anti-lock braking system (ABS) activity, lateral acceleration, and yaw rate are all useful data elements when studying the cause of a crash event. SAE also stated the vehicles in the study lacked modern safety features, such as pre-collision braking and electronic stability control, which could have prevented some of the accidents or provided intervention within the current recording duration of 5 seconds.

SAE asserted the study contained flawed assumptions about current automotive braking system architectures. SAE also stated there were two false assumptions concerning steering input. First, SAE explained the EDR Duration Study concluded that the availability of steering angle data, an optional data element, was very limited, thus reducing its significance in Phase I of the study. Second, SAE stated the study assigned steering angle data the same importance as the other data elements, and that the study's authors erroneously assumed a weighted distribution would compensate for the small number of cases with steering input. In response to this assumption, SAE stated actual field-related data from more recent part 563 compliant vehicles covering a wider range of manufacturers should have been used, and that the study's analysis should have been updated with current systems data. SAE also discussed the resolution of the steering input data, explaining that some pre-part 563 EDRs reported steering input data with a range of ± 16 degrees, meaning a steering maneuver beyond 16 degrees would need to be made to be detected and recorded in the EDR. SAE stated that depending on vehicle speed, a steering input of less than 16 degrees could have significance in relation to vehicle dynamics; however, if no such recorded input occurred, the study concluded the driver was not moving the steering wheel.

SAE also critiqued the study's lack of distinction between accelerator pedal position and engine throttle position, stating it purposely ignored EDR data recorded more than 5 seconds before a crash, and further stated that if all 8 seconds of pre-crash data, where available, were reviewed, the study could have confirmed whether the service brake was on at 5 seconds prior to a crash event. SAE explained this information could demonstrate whether pre-crash data beyond 5 seconds would change overall reconstruction results. Finally, in relation to the study's 1-Hz

source to determine vehicle speed, evasive maneuvers, and passenger status).

²⁶ NHTSA, Special Crash Investigation No. IN10013, available at <https://crashviewer.nhtsa.dot.gov/nass-sci/GetBinary.aspx?Report&ReportID=804261920&CaseID=804261915&Version=-1>.

²⁷ SAE provided comments and presented to NHTSA in response to the EDR Duration Study. See NHTSA-2022-0021-0005 and NHTSA-2022-0021-0006.

recording frequency in older vehicles, SAE and Auto Innovators stated brake pedal application can occur multiple times within one second, and state changes could be missed in the sample period. Several commenters expressed support for SAE's comments on the study.

Agency Response

This final rule adopts the NPRM's proposed part 563 EDR pre-crash data recording and frequency durations. This final rule's implementation will fulfill the FAST Act mandate and provide additional information on the status of vehicle systems and the actions taken prior to a crash.

General Comments

The agency acknowledges criticisms raised by several commenters, including suggestions that further studies are needed to determine the safety benefits of additional EDR pre-crash data. However, NHTSA is confident the EDR Duration Study provides a solid basis for this final rule's increase to 20 seconds of pre-crash data based on the study's findings on the amount of pre-crash actions missed in the 5 seconds prior to a recorded event by the EDR, particularly for in-road departure and intersection crashes. The EDR Duration Study found part-563's 5-second recording duration insufficient to record important information in a substantial percentage of crashes in which the EDR is triggered. This information, including the initiation of crash avoidance driving maneuvers, *e.g.*, pre-crash braking, would assist investigators with crash reconstruction. The study also found that 20 seconds of pre-crash data would encompass the 90th percentile recording duration required for the three crash modes and the crash avoidance maneuvers analyzed.

In support of the increased frequency requirement of this final rule, NHTSA understands some manufacturers already equip vehicles with EDRs that record data at 5 or 10 Hz, and in some cases multiple rates. NHTSA agrees with commenters who expressed support for the proposed increase by stating the increased frequency could capture events like braking interventions, lane change maneuvers, and steering maneuvers that may be missed at 2 Hz.

In response to Ford's comment regarding the 2007 Ford vehicle included in the EDR Technology Study²⁸ and referenced in the NPRM,

the agency is aware that the EDR in question was manufactured prior to the implementation of part 563. The agency did not reference it in the NPRM as a basis to state that all current EDRs are capable of recording 20 seconds of data. Instead, it serves as an example to show that manufacturers have already developed systems that record more than 5 seconds of pre-crash data. Finally, in response to comments encouraging the recording of additional data elements, this topic falls outside the scope of the NPRM and will not be addressed in this rulemaking. The agency may address the recording of additional data elements, including ADAS system status and performance parameters, in future rulemaking. Additional details on the estimated benefits of this final rule are discussed in section V.

EDR Duration Study

Many comments received criticized certain aspects of the EDR Duration Study and the NPRM's reliance on it in extending the recording duration of part 563. The agency does not find these arguments compelling. The study adequately met the FAST Act's mandate to conduct a study to determine the amount of time event data recorders installed in passenger motor vehicles should capture and record for retrieval vehicle-related data in conjunction with an event to provide sufficient information to investigate the cause of motor vehicle crashes.

Specifically, as required by the FAST Act, the study presented the durations necessary to provide sufficient information to investigate the cause of motor vehicle crashes. The agency does not agree with comments stating that the study incorrectly focused on driver actions rather than crash causation. The FAST Act required the agency to address data needed to assess crash causation. As such, vehicle dynamics were not the focus of the EDR Duration Study. Crash causation is crucial for effective crash investigation. Because many studies, some using police-accident reports²⁹ or EDR data, have shown that driver error is often the cause of crashes,³⁰ an understanding of pre-crash vehicle actions is critical to determining an appropriate recording duration. One study used the crashes in

the Naturalistic Driving Study (NDS) to determine that driver error contributed to 93% of observed crashes.³¹ In the EDR Duration Study, "behavior" is used synonymously with "action." Therefore, the study's objective in Phase II was to determine a recording duration that provides more certainty of capturing the complete duration of pre-crash actions.

In response to SAE's critique that speed, braking, and steering were studied exclusive to each other in Phase 1 of the EDR Duration Study and not with the rest of the EDR data, NHTSA acknowledges SAE's comment that crash reconstructionists analyze vehicle speed in conjunction with brake status. However, these two factors were not combined in Phase 1 because the study successfully addressed the research questions without studying whether enough brake pedal pressure was being applied to decelerate the vehicle. The study analyzed each pre-crash action individually because the study's objective focused on whether any braking input, steering input, or accelerator release occurred.

NHTSA also acknowledges SAE's statement that the study assumed the Service Brake On indicator signified driver intent to actively brake the vehicle, when it could instead be related to disengaging cruise control status or a slightly engaged brake pedal (*e.g.*, resting a foot on the pedal). In response to this comment, NHTSA states the EDR Duration Study solely focused on the pre-crash action itself, regardless of whether that action resulted in decreased vehicle speed. As such, any braking action can still be considered a valid pre-crash action of the driver.

In response to SAE's comment that weighted distributions were incorrectly used to compensate for the small number of cases with steering input in Phase I, NHTSA disagrees. Weighted distributions were used as the standard result format for all the data elements in the study, regardless of the sample size. Additionally, NASS-CDS data are designed for use in a weighted fashion because of its nationally representative structure.

In criticizing the study, SAE and Auto Innovators commented that the EDR Duration Study assumed that no recorded steering input meant the driver was not moving the steering wheel, but that pre-part 563 EDRs required a steering input change of more than 16 degrees to be captured by the EDR so active steering maneuvers in the dataset

No. DOT HS 812 929). National Highway Traffic Safety Administration.

²⁹ Singh, Santokh. Critical reasons for crashes investigated in the national motor vehicle crash causation survey. No. DOT HS 812 115. 2015.

³⁰ Dingus, Thomas A., et al. "Driver crash risk factors and prevalence evaluation using naturalistic driving data." *Proceedings of the National Academy of Sciences* 113.10 (2016): 2636–2641.

³¹ Khattak, Asad J., et al. "A taxonomy of driving errors and violations: Evidence from the naturalistic driving study." *Accident Analysis & Prevention* 151 (2021): 105873.

²⁸ Gabler, H.C., Tsoi, A., Hinch, J., Ruth, R., Bowman, D., & Winterhalter, M. (2020, June). Light-vehicle event data recorder technologies (Report

may not have been captured. The EDR Duration Study could only use the EDR data available (which included pre-part 563 EDRs) to evaluate what pre-crash actions were captured. The study assumed that if a non-zero steering angle was recorded at -5 s, the initiation of a pre-crash steering maneuver was not captured. NHTSA does not believe that the current resolution for steering input (5 degrees) would change the results of Phase 1 of the EDR Duration Study since the authors defined the steering input time as the time between the event and the earliest non-zero steering angle recorded. NHTSA agrees that, based on vehicle speed, a change in steering input less than the 16-degree resolution could be significant.

In response to comments on the issue of whether the accelerator pedal position or engine throttle position was used to assess driver action, the EDR Duration Study used the accelerator pedal position to indicate a depressed pedal, as the objective of the study was driver action prior to crash. NHTSA acknowledges that accelerator pedal position and engine throttle position do not always correspond (especially given modern vehicles with drive-by-wire technology). The study used accelerator pedal position as it is related to the driver's input, whereas the engine throttle position can lag behind that input. NHTSA also acknowledges SAE's comment that the EDR Duration Study ignored data extending beyond 5 seconds. Specifically, where EDRs recorded 8 seconds of pre-crash data in the study, the results were truncated to 5 seconds to combine them with the remainder of the dataset that only had 5 seconds of pre-crash data to make the brake pedal, accelerator pedal, and steering input data consistent. Doing so is consistent with the 5 seconds of pre-crash data required by part 563 prior to this final rule. This was done in Phase 1, as this part of the study evaluated whether 5 seconds of data was sufficient for capturing the initiation of pre-crash maneuvers in rear-end, road departure and intersection crashes. The authors of the EDR Duration Study could not use EDR data to determine the duration beyond 5 seconds needed to capture crash causation, because most EDR data only records 5 seconds of pre-crash data per the minimum requirements in part 563. Therefore, as required by the FAST Act, to determine the amount of time event data recorders installed in passenger motor vehicles should capture and record for retrieval vehicle-related data in conjunction with an event to provide sufficient information

to investigate the cause of motor vehicle crashes, Phase 2 of the study used two naturalistic driving studies (NDS) (100-Car NDS and SHRP-2 NDS). These studies were used because they include more than 5 seconds of data prior to an event.³²

Further, although some commenters stated that older vehicles used in the study had EDR data recorded at a sample rate less than the part 563 requirements (2 Hz), the EDR Duration Study acknowledged the uncertainties of the sample rate (1 Hz vs. 2 Hz) of data numerous times throughout the report. The study's results were presented in terms of the observed EDR data, the "Lower Bound," and "Upper Bound," which assumed the actual pre-crash action for EDRs recording at 1 Hz was one time step earlier than the reported time (e.g., if an initial braking action occurred at -4 s the action was assumed to occur at -5 s). NHTSA believes that presenting the results in this corridor fashion was appropriate and provided a fair and transparent representation of the range of times the driver action may have occurred. In response to SAE and Auto Innovators' comments that a pre-crash braking action can occur multiple times within the time span of 1 second (1 Hz) or 0.5 seconds (2 Hz), NHTSA notes that this fact supports increasing the recording frequency of pre-crash data, as required by this final rule, so that multiple pre-crash actions are captured by the EDR.

NHTSA also acknowledges comments received stating that the vehicles used in the study lacked modern safety features that could have prevented some crashes and provided intervention within 5 seconds of the crash event. However, NHTSA observes the available EDR data used in the study did not generally include any details on active safety features, as part 563 does not require the capturing of those elements, which are at times voluntarily recorded by manufacturers. Therefore, any pre-crash data related to modern safety features could not be included as part of the research in Phase 1 of the study.

NHTSA does not know if active safety features will be universally adopted in future vehicles or recorded for the purposes of crash reconstruction. However, NHTSA points out that ABS and electronic stability control (ESC) were studied in Phase 2 of the EDR Duration Study, which used naturalistic driving data from newer vehicles. The ABS activation times in that data ranged from 2–9 seconds prior to the crash,

further demonstrating that a 5-second duration is not always sufficient to capture all the pre-crash actions of the vehicle. Finally, some comments criticizing the EDR Duration study addressed areas outside the scope of this rulemaking and the research questions and conclusions made by the study, such as how beneficial the additional data will be when used with vehicle dynamics for crash reconstruction and that pre-crash data would benefit more from additional data elements rather than extending the time capture pre-crash. As such, the agency is not addressing these comments in this final rule.

B. EDR Components

EDR Comments Overview

The agency sought comment on whether the NPRM's proposed changes would affect current EDRs, including in terms of creating any increased memory needs, processor speed burdens, or other issues not considered by the proposal. Many commenters, including OEMs, manufacturers' associations, industry suppliers, trade associations, industry experts, and engineer organizations generally agreed that while the proposed 20 seconds of pre-crash data could be recorded by EDRs, some EDRs may require significant hardware and software changes to meet these demands. Commenters stated the memory (RAM and read-only Memory (ROM)), energy reserve, and microprocessor (or microcontroller) of EDRs may all need to be upgraded or expanded. Bosch stated that some manufacturers may have EDRs capable of accommodating the new requirements using current hardware. Nissan suggested that some of its EDR modules could record for 20 seconds without requiring hardware changes, given enough time for testing and development.

Agency Response

Following careful consideration of comments received, this final rule is extending the EDR recording period for timed data metrics from 5 seconds of pre-crash data at a frequency of 2 Hz to 20 seconds of pre-crash data at a frequency of 10 Hz. NHTSA acknowledges some current EDRs may require significant hardware and software changes to meet this final rule's recording requirements. However, the changes made by this final rule are necessary to fulfill the Fast Act's requirement that the agency "shall promulgate regulations to establish the appropriate period during which event data recorders installed in passenger

³² The two NDS studies used in the EDR Duration study collected data in normal driving conditions over the course of millions of trips and miles.

motor vehicles may capture and record for retrieval vehicle-related data to the time necessary to provide accident investigators with vehicle-related information pertinent to crashes involving such motor vehicles.”³³

Based on the data submitted to NHTSA by vehicle manufacturers and EDR records available from CISS, many newer EDRs already have sufficient memory, processing performance, and reserve energy capacity to capture and record 20 seconds of pre-crash data at 10 Hz. If necessary, manufacturers could potentially reconfigure these EDRs by reallocating memory to meet the new recording requirements for pre-crash data in this final rule, as the reallocation of memory would not entail any additional energy or processor capability. NHTSA acknowledges the subject systems would still need to undergo development and testing to ensure they function as intended with no adverse effect on the activation of air bags in a crash event with air bag deployment.

The agency is aware that memory is not solely used to record EDR data, as it is shared by other functions of the ACM. However, many modern EDRs, particularly those updated to meet UN ECE Regulation No. 160,³⁴ likely already have sufficient capability to meet the pre-crash recording duration and sample rate requirements of this final rule without disrupting how EDR data are currently recorded. Based on the CISS EDR data available, NHTSA is aware of at least one manufacturer that has made such EDR upgrades to a large portion of its newer models, such that only software changes would be needed to comply with the final rule.³⁵ Further, EDRs that currently capture and record more than 1600 bytes of pre-crash data could allocate resources to, at minimum, record the three required Table I data elements for 20 seconds at 10 Hz.

Additional analysis on comments received and the agency’s response in the areas of EDR memory, data processing, energy reserve, design, and the development process is provided below.

Memory Comments

Many commenters indicated the current amount of non-volatile memory in EDRs may not be sufficient to record 20 seconds of pre-crash data captured at 10 Hz. The NPRM indicated an increase in pre-crash recording duration from 5 seconds to 20 seconds with an accompanying increase in recording frequency from 2 Hz to 10 Hz, would require 1.33 kilobytes (kB) of additional memory (a factor of 2.43 increase from the baseline) if all 7 pre-crash data elements were recorded. However, SAE stated some suppliers estimated the memory would increase by a factor of 8.5. SAE explained that adding more memory to meet the new data capture requirements would involve a complex process, as reallocating memory from other data elements would require an entire development process for each type of EDR.³⁶

GM stated that to meet the proposed requirements in the NPRM, the memory for its latest generation EDR would have to increase from approximately 720 bytes per recorded event to 8260 bytes, or an increase by a factor of approximately 11.5 based on 46 pre-crash data elements. GM explained this estimate must be multiplied by 3 to account for 3 separate EDR-recorded event buffers. GM further stated it is desirable to have a consistent sampling rate for all pre-crash data elements to reduce software complexity, and that it does not have a design in production that can simply incorporate the requirements in spare memory.

GM explained memory allocation is one of the first steps of new product development, used to determine the specifications for the microprocessor, memory storage size and type, energy reserve, and power supply, and that changes to the type of memory required would have a significant impact on the design specifications for EDRs. Honda, Nissan, and Ford also stated that meeting the requirements proposed in the NPRM would require additional non-volatile memory. CSI and MEMA stated memory estimates should consider that the ACM and any other system housing the EDR shares processor power and memory with the EDR, and that additional memory is rarely available in existing systems. QuantivRisk, Inc. and CSI also stated that adding memory would require additional development and testing costs.

³⁶ Manufacturers typically have more than one type of EDR installed across their vehicle models.

Agency Response

NHTSA acknowledges comments received from industry, OEMs, and trade associations suggesting that EDRs would require more memory than that estimated by the NPRM (for both data capture and recording) to meet the NPRM’s proposed requirements. Necessary memory upgrades could include both non-volatile memory for storing the recorded crash data, and volatile memory (or RAM) for data processing (read into and write over). Currently, part 563’s specified recording duration of 5 seconds at 2 samples per second generates a total of 11 samples for each pre-crash data element (2 samples per second $\times$ 5 seconds + 1 initial sample).

The EDR Technology Study, reporting on information provided by EDR subject experts from OEMs and ACM/EDR suppliers, found a typical recorded crash event requires approximately 929 bytes (77 bytes for pre-crash data elements) to record all of the Table I and Table II data elements for a single event.³⁷ Depending on the redundancy strategy for data quality control, a typical recorded EDR requires approximately 1.86 kB per event. To record data for 20 seconds at 10 Hz, 201 samples (10 $\times$ 20 + 1) would be captured, or an additional 190 samples per pre-crash data element over the previous requirements of 5 seconds at 2 Hz. In total, an additional 1,330 (190 $\times$ 7) data points must be captured, processed, and recorded per crash event if all 7 pre-crash data elements are recorded (Table II lists optional data elements if they are recorded by the EDR). An EDR is required to record these elements for up to two events in a multi-event crash.³⁸ To capture two events, the EDR would require an additional 2,660 bytes of memory for the additional data, as required by this final rule. Similarly, an equal amount of RAM would be needed for data processing.

Memory reallocation may be necessary for older generation EDRs to meet this final rule’s required Table I elements. Additionally, manufacturers with EDRs that voluntarily record data elements not listed in Tables I and II³⁹

³⁷ See Tables 20 and 21 in DOT HS 812 929. Table I data elements require 72 bytes and Table II data elements require 857 bytes.

³⁸ For EDR data capture, part 563 requires the memory for air bag deployment events to be locked to prevent any future overwriting of the data. For non-air bag deployment events, the EDR can capture and record the current data, up to two events.

³⁹ Comments received from GM and Honda support the contention that some EDRs are

³³ Public Law 114–94, 2015 HR 22, Public Law 114–94, December 4, 2015, 129 Stat 1312.

³⁴ UN ECE Regulation No. 160 requires all new types of M1 and N1 vehicles in Europe to have an EDR beginning July 6, 2022, and further requires all new vehicles to have an EDR beginning July 7, 2024. Table 1 in Annex 4 of UN R160 lists twenty-three mandatory pre-crash data elements to be captured by the EDR.

³⁵ For example, EDR records from vehicle 2 in CISS Case Number: 1–20–2022–129–03.

of part 563 may need to reallocate memory if memory allocation is nearing capacity or there is insufficient memory to meet the requirements of this final rule. However, NHTSA accepts this potential as Congress unambiguously signaled its desire for the agency to prioritize the time necessary to provide accident investigators vehicle-related information pertinent to crashes through the FAST Act statutory mandate. This final rule's additional lead time should considerably minimize any required memory reallocation. Further, any memory reallocation needed to meet the requirements of this final rule could potentially be carried out by only capturing those elements required by Table I, as only Table I elements must be recorded if an EDR is installed.

In relation to recording requirements, GM suggested that it is preferable to record all pre-crash data elements captured by its latest generation EDR, including those required by part 563 and those voluntarily captured, at the same sample rate to not increase software complexity. However, EDRs that record data elements at different recording intervals and data sample rates already exist (*e.g.*, some EDRs capture and record data at both 5 s/10 Hz and 5 s/2 Hz). Further, although manufacturers may choose to do so, NHTSA is not requiring manufacturers to record all pre-crash data at 20 seconds and 10 Hz; rather they must only apply that standard to those elements listed in Table I and, if recorded, Table II of part 563.

If an EDR does record numerous data elements not listed in part 563 at 20 seconds and 10 Hz, NHTSA agrees that the amount of extra memory needed to record that data could significantly increase. However, the recording of additional elements outside of Table I is not required by this final rule, and the minimum amount of extra memory needed to record the three pre-crash Table I elements is only approximately 570 bytes (1,040 bytes if considering two events). The estimate provided by the agency for the additional memory needed (2,660 bytes) is for all 7 mandatory and optional pre-crash data elements captured at 20 s and 10 Hz, and for the recording of multiple events. The decision to install additional memory necessary for data buffering and redundancy is a voluntary decision by a manufacturer and is not required by part 563. As discussed in the NPRM, many manufacturers already have EDRs with sufficient hardware capabilities to capture and record more pre-crash data,

or will have the time to develop such EDRs given this final rule's additional lead time allowing for EDR development and testing/validation. For example, vehicle models equipped with EDRs containing 32 kB of flash data storage (memory) or greater should already have sufficient capacity to capture the increased amount of pre-crash data required by this final rule.

For EDRs containing insufficient memory to record the data elements in Table I and II at this final rule's required recording interval/data sample rate, manufacturers may be able meet the new requirements through various means. For example, if EDR memory is currently used to record other data elements not required in part 563, OEMs could reallocate the available memory to record the mandatory data elements at 20 seconds and 10 Hz. If no excess memory is available because a portion of the memory is used for purposes outside of capturing and recording EDR data, modification should not be overly burdensome, as only 1.33 kB of additional memory is needed under this final rule to record the seven pre-crash data elements. Further, if an OEM solely recorded the data elements required by Table I, only approximately 0.57 kB of additional memory would be needed to meet the requirements of this final rule (an increase from 33 samples to 603 samples for Table I pre-crash data elements).

Where memory reallocation is not possible or preferred and additional memory is necessary, manufacturers could increase the memory capacity of the EEPROM, or embed higher capacity flash memory chips with similar costs, since flash memory typically costs less than EEPROM.⁴⁰ For example, information from manufacturers in the EDR Technology Study indicated a typical 2013 microprocessor used in vehicle applications had 32 kB or 64 kB of flash data as part of the ACM, and that most companies are replacing the older memory technology (EEPROM) with flash memory located on the microprocessor. As previously stated, EDRs containing 32 kB of flash data storage (memory) or greater should have sufficient capacity to capture the increased amount of pre-crash data required by this final rule.

⁴⁰ NHTSA understands that manufacturers have moved from EEPROM to flash memory located on the microprocessor for memory storage. The agency did not receive specific comments on how much flash memory EDRs are using to record pre-crash for 5 seconds or on the amount of memory that would be needed to capture the additional data, including additional memory for redundancy. Therefore, it is difficult to discuss examples of how the different components would need to be upgraded.

Finally, in response to comments expressing concern that the NPRM failed to capture all costs associated with any EDR memory increases needed to meet the requirements of this final rule, NHTSA acknowledges these concerns and, following careful consideration, has adjusted estimated costs accordingly in the Final Regulatory Evaluation (FRE) accompanying this final rule. Additional details on the updated cost estimates of this final rule are discussed in section V.

Data Processing

Comments

Several commenters expressed concern that the proposal would create increased data processing needs. SAE and Auto Innovators stated that, depending on current microprocessor capacity, the proposed data requirements would necessitate additional energy capacity, speed, and memory upgrades, which would also require a new microprocessor and circuit board. SAE and Auto Innovators indicated these modifications would require a complete redesign of the EDR from both a hardware and software perspective. GM stated none of its current EDR designs can support the 20 second requirement without changes to the microprocessor. Honda commented that the NPRM's proposed increases in recording duration and frequency will increase the amount of RAM in the microcontroller unit (MCU) required to record the data, necessitating a physically larger and higher performance MCU. Honda explained that the proposed changes would also require the MCU ROM and processor performance (*e.g.*, clock frequency) to increase.

Agency Response

NHTSA acknowledges the concerns raised by several commenters, including Honda, GM, SAE, and Auto Innovators, that the proposed requirements may necessitate microprocessors with higher clock speeds and an increased amount of ROM depending on the performance specifications of the current microprocessor used to capture and record EDR data. NHTSA also acknowledges comments stating that the NPRM's proposed increase in RAM would necessitate a physically larger and higher performance microprocessor. However, these changes may only be necessary in older generation EDRs or EDRs that are recording data at or near the memory capacity. Further, although some older generation EDRs may lack the performance specifications needed

recording data beyond the Table I and II part 563 elements.

to capture and record the increased duration and frequency of pre-crash data required by this final rule (including clock speed of the microprocessor, available ROM, RAM, and flash memory), many newer EDRs have the necessary MCU specifications to record for 20 seconds. NHTSA acknowledges these newer versions would require a period of software development to change how data are buffered, written to memory, and tested to validate the EDR and ensure that all systems interacting with the EDR perform as intended. However, these concerns should be alleviated through the additional lead time provided by this final rule, which should allow manufacturers to make any EDR design changes needed to meet the requirements of this final rule.

Energy Reserve and Design Concerns Comments

Several comments stated that the proposal would require increased energy reserve. Auto Innovators explained the EDR function is typically integrated into a vehicle's ACU or ACM and includes reserve energy to successfully deploy the restraint systems, facilitate high voltage shutoffs for electric vehicles, and record EDR data into non-volatile memory if vehicle power is lost early in the crash event. GM stated the increased write time duration would require more energy reserve, and that a microprocessor with a higher current draw could affect the energy reserve. For many existing units to meet the new requirements, Auto Innovators stated that the amount of additional, voluntary data elements recorded by the EDR would need to be reduced, or that the air bag control/EDR module would require redesign to accommodate the additional reserve power capacity. Both Auto Innovators and SAE stated that many current EDRs record more than the minimum part 563 requirements, and that these additional data elements would also have to be recorded for 20 seconds.

Several commenters stated the proposed changes would require larger and, in some cases, multiple capacitors to meet the extended pre-crash recording period, as the EDR module operates under its own power supply during a crash. Commenters indicated larger capacitors pose engineering challenges in terms of lifespan, durability, and ability to charge during normal operation. Auto Innovators stated the additional energy capacity required to meet the new requirements would considerably increase the footprint of the ACU/EDR, and that

enough physical space may not exist in optimum locations for current vehicles (selected for crash sensing and durability) to accommodate increases in ACU/EDR size. Commenters explained needed changes to the size of the module could require redesign and affect placement in the vehicle, increasing design complexity and increasing costs for both consumers and manufacturers.

Agency Response

The ACU requires reserve energy (provided by capacitors) in the event of a loss of battery power in the vehicle. This reserve energy exists for the EDR to capture and record data, while also ensuring the vehicle's air bags can properly deploy. NHTSA acknowledges several comments received from industry stating that meeting the proposed EDR requirements may necessitate capacitors with increased capacitance, which may in turn require overall hardware changes and potential design changes to the EDR. However, none of the comments received stated that additional power was necessary across all EDR modules, instead only suggesting that more power may be required.

Based on comments received, NHTSA understands that some manufacturers equip EDRs that voluntarily record pre-crash data elements not listed as part of the minimum requirements in part 563. Any data elements not listed in part 563 that a manufacturer may choose to capture are not required to be recorded for 20 seconds at 10 Hz. A large amount of voluntarily recorded pre-crash data all recorded at 20 seconds could increase the amount of reserve energy required to write to memory and provide backup power, which could necessitate redesign of the EDR packaging. However, as previously stated, NHTSA is only requiring EDRs to record the three pre-crash data elements in Table I and the four pre-crash data elements in Table II (if they are recorded by the EDR) for 20 seconds. Although manufacturers may prefer to record all data at the same duration and sample rate, there are examples of EDRs in CISS that record data at different durations and sample rates. Manufacturers are of course free to record voluntarily captured elements as they prefer.

Based on NHTSA's analysis, the costs of capacitors, especially in large quantities, is relatively low. For example, an EDR capacitor upgrade from 3.3 μF to 10.0 μF would cost approximately \$0.02 per unit, based on

market research.⁴¹ Further, EDRs with sufficient memory capacity to allow for some memory reallocation would not require an increase in reserve energy. The physical size of capacitors can vary according to many different constraints such as: manufacturer, dielectric type, target application, mounting style, capacitance, voltage rating. Based on NHTSA's research, there are 6.8 μF capacitors and a 10.0 μF capacitors with similar specifications beside capacitance that have the same physical dimensions in terms of diameter and surface mount area. Varying other parameters (e.g., voltage rating) only changes the physical dimensions of these capacitors by 1 mm or less. Ultimately, the manufacturer chooses where to place the EDR housing within its vehicles. NHTSA has included cost estimates that cover software development and design validation but does not believe such small hardware components will significantly affect the size of the physical casing that holds the electronic components of the EDR.

Therefore, this final rule adopts the NPRM's proposal to extend the EDR recording period for timed data metrics from 5 seconds of pre-crash data to 20 seconds of pre-crash data at a frequency of 10 Hz. Manufacturers should be able to meet these requirements given the lead time and relatively low cost of capacitors to implement any required upgrades.

Development and Validation Comments

SAE and Auto Innovators stated that in addition to costs incurred from the proposed EDR component upgrades, the proposal would also require associated development and integration costs, including validation and testing at component, sub-system, and vehicle levels. These commenters stated that costs and associated lead times are further amplified because the EDR application is most often coupled with a safety restraint management system requiring rigorous safety system validation and verification. Nissan, explaining it confirms the functionality of the EDR in coordination with other compliance crash tests completed in less than 20 seconds, commented that the proposal would require additional or new crash test procedures to retrieve data from a vehicle. SAE commented that capturing 20 seconds of data would require a crash test facility over 985 feet

⁴¹ Based on quotes from DigiKey, the average unit price for 3.3 μF capacitors is \$0.11 and the average unit price for 10.0 μF capacitors is \$0.13. Therefore, \$0.02 was used as the upgrade cost for reserve energy.

long, and that no such test facility currently exists. GM also expressed concerns in relation to vehicle level validation, asking if the proposal would require a crash of sufficient length to encompass the entire 20 seconds of pre-crash data. GM explained that such a requirement would impact vehicle barrier facilities and testing protocol, resulting in additional costs.

Agency Response

Several commenters expressed concerns that the proposed rule would incur new costs, including for a new crash test facility and additional or new crash test procedures to record and retrieve the appropriate amount of data. In response, the agency points out that vehicles do not have to operate at the speeds specified for crash testing under such scenarios as FMVSS No. 208 or FMVSS No. 214 to meet the new EDR recording requirements of this final rule. New or altered test procedures may be needed to validate the EDR, but manufacturers should not need new crash test facilities to meet the new data capture requirements. Manufacturers may instead use other means that do not require the vehicle to travel at crash test speeds (*i.e.*, 56 kph or 35 mph) for 20 seconds to capture pre-crash data as testing validation for this final rule's data capture requirements. For example, tests may be conducted by initially operating the vehicle at a minimum speed before acceleration or by idling the vehicle prior to accelerating to the speeds necessary for other crash tests. The availability of these alternative options and the extended lead time provided by this final rule will help mitigate any potential incurred costs.

C. Additional Data Elements

Comments

Many commenters stated that part 563 should include the recording of additional ADAS/ADS data elements to improve EDR data effectiveness. Commenters stated the incorporation of new crash avoidance, pre-crash, and post-crash data elements would provide a greater safety value to improve driver-assistive safety technologies compared with increased recording duration and frequency. Several commenters recommended that a standard format for capturing and reporting data related to advanced safety systems should be defined and included as part of the EDR requirements. Some commenters encouraged NHTSA to follow a similar path to the European Union's (EU) recent mandate requiring the equipping of new vehicles with EDRs that record ADAS elements. Bosch recommended

the use of other recorders to record information like driver and ADS state to determine the control of the vehicle before an event triggering EDR recording, such as the Data Storage System for Automated Driving (DSSAD) recommended by the UN ECE, or the SAE ADS data logger (SAE J3197).

Agency Response

While NHTSA agrees with commenters that additional data elements may be beneficial for collision reconstruction, this topic falls outside the scope of this rulemaking. The NPRM did not address the addition of any new data elements, and the rulemaking responds to the FAST Act's instruction to promulgate regulations establishing the appropriate amount of time that EDRs should capture and record data.

The agency may address the recording of additional data elements, including ADAS system status and performance parameters, in future rulemaking. Manufacturers may of course continue to include or add pre-crash data elements outside of those listed in part 563⁴² to EDRs but must also comply with this final rule. Manufacturers may also continue to log data from modern safety features in other vehicle systems.

D. Privacy Considerations

Comments

As explained in the NPRM, the DOT Privacy Office has determined that this rulemaking does not create privacy risk because no new or substantially changed technology will collect, maintain, or disseminate information in an identifiable form. NHTSA requested comment on this determination.

In response to this request, SAE stated that when part 563 was initially proposed it specified a recording duration of 8 seconds, which the agency reduced to 5 seconds to apply prudent judgment in balancing securing data with the privacy rights of an individual vehicle operator.⁴³ SAE cited the comment submitted by the Electronic Privacy Information Center (EPIC) in response to the initial proposal of establishing part 563, in which EPIC cited several Fair Information Practices (FIPs) limiting data collection based on purpose-specific principles and cautioned NHTSA against an

⁴² Examples of some pre-crash data elements not listed in part 563 but recorded by some 2021 EDR-equipped light vehicles include: adaptive cruise control status, AEB status, brake pedal position, cruise control status, drive mode, forward collision warning, ignition status, lane departure warning, road departure mitigation status, tire pressure status, traction control system status, and wheel speed.

⁴³ 71 FR 50998 (Aug. 28, 2006).

incremental expansion of EDR data records as mandated policy. SAE stated NHTSA should demonstrate a clear public benefit for the proposed increased data capture duration, contrasted with a balance of personal privacy. Auto Innovators stated that expanding the pre-crash recording time to 20 seconds will capture a significant amount of driver behavior, much of which will not have any significant impact on the determination of crash causation factors that cannot currently be obtained by other crash reconstruction methods.

Agency Response

The agency emphasizes that EDRs do not record personally identifiable data, and captured data are regularly overwritten, except for specified crash events meeting the trigger threshold to retain data. Increasing the pre-crash recording duration from 5 seconds to 20 seconds should not increase privacy concerns, as no new or substantially changed technology will collect, maintain, or disseminate information in an identifiable form. Further, the Driver Privacy Act of 2015, part of the FAST Act⁴⁴ and implemented after the establishment of part 563, states that the owner or lessee of a motor vehicle is the owner of the data collected by an EDR. Recorded EDR data may only be retrieved for the purpose of improving motor vehicle safety and vehicle safety research (provided the data are not personally identifiable), or through the vehicle owners' consent or a court or administrative order. These privacy protections should alleviate expressed privacy concerns while allowing the agency to fulfill the FAST Act's mandate to establish the appropriate recording period in NHTSA's EDR regulation.

E. International Harmonization

Comments

Several commenters expressed support for international harmonization of EDR functions. Specifically, SAE, Honda, Auto Innovators, MEMA, and Bosch stated they support a harmonized approach with UN ECE Regulation No. 160.⁴⁵ Commenters noted that UN Regulation No. 160–01, which went into effect in July 2024, has adopted additional data elements for modern safety technologies. SAE recommended maintaining a mandated EDR practice

⁴⁴ Public Law 114–94, § 24301–24302, 129 Stat. 1312, 1713–14 (2015).

⁴⁵ UNECE WP.29 has established the EDR/DSSAD Informal Working Group (IWG) to develop internationally harmonized performance specifications/regulations for EDR functions.

consistent with global EDR regulations to ease manufacturers' financial burden and avoid penalizing US vehicle buyers. In support of this approach, SAE discussed other global requirements, including those of Korea (KMOVSS 56–2), Japan (J–EDR 2015), China (GB 39732–2020), EU (2022/545 based on UN R160), and Russia (Fed article 26 162–03), which all require a minimum of 5 seconds of pre-crash data captured at 2 Hz. Honda stated it has developed its EDRs to accommodate not only part 563 requirements, but also the various EDR regulations for China and UN R160 (00 and 01 Series).

Agency Response

NHTSA acknowledges that some other international EDR regulations specify a 5 second pre-crash data recording duration at 2 Hz. However, the agency has decided to proceed with the extended EDR data recording and frequency requirements proposed in the NPRM based on the requirements of the FAST Act and the findings of the EDR Duration Study, which found that capturing data at an increased recording duration and sample rate will enhance certainty when interpreting pre-crash data, resulting in improved crash investigations. In response to comments encouraging international harmonization in such areas as additional data elements for modern safety technologies, this topic falls outside the scope of the NPRM and will not be addressed in this rulemaking. However, the agency may address such topics in future EDR rulemakings, following review of the results of ongoing international efforts related to EDRs.

F. Other Considerations

Comments

NHTSA received several other comments generally related to part 563. One individual supported an increased EDR duration but stated there is a need to update part 563's trigger threshold definition. This commenter stated that the current trigger threshold, which specifies an 8 km/h change in vehicle velocity within a 150 ms interval, may not capture non-air bag deployment events, such as collisions involving a vulnerable road user and a vehicle. IIHS–HLDI provided similar comments and suggested modifying part 563 to include automatic emergency braking (AEB) activation status as a trigger threshold, as many vehicles are equipped with AEB systems. The Institute also stated that adding data on vehicle-to-pedestrian collisions would improve roadway design and help refine

vehicle structures and crash avoidance systems to mitigate the severity of those collisions.

One individual commenter stated part 563 should apply to all newly manufactured vehicles, regardless of weight. The commenter explained that some newer electric vehicles may weigh more than the applicability requirement of an unloaded vehicle weight of 5,500 lb. and would therefore be exempt from complying with part 563.

Agency Response

Although multiple commenters encouraged additional amendments to part 563, these suggestions fall outside the scope of the proposed rulemaking and are thus not included in this final rule. However, NHTSA may consider additional amendments to part 563 as part of a future rulemaking.

V. Summary of Estimated Benefits and Costs

The requirements specified in this final rule affect vehicle manufacturers that produce light vehicles with a GVWR not greater than 3,855 kg (8,500 pounds) and voluntarily install EDRs in their vehicles. This rule also applies to final-stage manufacturers and alterers. Both the agency and the public have historically benefited from incorporating EDR information into crash and defects investigations, as the inclusion of EDR data leads to improved investigations and better understanding of injury causes and mechanisms.

The NPRM stated the proposed increased recording time for the pre-crash data would provide benefits by helping to ensure that data on the initiation of pre-crash actions and maneuvers are captured for most crashes. The agency explained this increased data would enhance the usefulness of the recorded information, potentially leading to further improvements in the safety of current and future vehicles. The agency also stated the proposed increase in data recording frequency would clarify the interpretation of recorded pre-crash information for crash investigators and researchers.

In relation to costs, the NPRM acknowledged that increasing the recording time of the pre-crash data could add additional costs for increased memory if an EDR had little or no excess memory in the module. In the NPRM, the agency stated it understood that about 99.5 percent of model year 2021 passenger cars and other vehicles with a GVWR of 3,855 kg or less are already equipped with part 563-compliant EDRs, that no additional hardware would be required by the

proposed amendment, and that compliance costs would be negligible. The agency sought comment on potential costs and benefits associated with the NPRM's proposals.

Comments

Most commenters stated the proposal to increase the amount of pre-crash data captured and recorded would result in significant costs, including because of the need to upgrade and validate EDRs in vehicles. Many OEMs stated that costs would hinder the implementation of the proposed final rule, with some citing concerns over whether a real-world safety gap exists to justify costs incurred. Commenters stated the proposed changes would increase memory requirements, resulting in an increased overall EDR price. Commenters also stated software and hardware changes would be needed to meet the 20-second pre-crash capture requirements, including, where necessary, increased capacitance to provide power to the EDR and to make necessary changes to the printed circuit board.

Specifically, SAE pointed to a study done by the Federal Motor Carrier Safety Administration (FMCSA) on heavy-duty and commercial data recorders, referenced in the NPRM, stating it raised questions concerning the applicability of the cost estimates for flash memory. SAE also listed the following component changes and costs that must be considered for multiple module designs: microprocessor upgrade, additional memory (both RAM and nonvolatile memory), energy reserve increase, PCB design changes, module housing changes, potential mounting changes in vehicle software and hardware engineering design and development cost, component validation cost, vehicle validation cost for new module designs, and vehicle level recertification.

GM expressed concerns over the burdens associated with increased EDR complexity and the inability of different regions to arrive at a more common technical solution, pointing to recently implemented worldwide EDR regulations that maintain the 5-second pre-crash recording interval and sample rates historically required by part 563. GM further stated the cost estimate in the NPRM is not negligible and does not fully encompass all the required changes proposed by the NPRM, which could include component validation, full vehicle validation, and vehicle recertification of the EDR and the Sensing and Diagnostic Module.

Auto Innovators submitted additional comments related to costs following the

closing of the NPRM comment period.⁴⁶ These comments stated that, based on member responses, the estimated average cost of development and testing to meet the proposed rule would be \$8.4 million dollars per manufacturer, with an average estimated cost increase of \$5.40 per vehicle to develop an EDR meeting the proposed rule. Given those estimates, Auto Innovators stated that, assuming an average annual light duty vehicle production of 16.4 million vehicles for 17 OEMs, the cost burden for the first year would be \$231.36 million. Auto Innovators explained this is the sum of each OEM's development/test costs and that, assuming the same annual production took place, the annual cost burden following the first year of implementation of the final rule would be \$88.56 million, based on the annual affected vehicle production times the incremental EDR module cost.

Commenters also stated manufacturers may require vehicle crash tests to ensure the data transferred from sensors in the vehicle to the EDR are not affected by hardware updates. Commenters stated costs to consumers and lead-time implications are especially important because of such issues as supply chain disruptions, microchip shortages, high inflation, and economic uncertainty. Auto Innovators also stated NHTSA should consider equity issues given the average new car price of vehicles.

In support of the proposal, NAMIC commented that the costs to increase the recording duration are warranted by the benefits of more and better pre-crash data, even if costs in addition to memory are required (*e.g.*, redesign for a larger unit, additional RAM, *etc.*). NAMIC stated the proposed changes provide greater safety value than any additional costs to the vehicle. CAS stated the price of flash memory used to estimate costs in the NPRM was overestimated and that OEMs may receive discounts for bulk memory purchases. CAS further stated the incremental cost associated with upgrading the memory would not prevent the expansion of EDR data storage.

Agency Response

The agency does not agree with comments expressing skepticism over the benefits of the NPRM's proposed increased recording duration and frequency requirements. This final rule's requirements will improve crash investigations and crash data collection quality, ultimately assisting the agency and others in identifying potential

opportunities for safety improvement in vehicles already on the road, improving future vehicle designs, and creating more effective safety regulations. The increased information captured by the requirements of this final rule will aid not only the agency, but also crash investigators, first responders, and others.

However, following review the agency does find certain comments received stating that the NPRM did not consider additional costs associated with the NPRM's proposal compelling. As such, NHTSA has revised the cost estimates originally provided in the NPRM to include two different EDR versions: those solely requiring software changes to meet the proposed rule and those requiring both hardware and software changes. The updated estimated benefits and costs associated with this final rule are detailed below.

A. Benefits

EDR data are invaluable for improving system performance. EDR data improve crash investigations and crash data collection quality, which assists safety researchers, vehicle manufacturers, and the agency to better understand vehicle crashes and help determine crash causation.⁴⁷ Similarly, vehicle manufacturers can use EDR data to improve vehicle designs and develop more effective vehicle safety countermeasures. For example, as mentioned in the NPRM, the Toyota unintended acceleration study⁴⁸ confirmed the significant value of EDR pre-crash data.⁴⁹ The agency successfully used this EDR data to assist in determining the root cause of the events and to support the safety recalls. Further, in 2016, the agency used EDR data to establish crash scenarios and vehicle dynamics when evaluating the efficacy of vehicle-to-vehicle (V2V) communication technologies in an NPRM for V2V.⁵⁰

⁴⁷ Even though crash investigators gather insightful information about the dynamics of crashes, some parameters cannot be determined or cannot be as accurately measured (such as the change in velocity) by traditional post-crash investigation procedures, such as visually examining and evaluating physical evidence, *e.g.*, the crash-involved vehicles and skid marks.

⁴⁸ NHTSA Report No. NHTSA-NVS-2011-ETC, "Technical Assessment of Toyota Electronic Throttle Control (ETC) Systems," February 2011.

⁴⁹ In March 2010 NHTSA began obtaining data from Toyota EDRs as part of its inquiry into allegations of unintended acceleration (UA), and as follow-up to the recalls of some Toyota models. The study analyzed cases in which the accelerator pedal became stuck or entrapped, seeking to determine the root cause of each crash.

⁵⁰ Preliminary Regulatory Impact Analysis, FMVSS No. 150, Vehicle-to-Vehicle Communication Technologies for Light Vehicles, December 2016, HS 812 359.

The requirements of this final rule will fulfill the outstanding need of adequate recording of pre-crash actions for investigation and reconstruction without overtasking the vehicle's power and memory needs for capturing EDR data. The amendments may also result in foundational upgrades to the hardware and software for a modernized EDR, which could in turn support the capture and recording of other data elements. This final rule's increased recording duration and refined resolution may also provide OEMs with more granular pre-crash information that manufacturers can use to evaluate and develop improvements for vehicle systems. NHTSA acknowledges that, similar to the establishment of part 563, it is difficult to estimate the exact portion of benefits creditable to an increased amount of EDR data after a standard is implemented or a safety countermeasure is developed. While stored data are valuable in terms of safety research and emergency response, it is not easy to quantify how they translate to the improvement of vehicle safety. However, increased recording duration and frequency will provide many overall benefits to the public, as described below.

Increased Recording Duration

Per the findings of the EDR Duration Study, the current part 563 EDR pre-crash recording duration of 5 seconds does not capture the initiation of pre-crash braking and steering maneuvers in a substantial percentage of cases. Based on the findings of the study a recording duration of 20 seconds is required to ensure that the initiation of pre-crash actions and maneuvers can be captured for most crashes. The three crash modes examined in the EDR Duration Study—rear-end, intersection, and roadway departure—comprised about 70 percent of all passenger vehicle crashes, annually.⁵¹ Separately, these crashes represent the most prevalent, relatively longer maneuvered times required, and relatively severe crashes (based on fatalities). Therefore, the newly required 20 second recording time is adequate to record the pre-crash actions for almost all crashes given the collective frequency of these three crash types and what they represent.

Increasing the recording duration of pre-crash data will help ensure that data on the initiation of crash avoidance driving maneuvers are captured for most crashes. This increased recording duration will enhance the usefulness of

⁵¹ Derived from the NHTSA report "Target Crash Population for Crash Avoidance Technologies in Passenger Vehicles," March 2019, DOT HS 812 653.

⁴⁶ NHTSA-2022-0021-0025.

the recorded information, potentially leading to further improvements in the safety of current and future vehicles. The study also found that a better understanding of pre-crash actions will assist in the evaluation of emerging crash avoidance systems (e.g., lane departure warning, lane keeping assist, forward collision avoidance, automatic emergency braking, and intersection safety assistance systems).

The 20 second extended recording duration will be particularly useful in intersection crashes, which have an approach stage as the vehicle comes to the intersection and a traversal stage in which the vehicle is exposed in the intersection. Based on the EDR Duration Study, the currently required 5-second recording duration captures less than 1 percent of the total intersection event time, which includes the approach and traversal stage. The study found that 15 seconds would capture 50 percent of the total intersection event time, and 20 seconds would capture 95 percent of the total intersection event time. With this final rule's increased recording duration, actions such as running a stop sign, rolling stops, or running a red light could be captured in full and included in the crash reconstruction when supplemented with roadway and traffic control information. In road departure crashes, longer durations could also capture any corrective maneuvers by the vehicle before the initial road departure.

Increased Recording Frequency

Currently most EDRs capture pre-crash data at a frequency of 2 Hz. However, based on EDR records in the NASS-CDS and CISS (Crash Investigation Sampling System) databases, some manufacturers already use models that voluntarily capture pre-crash data at 5 Hz or 10 Hz. Further, some vehicle manufacturers and suppliers have indicated their support for an increased frequency rate. When manufacturers and suppliers were asked about near-term plans for EDRs in the EDR Technology Study, some respondents expressed interest in adding, "higher sampling frequency and longer recording interval for pre-crash data, i.e., sampling interval better than $\frac{1}{10}$ of a second."⁵²

In support of the benefits of this final rule's amendments to part 563, an increase in data recording frequency will help clarify the interpretation of recorded pre-crash information. For example, rapid vehicle control inputs (e.g., brake application and release or

rapid reversals in steering input of less than 0.5 seconds) may not be logged by an EDR that records data at 2 Hz. Although 20 seconds of pre-crash data will capture more crash causation information, a refinement in acquisition frequency is also needed to assuage data misinterpretation concerns. An improved data sampling rate is also needed due to the nature of crashes, which can include a quick sequence of events prior to a crash that require a vehicle's crash avoidance technologies, such as Anti-lock Braking System and Electronic Stability Control, to activate quickly. To understand the performance and effectiveness of such systems, the sample rate of pre-crash data elements should be increased. In addition, as EDR output for pre-crash data elements is not synchronized,⁵³ including at the previously required sample rate of 2 Hz, uncertainty could exist when an investigator is attempting to compare data at specific points in time with precision. The higher sample rate required by this final rule will reduce this potential uncertainty in relation to the relative timing of recorded data elements, to better correlate a driver's commands and a vehicle's performance.

This final rule's increased sample rate will also benefit crash causation analysis and pre-crash behavior. For example, additional events like momentary highly dynamic steering inputs, ABS, or ESC activation that are not recorded at the 2-Hz sample rate could be captured at 10 Hz. For multi-impact crash events, a sample rate of 10 Hz will allow the EDR to better capture the actions that occur when a vehicle undergoes a series of events (e.g., lane departure resulting in striking an object followed by striking another object in immediate succession).

Further, an increase in recording frequency could help investigators better identify where vehicle dynamics prior to a crash event relate to pedal misapplication. Pedal misapplication crashes occur when a driver presses one pedal while intending to press another pedal. In an emergency braking situation, pedal misapplication would result in the driver pressing the accelerator pedal hard. Identifying and decreasing pedal misapplication events is important, as a recent study observed pedal misapplication rates involved a much higher percentage of events than

previously estimated.⁵⁴ While data points can be estimated to account for data gaps when recorded at 2 Hz, driver actions may not be captured by the EDR at the time they occur. This informational gap may result in underestimations of the accelerator application rate, resulting in a failure to identify pedal misapplication entirely, if, for example, the driver fully presses the accelerator pedal to 100 percent for a quarter of a second. An increased recording frequency of 10 Hz will help identify events involving pedal misapplication, potentially providing additional information on how to mitigate these events and improve vehicular safety.

Finally, in addition to the many benefits provided by this final rule's requirement to increase part 563's data recording frequency requirements to 10 Hz, manufacturers' voluntary integration of ADAS data elements recorded at a sample rate of 10 Hz could provide valuable insights on the performance of new technologies. For example, some vehicle manufacturers already voluntarily collect EDR data on the status and operation of ADAS technologies (e.g., activation of forward crash warning alerts, automatic emergency braking activations, and lane keeping assist technologies). In voluntarily collecting this information, manufacturers have generally adopted the sample rate used for pre-crash data elements voluntarily recorded by the EDR (2 Hz), but some current EDRs capture data at 10 Hz. Evidence has shown that an increased sample rate of 10 Hz will help provide the resolution needed to understand the real-world performance and effectiveness of these advanced crash avoidance systems and better estimate the actions of the vehicle prior to a crash, such as the traveling trajectory.⁵⁵ This information will in turn allow researchers to better determine the timing of the sequence of pre-crash actions.

B. Costs

The Preliminary Regulatory Evaluation (PRE) the NPRM relied on to estimate costs considered only vehicles equipped with EDRs containing sufficient memory, microprocessor specifications, and reserve energy to record 20 seconds of data at 10 Hz.

⁵⁴ Smith, C.P., Sherony, R., Gabler, H.C., and Riexinger, L.E., "Identifying Pedal Misapplication Behavior Using Event Data Recorders," SAE Int. J. Advances & Curr. Prac. in Mobility 5(1):206–216, 2023, doi:10.4271/2022-01-0817.

⁵⁵ Matsumura, H., and Itoh, T., "Study on Estimation of Traveling Trajectory Using the Recording Data in the Event Data Recorder," SAE Int. J. Adv. & Curr. Prac. in Mobility 5(2):580–594, 2023, <https://doi.org/10.4271/2022-01-0837>.

⁵² DOT HS 812 929, pg. 39. Five vehicle manufacturers and three suppliers were interviewed as part of the study.

⁵³ While true time synchronization of data originating from the vehicle network may not be possible, the increased sample rate for pre-crash data elements may reduce the potential uncertainty related to the relative timing of data elements, specifically for correlating the driver's commands and the vehicle's performance.

NHTSA acknowledges comments criticizing the NPRM's cost estimates for not adequately accounting for any changes needed to meet the proposed amendments.

For example, the NPRM estimated additional memory costs by multiplying the additional 1,330 bytes to record for 20 seconds at 10 Hz by the cost of flash memory (0.072 cents/megabyte) reported in the EDR Technology Study. This calculation resulted in a cost estimate of \$0.003 for additional memory per event. However, in response to comments received, the agency reviewed online estimates, which indicate that the unit cost for a 16 kB, 32 kB, and 64 kB EEPROM is \$0.41, \$0.46, and \$0.56, respectively.⁵⁶ This pricing results in an additional cost of \$0.15 to increase memory from 16 kB to 64 kB.⁵⁷ As such, this final rule is updating the estimated unit cost for memory upgrade (if all seven pre-crash data elements are recorded) to be \$0.13 per vehicle. The \$0.13 per vehicle includes \$0.06 per vehicle to upgrade the storage memory and \$0.07 per vehicle to upgrade the RAM, both based on two events being recorded.

Although the PRE still applies to EDRs with sufficient memory, microprocessor specifications, and reserve energy to meet this final rule's requirements, NHTSA acknowledges it did not comprehensively consider costs associated with older EDR technologies and the corresponding level of upgrades potentially required in vehicles equipped with them, including costs for redesign and validation. Per comments received, NHTSA understands not all vehicles are equipped with EDRs containing sufficient memory/processor capability/reserve energy to require only software changes.⁵⁸ Based on feedback from commenters and in acknowledgement of this issue, NHTSA has revisited the cost estimates presented in the NPRM to determine the costs associated with meeting the requirements of this final rule given the wide variety of EDRs currently available.

Unlike the PRE, this final rule includes estimated costs for EDRs currently compliant with part 563 that need upgrades to meet this final rule's new recording duration and frequency requirements. These updated cost estimates are presented via a "lower bound" and "upper bound" to capture the potential range for the total cost of the final rule. These bounds are in place to avoid speculating on how many vehicles and EDR platforms would only require software changes to meet the new data capture requirements versus those that would require hardware and software changes.

Description of Upper and Lower Bound Cost Estimates

The cost estimates presented in the Final Regulatory Evaluation (FRE) now represent a "lower bound" reflecting the incremental costs of "upgraded EDRs" that already have the capacity to comply with this final rule.⁵⁹ The "upper bound" represents all the potential components of an EDR that may require upgrades to transition from a "base EDR" to an "upgraded EDR" to meet the requirements of this final rule. For this category of EDRs, the estimated costs encompass more than the incremental costs required to meet this final rule. As EDRs currently vary in hardware capabilities, the actual cost of the final rule should fall somewhere between the lower bound and upper bound of the cost estimates laid out below.

Every part 563 pre-crash data element will require the capturing of an additional 190 data points to meet the 20 second recording duration and 10 Hz frequency requirement of this final rule. Specifically, for the 3 required data elements in Table I, the total number of additional data points is 570. For all 7 pre-crash data elements in Table I and II, the total number of additional data points is 1,330. The NPRM explained that manufacturers could accommodate this needed increase in memory by using the existing memory already available for capturing and recording EDR data (typically in the ACM). The NPRM estimated associated costs for these additional memory needs (1.33 kB for all 7 pre-crash elements) would be \$0.003 per vehicle based on a conservative estimate of \$0.002/kB. However, as previously acknowledged, these estimated costs did not account for EDRs requiring hardware upgrades

based on insufficient reserve energy or microprocessors.

While many newer generation EDRs record at rates between 5 Hz to 10 Hz, most EDRs still record 5 seconds of pre-crash data. Although the agency has a large pool of EDR data, ascertaining the exact hardware specifications among various EDRs for the purposes of this rulemaking is not practical, as EDR modules come with a variety of chip designs capable of accomplishing similar functionality with similar costs, and this information is proprietary. The varied and proprietary nature of EDR designs thus makes defining a representative "base EDR" challenging. Further, EDR designs vary not only by manufacturer, but also often by vehicle model, and EDR capabilities are not standardized. Indeed, they must only meet the minimum requirements in part 563. For example, some EDRs record more than 5 seconds of pre-crash data, some record more than two events, and some voluntarily record more optional data elements than those specified in Table I or Table II of part 563. Further, some EDRs record the required and optional pre-crash data at different sample rates.

Despite the lack of available data needed to perform a comprehensive assessment of EDR design specifications and corresponding functionalities, the agency used its best knowledge to adequately describe a representative base EDR representing the upper bound for the cost estimates based on the specifications in Table 3. We assumed that a base EDR does not have sufficient excess memory to record pre-crash data for 20 seconds at 10 Hz, requiring the microcontroller and reserve energy to be upgraded or increased to meet the requirements of this final rule. We also assumed that a base level EDR must be fully upgraded/modernized, meaning its associated costs are well in excess of the incremental costs associated with making an already updated EDR compliant with the final rule. This cost is more representative of a vehicle manufacturer updating its EDR capability with an eye towards recording additional data elements, such as data elements required by UN R160. If a manufacturer chooses to capture and record ADAS-related pre-crash data elements not listed in part 563, then hardware components may need to be upgraded well beyond what is required by this final rule. However, as mandated by the FAST Act, NHTSA is only changing the duration and sample rate of part 563 pre-crash data elements.

For the lower bound of cost estimates, we assumed a vehicle is already

⁵⁶ See <https://www.mouser.com/c/semiconductors/memory-ics/EEPROM> as of July 25, 2023.

⁵⁷ Note that RAM is generally more expensive than EEPROM, but NHTSA does not have a comparable price comparison because of a lack of data and online product information specifically for RAM designed for vehicle use. However, based on NHTSA's internal analysis, RAM is approximately 20.0 percent more expensive than EEPROM given the same memory capacity. As a result, updating RAM would cost \$0.07 (= 0.06 * 1.20).

⁵⁸ The cost of upgrading this class of EDRs now reflects the "upper bound" of the cost analysis provided below and represents the need to go from a "base EDR" to an "upgraded EDR."

⁵⁹ The agency recognizes that even with the approach taken in the PRE, manufacturers would still need to test and validate any redesigned EDR to ensure it would function as intended and not negatively affect the performance of the air bag systems in the vehicle.

equipped with an EDR capable of capturing pre-crash data for 20 seconds at 10 Hz, as well as additional unrequired data (*i.e.*, it has already been upgraded by the vehicle manufacturer from the base level previously discussed to the fully modernized level). In this scenario, the “upgraded EDR” would not require hardware changes but may

still require development time for software changes, testing, and validation. As a result, the estimated cost for this scenario would only include software redesign and EDR validation. An upgraded EDR representing the lower bound is described by the specifications in Table 3.

As shown in Table 3, the estimated cost to upgrade only the hardware of the base EDR to that of the upgraded EDR is \$1.33 per EDR. This cost estimate includes an increase in the non-volatile memory capacity, a higher-performance MCU, and more reserve energy to capture and record the data and backup power to the system.

TABLE 3—BASE EDR AND UPGRADED EDR HARDWARE SPECIFICATIONS USED FOR COST ESTIMATES

Component		Base EDR	Upgraded EDR
Non-Volatile Memory	EEPROM or Flash	16 kB	64 kB.
Microcontroller (32-bit)	ROM	512 kB	1 MB.
	Memory	48 kB	96 kB.
	RAM	48 kB	96 kB.
	Clock Frequency	80 MHz	120 MHz.
Reserve Energy	Capacitance	3.3 µF	10 µF.
Estimated costs to upgrade hardware for increased data capture (per unit)			
		\$1.33	\$0.00.

Following publication of the NPRM and review of comments received NHTSA carried out a Final Regulatory Evaluation (FRE), available under the same docket number as this final rule, to estimate the total unit cost per EDR. The total unit cost consists of the following components: (1) increased memory capacity, (2) microcontroller upgrades, (3) energy reserve upgrade, (4) EDR redesign and validation, (5) assembling related material and labor costs, and (6) data imaging tool upgrade. The aggregated unit cost is the additional cost for an EDR to comply with the final rule. Based on these findings, the agency now estimates that the cost to upgrade EDRs to meet the new requirements under this final rule would range between \$0.87 and \$2.20 per vehicle equipped with an EDR.⁶⁰

NHTSA estimates that this final rule will affect approximately 15.23 million light vehicles annually with a GVWR less than 8,501 lbs. This number is derived from Ward’s Automotive Yearbook 2022 and the agency’s NCAP data. Based on Ward’s data, from 2012 to 2021, the average annual sales of light vehicles with a GVWR less than 14,001 lbs was approximately 16.21 million. Due to the incompatible GVWR categorization in Ward’s data, NHTSA was not able to directly parse out the number of light vehicles, *i.e.*, GVWR less than 8,501 lbs, so NCAP data was used. NCAP data includes the precise GVWR and expected sales volume, but only for models of vehicles that manufacturers reported to the agency. In other words, NCAP might not be adequate for assessing the absolute annual vehicle sale volume since the

expected sold volume might not be the actual volume sold and the reported models might not be comprehensive. However, NCAP is a reasonable, available source to derive the relative proportion of vehicles by GVWR. Based on 2021 and 2022 NCAP, an average of 6 percent of reported light vehicles had a GVWR greater than 8,500 lbs. Multiplying the annual sales from Ward’s data by the percentage of affected vehicles results in 15.23 million (= 16.21 million * 0.94). Based on approximately 15.23 million affected vehicles sold annually, the total estimated annual costs range from \$13.26 million to \$33.52 million.⁶¹ The FRE’s estimated unit cost per EDR for each cost component, the total unit cost, and the total annual costs for the lower and upper bound estimates are shown in Table 4.

TABLE 4—COST ESTIMATES FOR INCREASED RECORDING DURATION OF EDR PRE-CRASH DATA

Cost To Modernize EDR From Indicated Baseline		
Cost components	Upgraded EDR (lower bound)	Base EDR (upper bound)
Memory Capacity Increase	\$0.00	\$0.13
EEPROM/Flash Increase	0.00	0.06
Buffer (Volatile Memory)	0.00	0.07
Microcontroller Upgrades	0.00	1.10
Energy Reserve Upgrade	0.00	0.02
EDR Redesign and Validation	0.87	0.87
Labor for Assembling	0.00	0.08
Data Imaging Tool Upgrade	0.00	0.00
Aggregated Unit Cost	0.87	2.20

⁶⁰ All costs are in 2022 values.

⁶¹ Costs for testing, evaluation, and other fixed costs are factored into the component unit costs by a 1.5 markup factor from its variable cost.

TABLE 4—COST ESTIMATES FOR INCREASED RECORDING DURATION OF EDR PRE-CRASH DATA—Continued

Cost To Modernize EDR From Indicated Baseline		
Cost components	Upgraded EDR (lower bound)	Base EDR (upper bound)
Total Number of Affected Vehicles	15,230,000	
Total Cost of the Rule (in Millions)	\$13.26	\$33.52

Given the lack of reliable available data discussed above, NHTSA has used the cost estimates provided by Auto Innovators in response to the NPRM to estimate the cost for redesign and validation in the FRE.⁶² Auto Innovators provided an estimated average development/testing cost of \$8.4 million per OEM, based on feedback from OEMs. This estimate would amount to a total of \$142.8 million collectively for the 17 OEMs that provided estimates to Auto Innovators and would only be considered part of the cost burden for the first year. Applying this cost to 16.4 million vehicles sold annually⁶³ over 10 years, the estimated cost per vehicle for this component is \$0.87. In the FRE for this final rule, the estimated \$0.87 for redesign and validation has been applied equally in both the lower bound and upper bound scenarios. Estimated costs for memory, microprocessors, and capacitors were derived from an online search, with sources presented in the FRE for this rulemaking. The components were filtered using the following specifications: automotive grade or use, reel package, and surface-mount. The sourced online sale unit prices were quoted for small quantities compared to the large quantities that OEMs may order for production. The unit prices were further discounted to 30 percent of the unit price.⁶⁴ The costs for wiring and assembly have been adjusted for inflation from the estimated assembly costs presented in the 2006 EDR final rule.

In acknowledgment of the updated estimated costs laid out in the FRE, NHTSA has added lead time to this final rule to allow OEMs additional time to comply with this final rule. This lead time should mitigate costs that may be

required for OEMs to meet this final rule. The added lead time will also allow for the phasing out of older EDR systems prior to the implementation of the 20 second and 10 Hz requirements. Phasing out these EDRs will help negate required upgrades and any costs associated with the necessary components and costs needed to develop and test the package.

VI. Rulemaking Analyses and Notices

Executive Orders 12866, 13563, and 14094, and DOT Regulatory Policies and Procedures

We have considered the potential impact of this rule under Executive Order 12866, Executive Order 13563, Executive Order 14094, and DOT Order 2100.6A. This final rule is nonsignificant under E.O. 12866 and E.O. 14094 and was not reviewed by the Office of Management and Budget. It is also not considered “of special note to the Department” under DOT Order 2100.6A, *Rulemaking and Guidance Procedures*.

As discussed in this final rule and the NPRM, the additional pre-crash data that would be collected by EDRs under this final rule would be valuable for the advancement of vehicle safety by enhancing and facilitating crash investigations, the evaluation of safety countermeasures, advanced restraint and safety countermeasure research and development, and certain safety defect investigations. Improvements in vehicle safety could occur indirectly from the collection of these data.

We estimate that approximately 99.5 percent of model year 2021 passenger cars and other vehicles with a GVWR of 3,855 kg or less are already equipped with part 563-compliant EDRs. As discussed in the section on the cost impacts of this final rule, the agency believes that a portion of currently equipped EDRs would not require additional hardware to meet the requirements of this final rule and that the compliance costs would be low for software testing and validation. Additionally, this final rule’s lead time should allow manufacturers to choose how best to equip compliant EDRs in applicable vehicles by the effective date

of this final rule, while also mitigating costs. Updated cost estimates have been provided for EDRs that would require hardware and software updates.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small Government jurisdictions. The Act requires agencies to prepare and make available an initial and final regulatory flexibility analysis (RFA) describing the impact of proposed and final rules on small entities. An RFA is not required if the head of the agency certifies that the proposed or final rule will not have a significant impact on a substantial number of small entities. I hereby certify that this rule would not have a significant economic impact on a substantial number of small entities. Additional details related to the basis of this finding can be found in the FRE for this rulemaking final rule.

The factual basis for the certification (5 U.S.C. 605(b)) is set forth below. Although the agency is not required to issue an initial regulatory flexibility analysis, this section discusses many of the issues that an initial regulatory flexibility analysis would address.

This final rule creates minor amendments to 49 CFR part 563, Event Data Recorders (EDRs), to extend the recording period for pre-crash elements in voluntarily installed EDRs from 5 seconds of pre-crash data at a sample rate of 2 Hz to 20 seconds of pre-crash data at a sample rate of 10 Hz. This final rule applies to vehicle manufacturers that produce light vehicles with a GVWR not greater than 3,855 kg (8,500 pounds) and voluntarily install EDRs in their vehicles. It also applies to final-stage manufacturers and alterers. We know of no Federal rules which duplicate, overlap, or conflict with the final rule.

The Small Business Administration’s size standard regulation at 13 CFR part 121, “Small business size regulations,” prescribes small business size standards by North American Industry Classification System (NAICS) codes.

⁶² NHTSA–2022–0021–0025.

⁶³ Annual production of vehicles typically fitted with part 563 compliant EDRs averaged between 2015–2019 (pre-COVID). See <https://www.epa.gov/automotive-trends/explore-automotive-trends-data#SummaryData>.

⁶⁴ Online quotes are for a sale quantity that is significantly less than the quantity that would be purchased by the manufacturers. To account for the efficiency of mass production and pricing power, NHTSA uniformly discounted these unit prices by 70 percent to represent the component price for manufacturers. This 70 percent discount may be conservative based on the agency’s knowledge.

NAICS code 336211, Motor Vehicle Body Manufacturing, prescribes a small business size standard of 1,000 or fewer employees. NAICS code 336390, Other Motor Vehicle Parts Manufacturing, prescribes a small business size standard of 1,000 or fewer employees. Most motor vehicle manufacturers would not qualify as a small business. There are a number of vehicle manufacturers that are small businesses.

This final rule will directly affect 20 single stage motor vehicle manufacturers.⁶⁵ None of these are qualified as a small business. However, NHTSA analyzed current small manufacturers, multistage manufacturers, and alterers that currently have part 563 compliant EDRs and found that 13 motor vehicle manufacturers affected by this rulemaking would qualify as small businesses. While these 13 motor vehicle manufacturers qualify as small businesses, none of them would be significantly affected by this rulemaking for several reasons. First, vehicles that contain EDRs are already required to comply with part 563. These small businesses generally adhere to original equipment manufacturers' instructions in manufacturing modified and altered vehicles. Based on our knowledge, original equipment manufacturers do not permit a final stage manufacturer or alterer to modify or alter sophisticated devices such as air bags or EDRs. Therefore, multistage manufacturers and alterers will be able to rely on the certification and information provided by the original equipment manufacturer for EDRs.

This rule may require hardware changes and will require adjusting the recording time and sampling rate for up to seven pre-crash data elements. As previously stated, the agency believes some current or planned systems can accommodate these changes. Additionally, NHTSA believes the market for the vehicle products of the 13 small vehicle manufacturers is highly inelastic, meaning that purchasers of their products are enticed by the desire to have a highly customized vehicle. Generally, under this circumstance, if any prices increase, the price of competitor's models will also need to be raised by a similar amount, since all light vehicles must comply with the standards. Therefore, any reasonable price increase will not have any effect on sales of these vehicles. NHTSA also

designed the final rule to provide two years of lead time before the implementation of this final rule. Limited line⁶⁶ and small-volume manufacturers⁶⁷ will only need to produce compliant EDRs on or after September 1, 2029. Manufacturers producing altered vehicles or vehicles in two or more stages will have one additional year, until September 1, 2030, for compliance. This additional time provides any affected entities flexibility and ample time to make the necessary assessments to acquire a basis for certifying their vehicles' compliance.

Executive Order 13132 (Federalism)

NHTSA has examined this rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that this rule will not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance. The express preemption provision described above is subject to a savings clause under which compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from

liability at common law. 49 U.S.C. 30103(e). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved.

NHTSA rules can also preempt State law if complying with the FMVSS would render the motor vehicle manufacturers liable under State tort law. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. If and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. *See Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

Pursuant to Executive Orders 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation. To this end, the agency has examined the nature (*i.e.*, the language and structure of the regulatory text) and objectives of this rule and finds that this rule, like many NHTSA rules, would prescribe only a minimum safety standard. As such, NHTSA does not intend this rule to preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers. Establishment of a higher standard by means of State tort law will not conflict with the minimum standard adopted here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

This final rule proposes technical amendments to an already existing regulation.⁶⁸ When 49 CFR part 563 was promulgated in 2006, NHTSA explained its view that any state laws or regulations that prohibit the types of EDRs addressed by part 563 would create a conflict and therefore be preempted. As a result, regarding this final rule, NHTSA does not believe there are current state laws or regulations for EDRs that conflict with part 563 or with the overall minor

⁶⁶ Limited line manufacturer means a manufacturer that sells three or fewer carlines, as that term is defined in 49 CFR 583.4, in the United States during a production year.

⁶⁷ Small-volume manufacturer as defined in § 571.127, "Automatic emergency braking systems for light vehicles," is an original vehicle manufacturer that produces or assembles fewer than 5,000 vehicles annually for sale in the United States.

⁶⁸ The 2006 final rule promulgating 49 CFR part 563 discussed preemption at length. *See* 71 FR 50907, 51029 (Aug. 28, 2006).

⁶⁵ BMW, Fiat/Chrysler (Ferrari and Maserati), Ford, Geely (Volvo), General Motors, Honda (Acura), Hyundai, Kia, Lotus, Mazda, Mercedes, Mitsubishi, Nissan (Infiniti), Porsche, Subaru, Suzuki, Tata (Jaguar and Land Rover), Tesla, Toyota (Lexus), and Volkswagen/Audi.

change to capture time proposed by this document.

Further, the amendments required by this final rule are directed by the FAST Act, which directs NHTSA to conduct a study to determine the amount of time EDRs should capture and record data to provide sufficient information for crash investigators, and conduct a rulemaking based on this study to establish the appropriate recording period in part 563. NHTSA conducted an EDR Duration Study and submitted a Report to Congress summarizing the results of this study in September 2018. This final rule fulfills the rulemaking mandated by the FAST Act. To the extent there are state laws with different capture times than that required by this final rule, Congress made the determination in the FAST Act that the capture time required by part 563 should be extended. NHTSA is issuing this final rule in accordance with that statutory mandate.

Executive Order 12988 (Civil Justice Reform)

When promulgating a regulation, Executive Order 12988 specifically requires that the agency must make every reasonable effort to ensure that the regulation, as appropriate: (1) Specifies in clear language the preemptive effect; (2) specifies in clear language the effect on existing Federal law or regulation, including all provisions repealed, circumscribed, displaced, impaired, or modified; (3) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction; (4) specifies in clear language the retroactive effect; (5) specifies whether administrative proceedings are to be required before parties may file suit in court; (6) explicitly or implicitly defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship of regulations.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of this rule is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et. seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. NHTSA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule does not meet the criteria in 5 U.S.C. 804(2) to be considered a major rule. The rule will be effective sixty days after the date of publication in the **Federal Register**.

Executive Order 13609 (Promoting International Regulatory Cooperation)

Executive Order 13609, “Promoting International Regulatory Cooperation,” promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

The agency is currently participating in the negotiation and development of technical standards for Event Data Recorders in the United Nations Economic Commission for Europe (UNECE) World Forum for Harmonization of Vehicle Regulations (WP.29). As a signatory member, NHTSA is obligated to initiate rulemaking to incorporate safety requirements and options specified in Global Technical Regulations (GTRs) if the U.S. votes in the affirmative to establish the GTR. No GTR for EDRs has been developed at this time. NHTSA has analyzed this rule under the policies and agency responsibilities of Executive Order 13609 and has determined this rulemaking would have no effect on international regulatory cooperation.

National Environmental Policy Act

NHTSA has analyzed this rule for the purposes of the National Environmental Policy Act. In accordance with 49 CFR 1.81, 42 U.S.C. 4336, and DOT NEPA Order 5610.1C, NHTSA has determined that this rule is categorically excluded pursuant to 23 CFR 771.118(c)(4) (planning and administrative activities, such as promulgation of rules, that do not involve or lead directly to construction). This rulemaking, which amends regulations regarding Event Data Records (EDRs) to extend the EDR recording period of timed data metrics from 5 seconds of pre-crash data at a frequency of 2Hz to 20 seconds of pre-crash data at a frequency of 10 Hz, is not anticipated to result in any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid Office of Management and Budget (OMB) control number. This final rule makes amendments that relate to an information collection that is subject to the PRA, but the amendments are not expected to increase the burden associated with the information collection. In compliance with the requirements of the PRA, NHTSA published a notice in the **Federal Register** on August 26, 2021 (86 FR 47719), seeking public comment and providing a 60-day comment period. NHTSA followed up with a second notice, published on March 17, 2022 (87 FR 15302), announcing that the agency was submitting the information collection request to OMB for approval. OMB approved the collection without change on September 29, 2022 (OMB Control No. 2127–0758).

National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), “all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.” Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as SAE International (SAE). The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. The NTTAA requires agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical.

There are several consensus standards related to EDRs, most notably those standards published by SAE (J1698—Event Data Recorder) and the Institute of Electrical and Electronics Engineers (IEEE) (Standard 1616, IEEE Standard for Motor Vehicle Event Data Recorder). NHTSA carefully considered the consensus standards applicable to EDR data elements in establishing part 563. Consensus standards for recording time/intervals, data sample rates, data

retrieval, data reliability, data range, accuracy and precision, and EDR crash survivability were evaluated by NHTSA and adopted when appropriate. The FAST Act directed NHTSA to conduct a study to determine the amount of time EDRs should capture and record pre-crash data to provide sufficient information for crash investigators, and to conduct a rulemaking based on this study to establish the appropriate recording period in NHTSA's EDR regulation. NHTSA conducted the EDR Duration Study and submitted a Report to Congress summarizing the results of this study in September 2018. This rulemaking exceeds the pre-crash data recording durations of the SAE and IEEE standards (*i.e.*, SAE and IEEE recommend recording 8 seconds of pre-crash data) based upon the new information obtained from the EDR Duration Study. The results of the study on EDR recording duration suggest that the recommended recording duration by these standards would not capture the initiation of crash avoidance maneuvers. NHTSA declines to adopt the voluntary consensus standards for the pre-crash recording because such a decision would be inconsistent with the best available information to the agency and conflict with the outcome of a study required by the FAST Act.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually (adjusted for inflation with base year of 1995). Adjusting this amount by the implicit gross domestic product price deflator for the year 2020 results in \$158 million (113.625/71.868 = 1.581). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted.

This final rule would not result in expenditures by State, local, or tribal governments, in the aggregate, or by the private sector in excess of \$158 million (in 2020 dollars) annually. As a result, the requirements of section 202 of the Act do not apply.

Executive Order 13045 (Protection of Children From Environmental Health and Safety Risks)

Executive Order 13045, “Protection of Children from Environmental Health and Safety Risks,” (62 FR 19885, April 23, 1997) applies to any proposed or final rule that: (1) is determined to be “economically significant,” as defined in E.O. 12866, and (2) concerns an environmental health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If a rule meets both criteria, the agency must evaluate the environmental health or safety effects of the rule on children and explain why the rule is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. This rulemaking is not subject to the Executive order because it is not economically significant as defined in E.O. 12866.

Executive Order 13211

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rulemaking that: (1) is determined to be significant as defined under E.O. 12866, and is likely to have a significantly adverse effect on the supply of, distribution of, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rulemaking is not subject to E.O. 13211.

Privacy

The E-Government Act of 2002, Public Law 107–347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002), requires Federal agencies to conduct a Privacy Impact Assessment when they develop or procure new information technology involving the collection, maintenance, or dissemination of information in identifiable form or they make substantial changes to existing information technology that manages information in identifiable form. A PIA is an analysis of how information in identifiable form is collected, stored, protected, shared, and managed. The purpose of a PIA is to demonstrate that system owners and developers have incorporated privacy protections throughout the entire life cycle of a system.

The Agency submitted a Privacy Threshold Analysis analyzing this rulemaking to the DOT, Office of the Secretary's Privacy Office (DOT Privacy Office). The DOT Privacy Office has determined that this rulemaking does not create privacy risk because no new or substantially changed technology would collect, maintain, or disseminate information in an identifiable form because of this rule. NHTSA also notes that the Driver Privacy Act of 2015 assigns ownership of EDR data to the vehicle owner, provides limitations on data retrieval from EDR data, and generally prohibits access to EDR data with specific exceptions to this general rule.

Plain Language Requirement

E.O. 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

NHTSA has considered these questions and attempted to use plain language in promulgating this final rule. If readers have suggestions on how we can improve our use of plain language, please write us.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

List of Subjects in 49 CFR Part 563

Motor vehicle safety, Motor vehicles, Reporting and record keeping requirements.

In consideration of the foregoing, NHTSA amends 49 CFR part 563 as follows:

PART 563—EVENT DATA RECORDERS

- 1. Revise the authority citation for part 563 to read as follows:

Authority: 49 U.S.C. 322, 30101, 30111, 30115, 30117, 30166, 30168; delegation of authority at 49 CFR 1.95.

- 2. Add definitions for “*Limited-line manufacturer*” and “*Small-volume manufacturer*” in alphabetical order to § 563.5(b) to read as follows:

§ 563.5 Definitions.

(b) * * * * *

Limited-line manufacturer means a manufacturer that sells three or fewer carlines, as that term is defined in 49 CFR 583.4, in the United States during a production year.

Small-volume manufacturer means an original vehicle manufacturer that produces or assembles fewer than 5,000

vehicles annually for sale in the United States.

* * * * *

- 3. Revise § 563.7 to read as follows:

§ 563.7 Data elements.

(a) *Data elements required for all vehicles.* Each vehicle equipped with an EDR must record all of the data elements listed in table I to § 563.7(a), during the interval/time and at the sample rate specified in that table.

TABLE I TO § 563.7(a)—DATA ELEMENTS REQUIRED FOR ALL VEHICLES EQUIPPED WITH AN EDR

Data element	Recording interval/time ¹ (relative to time zero)	Data sample rate (samples per second)
Delta-V, longitudinal	0 to 250 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	100
Maximum delta-V, longitudinal	0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Time, maximum delta-V	0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Speed, vehicle indicated	–20.0 to 0 sec ⁴	4 10
Engine throttle, % full (or accelerator pedal, % full)	–20.0 to 0 sec ⁴	4 10
Service brake, on/off	–20.0 to 0 sec ⁴	4 10
Ignition cycle, crash	–1.0 sec	N/A
Ignition cycle, download	At time of download ³	N/A
Safety belt status, driver	–1.0 sec	N/A
Frontal air bag warning lamp, on/off ²	–1.0 sec	N/A
Frontal air bag deployment, time to deploy, in the case of a single stage air bag, or time to first stage deployment, in the case of a multi-stage air bag, driver.	Event	N/A
Frontal air bag deployment, time to deploy, in the case of a single stage air bag, or time to first stage deployment, in the case of a multi-stage air bag, right front passenger.	Event	N/A
Multi-event, number of event	Event	N/A
Time from event 1 to 2	As needed	N/A
Complete file recorded (yes, no)	Following other data	N/A

¹ Pre-crash data and crash data are asynchronous. The sample time accuracy requirement for pre-crash time is –0.1 to 1.0 sec (e.g., T = –1 would need to occur between –1.1 and 0 seconds.)

² The frontal air bag warning lamp is the readiness indicator specified in S4.5.2 of FMVSS No. 208, and may also illuminate to indicate a malfunction in another part of the deployable restraint system.

³ The ignition cycle at the time of download is not required to be recorded at the time of the crash, but shall be reported during the download process.

⁴ For vehicles manufactured before September 1, 2027, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second. For vehicles manufactured before September 1, 2029 by small-volume manufacturers and limited-line manufacturers, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second. For vehicles manufactured before September 1, 2030 by manufacturers producing altered vehicles or vehicles in two or more stages, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second.

(b) *Data elements required for vehicles under specified conditions.* Each vehicle equipped with an EDR

must record each of the data elements listed in column 1 of table II to § 563.7(b) for which the vehicle meets

the condition specified in column 2 of that table, during the interval/time and at the sample rate specified in that table.

TABLE II TO § 563.7(b)—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS

Data element name	Condition for requirement	Recording interval/time ¹ (relative to time zero)	Data sample rate (per second)
Lateral acceleration	If recorded ²	N/A	N/A
Longitudinal acceleration	If recorded	N/A	N/A
Normal acceleration	If recorded	N/A	N/A
Delta-V, lateral	If recorded	0–250 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	100

TABLE II TO § 563.7(b)—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS—Continued

Data element name	Condition for requirement	Recording interval/time ¹ (relative to time zero)	Data sample rate (per second)
Maximum delta-V, lateral	If recorded	0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Time maximum delta-V, lateral	If recorded	0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Time for maximum delta-V, result- ant.	If recorded	0–300 ms or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Engine rpm	If recorded	–20.0 to 0 sec ⁵	⁵ 10
Vehicle roll angle	If recorded	–1.0 up to 5.0 sec ³	10
ABS activity (engaged, non-en- gaged).	If recorded	–20.0 to 0 sec ⁵	⁵ 10
Stability control (on, off, or en- gaged).	If recorded	–20.0 to 0 sec ⁵	⁵ 10
Steering input	If recorded	–20.0 to 0 sec ⁵	⁵ 10
Safety belt status, right front pas- senger (buckled, not buckled).	If recorded	–1.0 sec	N/A
Frontal air bag suppression switch status, right front passenger (on, off, or auto).	If recorded	–1.0 sec	N/A
Frontal air bag deployment, time to nth stage, driver ⁴ .	If equipped with a driver's frontal air bag with a multi-stage infla- tor.	Event	N/A
Frontal air bag deployment, time to nth stage, right front passenger ⁴ .	If equipped with a right front pas- senger's frontal air bag with a multi-stage inflator.	Event	N/A
Frontal air bag deployment, nth stage disposal, driver, Y/N (whether the nth stage deploy- ment was for occupant restraint or propellant disposal purposes).	If recorded	Event	N/A
Frontal air bag deployment, nth stage disposal, right front pas- senger, Y/N (whether the nth stage deployment was for occu- pant restraint or propellant dis- posal purposes).	If recorded	Event	N/A
Side air bag deployment, time to deploy, driver.	If recorded	Event	N/A
Side air bag deployment, time to deploy, right front passenger.	If recorded	Event	N/A
Side curtain/tube air bag deploy- ment, time to deploy, driver side.	If recorded	Event	N/A
Side curtain/tube air bag deploy- ment, time to deploy, right side.	If recorded	Event	N/A
Pretensioner deployment, time to fire, driver.	If recorded	Event	N/A
Pretensioner deployment, time to fire, right front passenger.	If recorded	Event	N/A
Seat track position switch, fore- most, status, driver.	If recorded	–1.0 sec	N/A
Seat track position switch, fore- most, status, right front pas- senger.	If recorded	–1.0 sec	N/A
Occupant size classification, driver	If recorded	–1.0 sec	N/A
Occupant size classification, right front passenger.	If recorded	–1.0 sec	N/A
Occupant position classification, driver.	If recorded	–1.0 sec	N/A
Occupant position classification, right front passenger.	If recorded	–1.0 sec	N/A

¹ Pre-crash data and crash data are asynchronous. The sample time accuracy requirement for pre-crash time is –0.1 to 1.0 sec (e.g., T = –1 would need to occur between –1.1 and 0 seconds.)

² “If recorded” means if the data is recorded in non-volatile memory for the purpose of subsequent downloading.

³ “Vehicle roll angle” may be recorded in any time duration; –1.0 sec to 5.0 sec is suggested.

⁴ List this element n – 1 times, once for each stage of a multi-stage air bag system.

⁵For vehicles manufactured before September 1, 2027, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second. For vehicles manufactured before September 1, 2029 by small-volume manufacturers and limited-line manufacturers, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second. For vehicles manufactured before September 1, 2030 by manufacturers producing altered vehicles or vehicles in two or more stages, the required recording interval is –5.0 to 0 sec relative to time zero and the required data sample rate is 2 samples per second.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.

Adam Raviv,
Chief Counsel.

[Final Rule, RIN 2127–AM12, 49 CFR part 563 Event Data Recorders]

[FR Doc. 2024–29862 Filed 12–17–24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 241212–0325]

RIN 0648–BN01

Fisheries of the Northeastern United States; Framework Adjustment 15 to the Monkfish Fishery Management Plan; Framework Adjustment 6 to the Spiny Dogfish Fishery Management Plan

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

ACTION: Final rule.

SUMMARY: NMFS is implementing regulations for Framework Adjustment 15 to the Monkfish Fishery Management Plan/Framework Adjustment 6 to the Spiny Dogfish Fishery Management Plan, which the New England and Mid-Atlantic Fishery Management Councils jointly recommended and NMFS approved. This action establishes area-based gear requirements for vessels fishing with gillnets in the monkfish fishery, starting on January 1, 2026, and for vessels fishing with gillnets in the spiny dogfish fishery starting on May 1, 2025. This action is necessary to minimize bycatch of Atlantic sturgeon in the monkfish and spiny dogfish fisheries to the extent practicable and fulfill requirements of the Biological Opinion on Ten Fishery Management Plans in the Greater Atlantic Region and the New England Fishery Management Council's Omnibus Habitat Amendment 2.

DATES: Effective May 1, 2025.

ADDRESSES: Copies of the Framework 15/Framework 6 document, including the Regulatory Flexibility Act Analysis and other supporting documents for the

measures, are available from Dr. Cate O'Keefe, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950 and Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901. The Framework 15/Framework 6 document is also accessible via the internet at: <https://www.nefmc.org/management-plans/monkfish> or <https://www.mafmc.org/dogfish>.

FOR FURTHER INFORMATION CONTACT:

Spencer Talmage, Fishery Policy Analyst, (978) 281–9232.

SUPPLEMENTARY INFORMATION:

Background

The New England Fishery Management Council (New England Council) and the Mid-Atlantic Fishery Management Council (Mid-Atlantic Council) (collectively, the Councils) jointly manage both the Monkfish and Spiny Dogfish Fishery Management Plans (FMP). The New England Council is the administrative lead for the Monkfish FMP, while the Mid-Atlantic Council is the lead for the Dogfish FMP.

NMFS issued a Biological Opinion on May 27, 2021, that considered the effects of the authorization of two interstate fishery management plans (ISFMP) and eight Federal FMPs, including the Monkfish and Spiny Dogfish FMPs, on Endangered Species Act (ESA)-listed species and designated critical habitat through a formal Section 7 consultation. The Biological Opinion determined that NMFS's authorization of the eight FMPs and two ISFMPs may adversely affect, but is not likely to jeopardize, Atlantic sturgeon. The Biological Opinion included an Incidental Take Statement and Reasonable and Prudent Measures (RPM) with accompanying Terms and Conditions to minimize the impacts of incidental take of Atlantic sturgeon. The RPMs required that NMFS convene a working group to review all of the available information on Atlantic sturgeon bycatch in the federally permitted large-mesh gillnet fisheries and, by May 27, 2022, develop an Action Plan to reduce Atlantic sturgeon bycatch in these fisheries by 2024.

NMFS initially issued the Action Plan on May 26, 2022, and revised it on September 26, 2022, to incorporate feedback from the Councils and public. The Councils subsequently developed

this joint framework action—Framework 15 to the Monkfish FMP and Framework 6 to the Dogfish FMP—to address the recommendations of the Action Plan and fulfill the requirements of the Biological Opinion.

Under the Magnuson-Stevens Fishery Conservation and Management Act, we approve, disapprove, or partially approve measures that the Councils propose, based on consistency with the Act and other applicable law. We review proposed regulations for consistency with the FMP, plan amendment, the Magnuson-Stevens Act and other applicable law, and publish the proposed regulations, solicit public comment, and promulgate the final regulations. We have approved all of the measures in this joint framework action recommended by the Councils, as described below. The measures implemented in this final rule:

- Require vessels fishing on a monkfish day-at-sea (DAS) within the New Jersey Atlantic Sturgeon Bycatch Reduction Area to use low-profile gillnet gear, beginning on January 1, 2026;
- Prohibit dogfish vessels fishing in the New Jersey Atlantic Sturgeon Bycatch Reduction Area from leaving gillnet gear in the water overnight during the months of May and November, effective May 1, 2025; and
- Prohibit dogfish vessels fishing in the Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area and Virginia Atlantic Sturgeon Bycatch Reduction Area from leaving gillnet gear in the water overnight from November through March, effective May 1, 2025.

Approved Measures

1. Low-Profile Gillnet Gear

The regulations implemented by this final rule require vessels fishing on a Monkfish DAS within the New Jersey Atlantic Sturgeon Bycatch Reduction Area that are using large mesh (*i.e.*, greater than or equal to 10 inches (25.4 centimeters (cm))) to use low-profile gillnet gear, beginning on January 1, 2026. Low-profile gillnet gear is defined in this final rule as having:

- Mesh size ranging from 12 to 13 inches (30.48 to 33.02 cm);
- Net height ranging from 6 to 8 meshes tall;
- Net length of 300 feet (91.44 meters (m));
- Tie-down length of less than or equal to 30 inches (76.2 cm);

- Tie-down spacing of 12 feet (3.66 m);
- Primary hanging ratio of 0.50;
- Twine size of 0.81 millimeters (mm); and
- Tie downs at every float to keep the float line down.

These characteristics are intended to reduce interaction with Atlantic sturgeon by reducing the likelihood that Atlantic sturgeon high in the water column will become entangled, by allowing smaller sturgeon to swim through the larger mesh, and by allowing the larger sturgeon to break the mesh.

The requirement to use low-profile gillnet gear within the New Jersey Atlantic Sturgeon Bycatch Reduction Area will begin on January 1, 2026, as recommended by the Councils, to allow for the twine size to be considered under Marine Mammal Protection Act (MMPA) provisions and to provide time for affected members of the fishing industry to transition to new gear. The definition of the low-profile gillnet gear requires a twine size of 0.81 mm; however, this conflicts with current Harbor Porpoise Take Reduction Plan (HPTRP) Regulations, which require that large-mesh gillnet gear in the waters off the New Jersey Management Area have a twine size at least 0.9 mm in diameter from January 1 through April 30, except during April 1 through April 20 (50 CFR 229.34(b)(1)(ii)). The Harbor Porpoise Take Reduction Team (HPTRT) was asked by the Councils to consider whether this requirement could be modified to reduce the twine size required in the HPTRP regulations. On June 28, 2024, the HPTRT received a presentation regarding the potential impact of 0.81 mm mesh on harbor porpoise; the analysis presented showed that allowing the 0.81-mm twine size would not be anticipated to cause a statistically significant change in harbor porpoise bycatch relative to current conditions. The HPTRT did not voice any concerns over the proposed change in gear configuration nor the analysis of possible effects.

The low-profile gillnet design is a new gear configuration for a large majority of the fleet. The transition to the new gear will require construction of new nets, which may take time on the part of gear manufacturers, who are limited in number. Thus, delaying this requirement until January 1, 2026, provides industry with the time necessary to acquire and familiarize itself with the new selective gear.

2. Overnight Soak Prohibitions

Within the New Jersey Atlantic Sturgeon Bycatch Reduction Area, this

action requires federally permitted spiny dogfish vessels fishing with roundfish gillnets (*i.e.*, not tie-down gillnets) with a mesh size of 5 to 10 inches (12.7 to 25.4 cm) to remove nets from the water by 8 p.m. Eastern Time (ET) each day until 5 a.m. ET the following day. This requirement will be in place from May 1 through May 31 and November 1 through November 30 of each year, beginning May 1, 2025. This seasonal requirement is based on observer data showing that, of sturgeon takes observed from 2017–2019 and 2021–2022, takes by dogfish vessels within the New Jersey Atlantic Sturgeon Bycatch Reduction Area during May and November accounted for a combined 23 percent of all observed takes by dogfish vessels during the time period.

In the Delaware and Maryland Sturgeon Bycatch Area and in the Virginia Atlantic Sturgeon Bycatch Reduction Area, this action requires federally permitted spiny dogfish vessels fishing with roundfish gillnets (*i.e.*, not tie-down gillnets) with a mesh size of 5.25 to 10 inches (13.34 to 25.4 cm) to remove nets from the water by 8 p.m. ET each day until 5 a.m. ET the following day. This requirement is in place from November 1 through March 31 each year, beginning May 1, 2025. This seasonal requirement is based on observer data showing that, of sturgeon takes observed from 2017–2019 and 2021–2022, takes by dogfish vessels within the Delaware and Maryland Bycatch Reduction Area and in the Virginia Sturgeon Bycatch Reduction Area from November through March accounted for 59 percent of all observed takes by dogfish vessel during the time period.

Implementing an overnight soak restriction for these vessels in the Atlantic Sturgeon Bycatch Reduction Areas during these seasons is expected to reduce the amount of Atlantic sturgeon bycatch, but the amount of that reduction is not certain. Within these areas, the overnight soak prohibitions effectively restrict the length of time gillnets could be soaked by dogfish vessels to a maximum of 15 hours. Bycatch mortality increases as soak time increases, and this restriction will cap soak time at levels where mortality is lower. As a result, the overnight soak prohibitions and the resulting reduction in overall soak time in the fishery are expected to greatly reduce the mortality of Atlantic sturgeon that are caught in nets within the Atlantic Sturgeon Bycatch Reduction Areas.

Comments and Responses

We received a total of 32 comments during the public comment period for the proposed rule. Of the 32 individual comments received, 17 were unique comments, and 15 were a form letter with identical, or close to identical, contents, but submitted by different individuals. Of the 32 individual comments received, 6 opposed the proposed measures, 1 fully supported the proposed measures, 1 supported the action but suggested improvements, and the remaining 25 suggested changes to the action, but did not clearly offer either support or opposition for the action.

Comments in Support

Comment 1: One member of the public generally supported the proposed measures, noting their agreement that Atlantic sturgeon bycatch should be limited. The commenter also provided feedback on the proposed rule. First, the commenter suggested that more information should be provided regarding the population levels for Atlantic sturgeon, monkfish, and spiny dogfish. The commenter also questioned why shortnose sturgeon was not included in this action. Finally, the commenter suggested additional modifications and requirements for large mesh gillnet gear that they suggested would reduce bycatch of Atlantic sturgeon. These were breakaway panels, net slack requirements, and depth restrictions.

Response: NMFS agrees that reduction in Atlantic sturgeon bycatch is important for marine conservation and stewardship. The Environmental Assessment (EA) for this action (see **ADDRESSES**) contains detailed information regarding target species (*e.g.*, monkfish and dogfish), Atlantic sturgeon, and other species affected and potentially affected by the action (including shortnose sturgeon). Regarding additional gear modifications suggested in the comment, the low-profile gillnet design was derived from completed scientific work specifically focusing on reducing Atlantic sturgeon bycatch in the gillnet fisheries. Additional research would need to be conducted to determine the impact of the modifications and requirements on sturgeon bycatch, other species, and directed fisheries prior to consideration under the Council process for implementation in the gillnet fisheries.

Comment 2: The Center for Biological Diversity commented that it supports efforts to reduce and eliminate bycatch of marine species, including Atlantic sturgeon. The Center for Biological

Diversity did not have specific comments regarding the measures being proposed, but stated that we should more explicitly consider the impacts of derelict fishing gear on the environment within the EA for this action and within other analyses conducted by the agency.

Response: We note the Center for Biological Diversity's support of the action to reduce bycatch of Atlantic sturgeon. NMFS does not expect the measures in this action to have a measurable impact on the incidence of derelict fishing gear either positively or negatively, though some reduction in derelict fishing gear may result if fishing effort is reduced. As such, we have determined that there is no need to update the EA for this action in response to this comment.

Comments in Opposition Comment 3: One member of the public opposed regulations for the fishing industry in general.

Response: While NMFS acknowledges the commenter's concern, regulations are the means by which measures contained in an FMP can be implemented and effectuated. Such regulations can be developed by the agency on its own, pursuant to the authority of MSA section 305(d), or, as here, through Council-recommended regulations pursuant to section 303(c). NMFS is required by section 304(b) of the MSA to evaluate proposed regulations pertaining to the fishing industry that are submitted by the Councils pursuant to section 303(c) that are deemed to be necessary and appropriate to implement an FMP. NMFS reviews such submitted regulations to determine whether they are consistent with the FMP, the MSA, and other applicable law. As stated in the Classifications section of this final rule, the NMFS Assistant Administrator determined that this final rule is consistent with the Monkfish and Spiny Dogfish FMPs, other provisions of the Magnuson-Stevens Act, and other applicable law. As such, NMFS is promulgating these regulations to implement Frameworks 15 and 6.

Comment 4: Two members of the public commented that no action (Alternative 1 in the EA) should be the preferred alternative and the action included in this rule (Alternative 5) should not be implemented. One of the commenters stated that the impacts of no action could be positive for Atlantic sturgeon compared to the other alternatives.

Response: NMFS disagrees that no action should be taken and that Alternative 5 is not supported by the impact analysis. Alternative 5 is expected to reduce Atlantic sturgeon

bycatch and mortality in the gillnet fishery compared to taking no action. The measures implemented in this action, Alternative 5, balance as much bycatch reduction for Atlantic sturgeon as possible with as minimal potential impacts on the monkfish and spiny dogfish fisheries as possible. Other alternatives that were not included in the proposed rule also would be expected to reduce Atlantic sturgeon bycatch. Alternatives 2 through 4 would reduce the bycatch of Atlantic sturgeon more than any other alternatives. However, they would also have more negative impacts on the monkfish and dogfish fisheries than other alternatives because they would prevent operation of the monkfish and spiny dogfish fisheries entirely during certain times of the year in the Atlantic Sturgeon Bycatch Reduction Areas. Alternative 5 allows for the continued operation of the monkfish and spiny dogfish fisheries within the Atlantic sturgeon bycatch reduction areas, thereby reducing bycatch and mortalities while also minimizing socioeconomic impacts on the monkfish and spiny dogfish fisheries.

Low-Profile Gillnet Requirement

Comment 5: One member of the public stated that the proposed regulations should not explicitly name the low-profile gillnet, arguing that giving the gear a specific name will result in confusion.

Response: NMFS disagrees that a specific name assigned to the gear type would result in confusion. There are already several examples of selective gear types defined in the regulations, including Rühle Trawl § 648.80(a)(9)(ii), Rope Separator Trawl § 648.84(e), and Large-Mesh Belly Panel Trawl § 648.84(f), and there is no evidence that significant confusion has resulted from that practice. Defining the low-profile gillnet gear allows for a clear definition of the gear configuration in the regulations and makes it easier to distinguish it from other gillnet gear. This also simplifies future modifications to the specific gear and its required configurations, should they become necessary.

Comment 6: Two members of the fishing industry, including one HPTRT member, commented about the potential interactions between, and possible inadvertent economic impacts of, the HPTRP regulations that would require a different minimum twine size than the low-profile gillnet gear minimum twine size. Regarding the HPTRP regulations, the commenters expressed concern that the 0.81-mm twine size was included in the definition for low profile gillnet gear

while HPTRP regulations are currently in place include a 0.9-mm minimum twine size. The commenters assert that if nothing is done to resolve the conflict in these sets of regulations, then an inadvertent fishery closure could occur, incurring negative economic impacts typically associated with fishery closure. The commenters recommended a delay to January 1, 2027, to resolve this issue.

Response: NMFS expects that the delay in effectiveness of the low-profile gillnet requirement to January 1, 2026, will provide sufficient time to resolve the concerns raised by this commenter, and disagrees that a delay to January 1, 2027, would be necessary at this time.

On June 28, 2024, the HPTRT met and received information regarding all of the characteristics of the low-profile gillnet, including the 0.81-mm twine size, and the potential impacts of said gear on take of harbor porpoise. The team did not voice any concerns over the proposed change in gear configuration or the analysis presented on possible effects. We expect to propose future alteration of the HPTRP regulations to accommodate the twine size included in the low-profile gillnet requirement in this action.

Further, the 0.81-mm twine size was derived from the scientific research used to inform the development of this action; the inclusion of 0.81-mm twine size in the low-profile gillnet design is essential to ensuring that the gear is most effective at reducing bycatch of Atlantic sturgeon. Removing the twine size specification from the gear definition would be expected to reduce the efficacy of these regulations in reducing Atlantic sturgeon bycatch, which is the primary goal of this action.

Other General Comments

Comment 7: One member of the public questioned whether an interaction with an Atlantic sturgeon that is released alive should qualify as a take, instead stating that a take should only be when an Atlantic sturgeon is killed and landed.

Response: NMFS disagrees with the assertion by this commenter that a take should only be when an Atlantic sturgeon is killed and landed. Atlantic sturgeon is protected under the ESA, and the ESA is explicit in its definition of take. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). Non-lethal, incidental interaction with Atlantic sturgeon caused by fisheries activity falls into the definition of take as defined under the ESA.

Comment 11: One member of the public commented that the action should consider the impact of offshore wind development on monkfish and dogfish.

Response: The EA for this action includes a summary of the expected impacts of offshore wind energy development on monkfish and dogfish that considered all stages of wind energy development, including initial site assessment, construction activities, and the completed wind fields. Each of these could potentially result in a variety of direct and indirect impacts on the affected species and their marine habitat. The analysis concludes that the impacts could range from no impact to moderate negative. However, the impact of offshore wind energy development on monkfish and dogfish do not change the need for this action to reduce bycatch of Atlantic sturgeon in the monkfish and dogfish gillnet fisheries. The analysis can be found in the Cumulative Effects Analysis (CEA), Section 6.7.2.2.1, of the EA supporting this action (see ADDRESSES).

Comment 12: One member of the public commented on offshore wind development in relation to the status of North Atlantic right whales.

Response: The relationship between offshore wind development and the status of North Atlantic right whales is outside the scope of this rulemaking.

Economic Impacts

We received several comments from the public regarding the potential economic impacts of this action on the monkfish and spiny dogfish fisheries. These comments often made overlapping or interrelated points. To reduce repetition and ensure ease of readability, these comments and responses have been summarized and addressed by issue, rather than by individual comment.

Comment 13: We received 17 comment letters, including those from the Sustainable Fisheries Association (SFA) and 14 members of the fishing industry who submitted comments mirroring the language used by the SFA, that urged a delayed effectiveness for the overnight soak prohibitions that were proposed. The most commonly requested date for a delayed effectiveness of this action was May 1, 2025, the start of fishing year 2025. Each comment cited economic concerns and costs relating to adjustments to fishing behavior, including changes to mesh sizes, which vessels would need to make in order to come into compliance with the overnight soak prohibition regulations. Commenters asserted that, should the overnight soak prohibition

go into effect before May 1, 2025, there would either not be enough time for vessel owners to comply with the regulations, or the cost of doing so would be prohibitively high in a short span of time. As a result, the commenters stated that they would likely not fish during the seasonal restriction if no delay was provided. Commenters noted that the dogfish fishery is dependent on a small number of processors and a relatively small market that could be negatively impacted by the overnight soak prohibition if implemented shortly after this rule publishes and before May 1, 2025. They expressed concern that doing so could result in the loss of markets and processors for the foreseeable future.

Response: NMFS finds that the request from the public to delay effectiveness of the overnight soak prohibitions is reasonable and justified, and that change is reflected in the May 1, 2025, effectiveness date of this final rule. In making this determination, NMFS considered the economic implications raised by members of the public in comparison to the potential impacts on Atlantic sturgeon that might occur as a result of the delay. NMFS agrees with the argument that a standard 30-day delayed effectiveness under the Administrative Procedure Act (APA) may not be sufficient time for industry to adjust to the regulations being put into place by this final action.

A delay in effectiveness to May 1, 2025, would only eliminate the seasonal overnight soak prohibition in the Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Areas from a date 30 days after the publication of this final rule through March 31, 2025. Though the measures being approved in this final action do address Atlantic sturgeon bycatch in the monkfish and dogfish fisheries, the negative impacts to Atlantic sturgeon that might occur as a result of losing 3 to 4 months of the overnight soak prohibition are unlikely to be significant. These impacts do not justify implementation after only a 30-day delayed effectiveness given the weight of the economic concerns that have been raised by the public.

NMFS also notes that delayed effectiveness for gear related measures is not a novel concept; the low-profile gillnet gear requirement in the New Jersey Atlantic Sturgeon Bycatch Reduction Area approved in this very action is delayed until January 1, 2026. The rationale for that delay was also in part to provide time necessary for industry to adapt to the regulations being implemented. It would be inconsistent to accept that rationale

when implementing measures that affect one fishery, while rejecting it for measures implemented for another, closely related fishery.

Finally, the Atlantic States Marine Fisheries Commission is currently developing complementary action to address Atlantic sturgeon bycatch by state-only permitted vessels within the footprint of the Atlantic Sturgeon Bycatch Reduction Areas being put into place by this action. A delay in effectiveness to May 1, 2025, reduces or avoids the potential for mismatched implementation of these regulations and simplifies enforcement.

Comment 14: We received seven comments that requested that the overnight soak prohibition in the Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area and Virginia Atlantic Sturgeon Bycatch Reduction Area be effective for mesh sizes greater than 5.25 inches to 10 inches (13.34 to 25.4 cm), rather than for mesh sizes 5.25 inches to 10 inches (13.34 to 25.4 cm). The commenters want to be able to use 5.25-inch (13.34-cm) mesh and noted that there would be a high cost for vessels to switch gear to less than 5.25-inch (13.34-cm) gear so that they could continue to fish in the areas.

Response: NMFS is not changing the overnight soak prohibitions in the Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area and the Virginia Atlantic Sturgeon Bycatch Reduction Area in response to these comments. The Councils' process fully considered what range of mesh sizes the prohibitions would apply to during the development of this action, including at Advisory Panel, Joint Committee, and Council meetings. The Councils were deliberate in their selection of mesh sizes that would be subject to these regulations in order to most effectively address Atlantic sturgeon bycatch and mortality. These comments provided no information that would justify deviation from the range of mesh sizes recommended by the Councils. NMFS also notes that to address the economic impact of replacing gear, it is delaying the effective date of the measures until May 1, 2025. Vessel owners replace gillnets over time because of wear and tear or loss. The delay in effectiveness to May 1, 2025, allows vessel owners a longer time frame to voluntarily replace gillnets due to usual wear and tear with gear that uses smaller mesh, should they so choose, prior to the effective date of the overnight soak prohibition.

Comment 15: Four comments were received that generally stated that this action would result in the weakening or overall loss of the impacted fisheries

and associated businesses. Two commenters additionally noted that, under National Standard 7, the MSA requires “normal and prudent measures” do not impose a financial burden, and that the costs associated with needing to replace standard gillnet gear with low-profile gillnet gear would be significant.

Response: NMFS disagrees with the implication that this action is inconsistent with National Standard 7, which states that “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” National Standard 7 guidelines also establish that the supporting analyses for FMPs should demonstrate that the benefits of fishery regulation are real and substantial relative to added costs, including costs to the industry for compliance. The EA includes an analysis of impacts to small entities for the purposes of the Regulatory Flexibility Act, which does expect some cost to industry as it complies with the regulations within this action.

As described in the EA (see **ADDRESSES**), the action in this rule strikes a balance between ESA requirements to reduce sturgeon bycatch and the economic impact on the monkfish and dogfish fisheries. Overnight soak prohibitions for the dogfish fishery and the requirement for the monkfish fishery to use low-profile gillnet gear in times and areas with high Atlantic sturgeon take were selected over more restrictive time and area closures that would have prevented all fishing by the monkfish and spiny dogfish fisheries in those places and times. These measures allow the fishery to continue to operate in a manner that reduces impacts to Atlantic sturgeon. Further, delays in the effective date of this action are designed to, as much as possible, mitigate costs incurred by the need to purchase new gear to comply with the new regulations.

The measures in this action represent the most flexible set of regulations under consideration while still fulfilling requirements to reduce Atlantic sturgeon bycatch. As such, this action is consistent with National Standard 7 of the MSA.

Changes From the Proposed Action

In this final rule, we have made a small number of changes to the proposed implementing regulations. These changes clarify the proposed regulatory text, but are not substantive in terms of modifying the proposed measures. After consulting with the Councils, in this final rule, we make the

following changes to the proposed implementing regulations:

- Revise the proposed text at § 648.14(s)(2)(iv) to replace the word “Violate” with “Fail to comply with.” This change makes the regulation consistent with other regulatory text in § 648.14.

- Revise the proposed text at § 648.91(d)(2)(i) to more clearly reference the regulations defining and implementing the Mid-Atlantic Exemption Area at 648.80(c)(5).

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Monkfish and Spiny Dogfish FMPs, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

During development of this action, NMFS reached out to Tribal representatives from the coastal Tribes in the Greater Atlantic Region to seek whether they wanted to engage on this Framework. No response was received, and as such, NMFS has determined that this action would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes; therefore, consultation with Tribal officials under E.O. 13175 is not required, and the requirements of sections (5)(b) and (5)(c) of E.O. 13175 also do not apply. A Tribal summary impact statement under section (5)(b)(2)(B) and section (5)(c)(2)(B) of E.O. 13175 is not required and has not been prepared.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. Although we received comments on the economic impacts of the proposed action, these comments did not change the factual basis for this certification. Comments on the economic impacts, and responses to those comments, are included in the Comments and Responses section of this final rule. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing.

Dated: December 12, 2024.

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. Amend § 648.2, by adding in alphabetical order the definition for “low-profile gillnet gear” to read as follows:

§ 648.2 Definitions.

* * * * *

Low-profile gillnet gear means monkfish gillnets that are constructed with the following characteristics designed to reduce interaction with Atlantic sturgeon: 12 to 13 inch (30.48 to 33.02 cm) diamond mesh; Net height of 6 to 8 meshes; Net length of 300 feet (91.44 m); Tie-down length less than or equal to 30 inches (76.2 cm); Tie-down spacing of 12 feet (3.66 m); Primary hanging ratio of 0.50 (*i.e.*, the length of webbing is twice that of the length of line used); Twine size of 0.81 mm; and the net is tied at every float to keep the float line down.

* * * * *

■ 3. Amend § 648.14, by adding paragraphs (m)(3)(iii) and (s)(2)(iv) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(m) * * *

(3) * * *

(iii) Fail to comply with the New Jersey Atlantic Sturgeon Bycatch Reduction Area requirements specified at § 648.91(d).

* * * * *

(s) * * *

(2) * * *

(iv) *Area requirements.* Fail to comply with the Atlantic Sturgeon Bycatch Reduction Areas requirements specified at § 648.234(a).

* * * * *

■ 4. Amend § 648.91, by adding paragraph (d) to read as follows:

§ 648.91 Monkfish regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(d) *New Jersey Atlantic Sturgeon Bycatch Reduction Area*—(1) *Area Definition*: The New Jersey Dogfish and Monkfish Atlantic Sturgeon Bycatch Reduction Area is defined by straight lines connecting the following points in the order stated:

TABLE 1 TO PARAGRAPH (d)

Point	N lat.	W long.
NJ1	40°24'	73°54'
NJ2	40°9'	73°24'
NJ3	39°30'	73°51'
NJ4	39°48'	74°12'
NJ1	40°24'	73°54'

(2) *Restrictions in the New Jersey Atlantic Sturgeon Bycatch Reduction Area*. Effective year round beginning on January 1, 2026, vessels may not fish with gillnet gear under a Monkfish DAS within the New Jersey Atlantic Sturgeon Bycatch Reduction Area unless:

(i) A vessel is fishing on a monkfish-only DAS within the MA Exemption Area and in accordance with the requirements set forth at § 648.80(c)(5)(ii), with roundfish gillnets with a mesh size equal to or greater than 5 inches (12.7 cm) and less than 10 inches (25.4 cm).

(ii) A vessel is fishing with low profile gillnet gear, as defined in § 648.2.

■ 5. Add § 648.234 to read as follows:

§ 648.234 Gear restrictions.

(a) *New Jersey Atlantic Sturgeon Bycatch Reduction Area*—(1) *Area Definition*: The New Jersey Dogfish and Monkfish Atlantic Sturgeon Bycatch

Reduction Area is defined by straight lines connecting the following points in the order stated:

TABLE 1 TO PARAGRAPH (a)

Point	N lat.	W long.
NJ1	40°24'	73°54'
NJ2	40°9'	73°24'
NJ3	39°30'	73°51'
NJ4	39°48'	74°12'
NJ1	40°24'	73°54'

(2) From May 1 through May 31 and November 1 through November 30 of each year, vessels issued a Federal spiny dogfish permit must remove gillnet gear with a mesh size equal to or greater than 5 inches (12.7 cm) and less than 10 inches (25.4 cm) from within the New Jersey Atlantic Sturgeon Bycatch Reduction Area from 8 p.m. eastern time each day through 5 a.m. eastern time the following day.

(b) *Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area*—(1) *Area Definition*: The Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area is defined by straight lines connecting the following points in the order stated:

TABLE 2 TO PARAGRAPH (b)

Point	N lat.	W long.
DM1	38°27'	75°60'
DM2	38°21'	74°48'
DM3	37°30'	75°12'
DM4	37°48'	75°30'
DM1	38°27'	75°60'

(2) *Requirements*: From November 1 through March 31 of each year, vessels issued a Federal spiny dogfish permit must remove roundfish gillnets with a mesh size equal to or greater than 5.25 inches (13.3 cm) and less than 10 inches (25.4 cm) from the water within the Delaware and Maryland Atlantic Sturgeon Bycatch Reduction Area from 8 p.m. eastern time each day through 5 a.m. eastern time the following day.

(c) *Virginia Atlantic Sturgeon Bycatch Reduction Area*—(1) *Area Definition*: The Virginia Atlantic Sturgeon Bycatch Reduction Area is defined by straight lines connecting the following points in the order stated:

TABLE 3 TO PARAGRAPH (c)

Point	N lat.	W long.
37°18'	75°54'	
VA2	36°48'	75°36'
VA3	36°33'	75°51'
VA4	36°54'	76°6'
VA1	37°18'	75°54'

(2) *Requirements*: From November 1 through March 31 of each year, vessels issued a Federal spiny dogfish permit must remove roundfish gillnets with a mesh size equal to or greater than 5.25 inches (13.3 cm) and less than 10 inches (25.4 cm) from the water within the Virginia Atlantic Sturgeon Bycatch Reduction Area from 8 p.m. eastern time each day through 5 a.m. eastern time the following day.

[FR Doc. 2024–29861 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 243
Wednesday, December 18, 2024

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

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1605

Breakage on Late Contributions, Makeup Contributions, and Loan Payments

AGENCY: Federal Retirement Thrift Investment Board.
ACTION: Proposed rule.

SUMMARY: The Federal Retirement Thrift Investment Board (FRTIB) proposes to permit the TSP record keeper to calculate gains and losses on late contributions, makeup contributions, loan payments even when the total amount on a late payment record or total agency contributions on a current payment record is less than \$1.00.

DATES: Comments must be received on or before February 18, 2025.

ADDRESSES: You may submit comments using one of the following methods:
• Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

• Mail: Office of General Counsel, Attn: Dharmesh Vashee, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

Comments will be made available to the public online at <https://www.regulations.gov>. Do not include any personally identifiable or confidential information that you do not want publicly disclosed. Anonymous comments are acceptable.

FOR FURTHER INFORMATION CONTACT: For press inquiries: James Kaplan at (202) 864-7150. For information about how to comment on this proposed rule: Elizabeth Harris at (202) 913-5300.

SUPPLEMENTARY INFORMATION: The FRTIB administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514. The TSP is a tax-deferred retirement savings plan for Federal

civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)). The provisions of FERSA that govern the TSP are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79.

Under 5 U.S.C. 8432, the Executive Director of the FRTIB is directed to prescribe regulations to establish an error correction procedure for lost earnings that result from employing agencies' errors.

Employing agencies submit agency matching contributions, deduct employee contributions from participants' basic pay, and deduct loan payments from participants' basic pay. Employing agencies also submit makeup contributions to the TSP.

Contribution and loan payment information is submitted by employing agencies to the TSP record keeper using a payment record. Occasionally, a payment record is not submitted timely or contains an error. As a result, the participant's funds are unavailable for investment by the TSP record keeper and do not experience gains realized or losses incurred that they would have otherwise. These missed gains or losses are referred to as breakage.

Currently, § 1605.2(a)(1) says that the TSP does not calculate breakage if the total amount on a late payment record or total agency contributions on a current payment record is less than \$1.00. We believe this rule exists due to technological and administrative limitations that no longer exist and is, therefore, obsolete. This proposed rule would permit the TSP record keeper to calculate breakage even when the total amount on a late payment record or total agency contributions on a current payment record is less than \$1.00.

Regulatory Flexibility Act

This proposed regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees, members of the uniformed services who participate in the TSP, and beneficiary participants.

Paperwork Reduction Act

This proposed regulation does not require additional reporting under the criteria of the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, and 1501-1571, the effects of this regulation on State, local, and Tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by State, local, and Tribal governments, in the aggregate, or by the private sector. Therefore, a statement under 2 U.S.C. 1532 is not required.

List of Subjects in 5 CFR Part 1605

Claims, Government employees, Pensions, Retirement.

Suzanne Tosini,
Acting Executive Director, Federal Retirement Thrift Investment Board.

For the reasons stated in the preamble, the FRTIB proposes to amend 5 CFR part 1605 as follows:

PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

■ 1. The authority citation for part 1605 continues to read as follows:

Authority: 5 U.S.C. 8351, 8432a, 8432d, 8474(b)(5) and (c)(1). Subpart B also issued under section 1043(b) of Public Law 104-106, 110 Stat. 186 and § 7202(m)(2) of Public Law 101-508, 104 Stat. 1388.

■ 2. Amend § 1605.2 by revising paragraph (a)(1) to read as follows:

§ 1605.2 Calculating, posting, and charging breakage on late contributions and loan payments.

* * * * *
(a) * * *

(1) The TSP record keeper will not calculate breakage if contributions or loan payments are posted within 30 days of the "as of" date; and

* * * * *

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1****[REG–116017–24]****RIN 1545–BR36****Administrative Requirements for an Election To Exclude Applicable Unincorporated Organizations From the Application of Subchapter K; Correction****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking and public hearing; correction.

SUMMARY: This document contains corrections to REG–116017–24, which was published in the **Federal Register** on Wednesday, November 20, 2024. REG–116017–24 contained proposed regulations that would provide certain administrative requirements for unincorporated organizations taking advantage of modifications to the rules governing elections to be excluded from the application of partnership tax rules.

DATES: Written or electronic comments are still being accepted and must be received by January 21, 2025. A public hearing on the proposed regulations has been scheduled for February 7, 2025, at 10 a.m. Eastern Standard Time (EST). Requests to speak and outlines of topics to be discussed at the public hearing must be received by January 21, 2025.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG–116017–24) by following the online instructions for submitting comments. Requests for the public hearing must be submitted as prescribed in the “Comments and Public Hearing” section of the notice of proposed rulemaking published on November 20, 2024 (89 FR 91617). Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS’s public docket. Send paper submissions to: CC:PA:01:PR (REG–116017–24), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Cameron Williamson at (202) 317–6684; and concerning submissions of comments and/or the public hearing,

contact the Publications and Regulations Section at (202) 317–6901 (not toll-free numbers) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:**Background**

The notice of proposed rulemaking (REG–116017–24) that is the subject of this correction is under sections 761(a), 6031(a), 6417(d) and (h), and 7805(a) of the Internal Revenue Code.

Correction of Publication

Accordingly, FR Doc. 2024–26962 (REG–116017–24), appearing on page 91617 in the **Federal Register** on Wednesday, November 20, 2024, is corrected as follows:

1. On page 91619, in the third column, in the first full paragraph, in the seventh line down from the top of the paragraph, the language “modifications for” is removed.

Kalle L. Wardlow,

Federal Register Liaison, Publications & Regulations Section, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2024–29653 Filed 12–17–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF EDUCATION**34 CFR Chapter III****[Docket ID ED–2024–OSERS–0131]****Proposed Priority and Requirements—Innovative Rehabilitation Training Program**

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Proposed priority and requirements.

SUMMARY: The Department of Education (Department) proposes a priority and requirements under the Innovative Rehabilitation Training program, Assistance Listing Number 84.263G. The Department may use the proposed priority and requirements for competitions in fiscal year (FY) 2025 and later years. We take this action to promote the development of innovative and improved methods of training on promising vocational rehabilitation (VR) counseling, engagement, and service delivery strategies and practices to State VR agency personnel or other public or non-profit rehabilitation professionals and paraprofessionals (including those enrolled in master’s or bachelor’s level rehabilitation programs) to provide quality VR and supported employment services that lead to quality employment

outcomes for individuals with disabilities.

DATES: We must receive your comments on or before January 17, 2025.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at www.regulations.gov. However, if you require an accommodation or cannot otherwise submit your comments via www.regulations.gov, please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted by fax or by email, or comments submitted after the comment period closes. To ensure the Department does not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under “FAQ.”

Note: The Department’s policy is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A10, Washington, DC 20202. Telephone: (202) 987–0128. Email: 84.263G@ed.gov.

A brief summary of the proposed rule is available at www.regulations.gov/docket/ED-2024-OSERS-0131.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding the proposed priority and requirements. To ensure that your comments have maximum effect in developing the final priority and requirements, we urge you to clearly identify the specific section of the proposed priority and requirements that each comment addresses.

We are particularly interested in comments about whether the proposed priority and requirements would be challenging for new applicants to meet and, if so, how the proposed priority

and requirements could be revised to address such potential challenges.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 14094 and their overall requirement of reducing regulatory burden that might result from this proposed priority and requirements. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect public comments about the proposed priority and requirements by accessing *Regulations.gov*. To inspect comments in person, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this proposed priority and requirements. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: The Innovative Rehabilitation Training program is designed to develop (a) new types of training programs for rehabilitation personnel and to demonstrate the effectiveness of these new types of training programs for rehabilitation personnel in providing rehabilitation services to individuals with disabilities; (b) new and improved methods of training rehabilitation personnel so that there may be a more effective delivery of rehabilitation services to individuals with disabilities by designated State rehabilitation agencies and designated State rehabilitation units or other public or non-profit rehabilitation service agencies or organizations; and (c) new innovative training programs for VR professionals and paraprofessionals to have a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities so they can more effectively provide VR services to individuals with disabilities.

Program Authority: 29 U.S.C. 709(c) and 772.

Applicable Program Regulations: 34 CFR parts 385 and 387.

Proposed Priority

This document contains one proposed priority, Innovative Rehabilitation Training on Emerging VR Counseling,

Engagement, and Service Delivery Strategies Leading to Quality Employment in 21st Century Careers for Individuals With Disabilities, and six topic areas under the priority.

Background: The Rehabilitation Services Administration (RSA), Office of Special Education and Rehabilitative Services proposes this priority and these requirements, based on allowable activities under 34 CFR parts 385 and 387, to enable VR agency professionals to help more VR participants benefit from the training, education, and employment opportunities offered by the Workforce Innovation and Opportunity Act (WIOA).

The proposed priority would support the purposes of WIOA, including to “improve the quality and labor market relevance of workforce investment, education, and economic development efforts to provide America’s workers with the skills and credentials necessary to secure and advance in employment with family-sustaining wages and to provide America’s employers with the skilled workers the employers need to succeed in a global economy.” (WIOA sec. 2(3)). It is also consistent with RSA Technical Assistance Circulars 23–03 Maximizing Services and the Use of Funds to Support Quality Employment Outcomes for Individuals with Disabilities through the VR and Supported Employment Programs and 24–01 Promoting Meaningful and Sustained Engagement of Individuals with Disabilities in the VR Program; the RSA Commissioner’s Dear Colleague Letters DCL–24–02 on RSA priorities and DCL–25–01 on artificial intelligence; and priority 5(j) of the Secretary’s Supplemental priorities (Final Priority and Definitions, **Federal Register**, December 10, 2021), reflecting the Department’s commitment to effective VR services and use of funds, meaningful and sustained engagement with VR participants, collaboration with workforce development partners and community-based organizations including community rehabilitation programs (CRPs), advanced technology employment and training, and equity of access and opportunity for students with disabilities, disconnected youth and adults with disabilities. The proposed priority would promote quality employment for individuals with disabilities through innovative rehabilitation training to VR professionals on emerging VR counseling, engagement, and service delivery practices.

Applicants would be able to apply under one or more of the priority’s six topic areas: (1) VR Counselor Participant Engagement Practices, (2) Career

Assessment Addressing Emerging Career and Employment Trends, (3) Preparing VR Participants for High-Quality Employment in Science, Technology, Engineering, and Math (STEM) and Advanced Technology Careers, including Artificial Intelligence (AI), (4) Dual Customer Employer Engagement and Service Delivery Strategies, (5) Engagement and Service Delivery Strategies for Underserved Populations, and (6) Field Initiated.

Topic Area 1: VR Counselor Participant Engagement Practices

Participant engagement is described as “an active, multifaceted process that involves the empowerment of participants, participants’ exercise of self-determined informed choice, and their collaboration with employment specialists in the working alliance” (Johnson et al., 2009). Research and program data suggests that participant engagement contributes to successful VR services and outcomes, particularly by increasing participant retention in VR programs. Southwick and Schultz (2019) and Dutta et al. (2017) found that active engagement increases participants’ motivation, expectations, and confidence—characteristics essential for successful VR services and employment outcomes. State VR agencies are developing and implementing promising employee engagement strategies, including Motivational Interviewing and Rapid Engagement. Research suggests that Motivational Interviewing, for example, strengthens counselor-participant working relationships; improves understanding of participant circumstances, needs, and goals reflected in Individualized Plans for Employment (IPE); and encourages participants’ sustained engagement in the resulting VR services (Torres, Frain, Tansey, 2019).

Early and sustained engagement may mitigate participants from exiting the VR process before receiving services under an individualized plan for employment (IPE). Nationally, the VR participant attrition rate was 29 percent in Program Year (PY) 2023, with individual States’ attrition rates ranging between 14 percent and 60 percent during the same period.

Topic area 1 would strengthen counselors’ engagement with participants throughout the VR continuum—from referral and application to the provision of services under a signed IPE—leading to quality competitive integrated employment outcomes.

Topic Area 2: Career Assessment Addressing Emerging Career and Employment Trends

WIOA emphasizes the need to ensure that competitive integrated employment outcomes optimally reflect VR participants' individual strengths, abilities, capabilities, interests, and informed choice. To this end, topic area 2 of this proposed priority would increase the effectiveness of VR professionals' vocational evaluation and comprehensive assessment practices in identifying and supporting VR participants' optimal career and employment goals, postsecondary education and training pathways, comprehensive support needs including rehabilitation technology, and potential options such as business ownership, self-employment, and telework.

Topic Area 3: Preparing VR Participants for High-Quality Employment in (STEM) and Advanced Technology Careers, Including AI

STEM is a promising career field for individuals with disabilities. Across all workers, employment in STEM occupations grew by 10.5 percent between May 2009 and May 2015, compared to 5.2 percent growth in non-STEM occupations (Fayer et al., 2017). Currently, STEM occupations requiring postsecondary-level scientific or technical knowledge account for 6.6 percent of the workforce in 2023 (U.S. Bureau of Labor Statistics, 2024). More broadly, considering all educational attainment levels and pathways, the National Science Foundation estimates that workers in jobs requiring significant STEM-related knowledge account for 23 percent of the workforce (National Science Board, National Science Foundation, 2024). STEM fields are projected to grow by an additional 10.4 percent through 2033, nearly three times the rate of non-STEM jobs (with positions in computing, engineering, and advanced manufacturing leading the way) (U.S. Bureau of Labor Statistics, 2024). STEM jobs pay substantially more than non-STEM jobs, with median annual wages of \$95,420 for STEM occupations, compared to \$40,120 for non-STEM occupations (Krutch & Roderick, 2022).

VR agencies are working to prepare VR participants for the expanding career potential in emerging STEM-related fields, through pre-employment transition services and other initiatives. Of all VR participants who achieved competitive integrated employment after receiving VR services under an IPE during PYs 2017–2019, 20,420 (5.3 percent) were employed in STEM fields.

Of these participants, 8,348 (40.9 percent) were youth aged 14–24 (Chun et al., 2023). Examples of STEM-related pre-employment transition services, for example, have grown significantly since the passage of WIOA in 2014, as evidenced by the VR portions of the WIOA State Plans. Topic area 3 would support VR professionals' efforts to maximize opportunities for VR participants to explore, consider, and pursue careers in STEM and other advanced technologies, including AI.

Topic Area 4: Dual Customer Employer Engagement and Service Delivery Strategies

WIOA has fostered the growth of dual customer business engagement initiatives that create career exploration, training, and employment opportunities for VR participants while meeting employers' need for skilled workers. State VR agencies have adopted a variety of business engagement models including Progressive Employment, Rapid Engagement, Customized Employment, Customized Training, Individualized Placements and Supports as well as apprenticeships in partnership with businesses, State and local workforce development partners, and community-based organizations including CRPs. Topic area 4 would support such business engagement trends by improving the capacity of VR counselors and specialists to provide optimal dual customer services and training outlined in 34 CFR 361.32.

Topic Area 5: Engagement and Service Delivery Strategies for Underserved Populations

Publicly available, individual-level RSA-911 VR participant data indicate that disparities exist in VR eligibility determination, service provision, and employment outcomes for Black, American Indian/Alaska Native, and Hispanic individuals with disabilities, and other traditionally underserved or underrepresented populations (Shaewitz, D.M. & Yin, M., 2021). Innovative practices can also address challenges in accessing VR services and outcomes faced by youth in foster care; formerly incarcerated adults; veterans; residents of rural, remote, or impoverished communities; and individuals with intellectual, developmental, emotional, sensory, substance abuse, traumatic head injury-related disabilities, among others. Topic area 5 of this proposed priority would promote access to VR services, resources, and opportunities for these or other underserved or underrepresented groups. Applicants may identify an underserved or underrepresented group,

or combination of populations, and develop an innovative training program enabling VR professionals to address their challenges through research-based promising practices.

Topic Area 6: Field Initiated

Finally, to maximize the breadth and impact of this proposed priority, topic area 6 would offer applicants the flexibility to propose improved methods of training on promising VR counseling, engagement, and service delivery strategies and practices on topic areas that are either not specified in this priority or a combination of two or more topic areas described in this priority, consistent with the priority's purpose.

Applicants may draw from the activities and findings of RSA's WIOA-related discretionary grant investments, and other Federal, State, and non-government activities, to develop innovative training proposals under this priority. Beginning in 2015, RSA's VR Technical Assistance Centers on Workforce Innovation (WINTAC), Youth (Y-TAC), and Targeted Communities (VRTAC-TC) provided intensive, targeted, and universal technical assistance and training to State VR agencies in support of WIOA purposes and priorities, including youth transition, pre-employment transition services, employer engagement, apprenticeships, labor market analysis, credentialing, and measurable skill gains leading to quality competitive integrated employment outcomes. Other WIOA-relevant RSA investments during this period included the Career Pathways for Individuals with Disabilities demonstration project and the National Technical Assistance Center on Transition in partnership with the Department's Office of Special Education Programs. These initiatives involved evidence-based or emerging practices such as Index Plus, Community-Based Participatory Research, Motivational Interviewing, Trauma-Informed Care, Integrated Placement and Supports, and Integrated Resource Teams. State VR agencies engaged in these initiatives reported improvements in VR service delivery and outcomes. WINTAC, for example, helped the State VR agency of Alaska increase pre-employment transition services by 384 percent in three years. VRTAC-TC contributed to significant increases in VR applications, eligibility determinations, IPE development, service delivery, and competitive integrated employment outcomes for 21 priority underserved population groups from 24 socioeconomically challenged communities in 12 States, relative to the

same population groups elsewhere in their respective States.

RSA investments in support of WIOA continued with the Innovative Rehabilitation Training grants awarded in 2019 and 2020 as well as the VR Technical Assistance Center for Quality Employment and the VR Technical Assistance Center for Quality Management, awarded in 2020. RSA further invested in innovative approaches related to career advancement, transitioning from subminimum wage employment to competitive integrated employment, State and local partnerships to improve youth transition outcomes, and transformational approaches to create 21st Century workforce opportunities for adults and youth with disabilities, through Disability Innovation Fund awards in 2021, 2022, 2023, and 2024.

Currently, the Innovative Rehabilitation Training program (awarded in 2019 and 2020) is providing training to VR professionals and students on VR counseling, career assessment, forensic evaluation, pre-employment transition services, business engagement, business ownership, self-employment, and telecommuting, and specialized VR services for individuals with intellectual disabilities and autism spectrum disorders. The grants reflect a wide range of curricula (full academic courses, certificate program, standalone modules); products (research studies, published articles, videos); information delivery methods (online or on-site, synchronous or asynchronous, on-demand or scheduled); instructional technologies (including advanced technologies such as Virtual Reality simulations and role playing); and communities of practice (involving VR agency leadership, cross-disciplinary VR specialists, stakeholders, and partners). Grantees have established strong partnerships with State VR agencies, pertinent national associations, and IHEs to develop, evaluate, disseminate, and replicate the curricula and recruit training participants.

This proposed priority represents a natural progression from previous RSA investments and the existing Innovative Rehabilitation Training program. The priority would promote key elements from WIOA including dual customer business engagement services, with a focus on contemporary emerging, high-paying careers in STEM, green industries, critical infrastructure, and advanced technology fields, including AI.

Proposed Priority: Innovative Rehabilitation Training on Emerging VR

Counseling, Engagement, and Service Delivery Strategies Leading to Quality Employment in 21st Century Careers for Individuals With Disabilities. Projects that propose a new innovative rehabilitation training program for rehabilitation personnel on emerging VR counseling, engagement, and service delivery best practices or strategies in any of six topic areas that provides a 21st century understanding of the evolving labor force and the needs of individuals with disabilities, resulting in more effective delivery of rehabilitation services to individuals with disabilities. The six topic areas under this priority are:

(1) VR Counselor Participant Engagement Practices. Proposed projects under this topic area must focus on improving VR counselors' knowledge and skills to effectively engage with VR participants through the VR continuum from referral and application to the provision of VR services under a signed IPE, and through the achievement of an employment outcome. This may include, for example, VR counseling relationship-building skills training; early and ongoing engagement strategies, including pre-employment transition services; benefits counseling, financial planning, and VR participant self-advocacy skills training; and the development of internal and external partnerships with cross-disciplinary VR agency specialists, employers, workforce development partners, Client Assistance Programs, and community-based organizations, including CRPs and Centers for Independent Living (CILs).

(2) Career Assessment Addressing Emerging Career and Employment Trends. Proposed projects under this topic area must focus on identifying and supporting VR participants' informed choice and optimal career and employment goals, postsecondary education and training, credentialing and measurable skills attainment pathways, and comprehensive support needs including assistive technology, consistent with participants' unique strengths, abilities, capabilities, and interests. This may include, for example, providing vocational evaluation and comprehensive assessments; facilitating AI-enabled individual supports and accommodations, conducting local and national labor market analyses; tracking emerging 21st century career trends in STEM, advanced technologies, and green industries such as sustainable manufacturing and renewable energy; exploring work options such as business ownership, self-employment, and telework; and identifying the most

appropriate training and employment options including apprenticeships, customized employment, and career pathways.

(3) Preparing VR Participants for High-quality Employment in STEM and Advanced Technology Careers, including AI. Proposed projects under this topic area must focus on maximizing the number of VR participants provided the opportunity to explore, consider, and pursue high quality careers in STEM and advanced technology careers, including AI, and other emerging high-quality fields. This may include, for example, early and meaningful exposure to such careers through quality pre-employment transition services; peer mentorship by persons with disabilities in such careers; identification of VR participants whose unique strengths, abilities, interests, and informed choice align with such careers; and partnerships with State and local educational agencies, Institutions of Higher Education (IHE), career and technical education programs, disability organizations, CRPs, and others to provide the appropriate training, education, and support services.

(4) Dual Customer Employer Engagement and Service Delivery Strategies. Proposed projects under this topic area must focus on helping VR agency personnel to engage effectively with employers through the provision of the services and training outlined in 34 CFR 361.32, meeting employers' needs for skilled workers while creating quality employment and training opportunities for VR participants. This may include, for example, strategies for identifying promising dual customer employer engagement opportunities; providing training and technical assistance to employers regarding the employment of individuals with disabilities, including disability awareness, and the requirements of the Americans with Disabilities Act and other employment-related laws; supporting VR agency capacity-building to provide quality dual customer services and training to employers; conducting outreach to employers, community-based organizations, and business associations highlighting VR agency capabilities and documented successes; and delivering dual customer service and training through the coordinated efforts of cross-disciplinary VR personnel, employers, and workforce development system partners.

(5) Engagement and Service Delivery Strategies for Underserved Populations. Proposed projects under this topic area must focus on promoting access to VR services, resources, and opportunities

for current or prospective VR participants from the underserved population(s) selected by the applicant. This may include, for example, identifying the needs, challenges, opportunities, cultural sensitivities, or linguistic requirements of the selected population; establishing partnerships with local or national associations, community-based organizations including CRPs and CILs, and advocates representing the selected population; conducting outreach strategies to engage the selected populations throughout the VR process; and developing VR policies, procedures, practices, and VR service delivery approaches that address the populations' unique needs, challenges, cultural sensitivities, or linguistic requirements. Applicants must identify the selected underserved population(s), which may include disability category, race, ethnicity, socioeconomic status, or other factors.

(6) Field-Initiated. Proposed projects under this topic area must address an area not specified in this priority, consistent with the stated purpose of the priority, or a combination of two or more topic areas specified in this priority.

Note: The numbering of the topic areas does not reflect an established hierarchy or preference among the topic areas.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority:

Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Project Requirements

The Department proposes the following project requirements for

applicants under this priority. Based on ongoing administration of the current program, RSA expects that these requirements will promote innovation, continuous improvement, and enduring impacts on VR professionals and participants beyond the life of the grant. We may apply one or more of these requirements in any year in which this program is in effect.

Proposed Project Requirements:

(a) Establish the empirical basis of the proposed project objectives and activities. The applicant must identify the particular focus it intends to address within the selected topic area; the key knowledge and practice determinants of VR service effectiveness and employment outcome quality; and the empirical sources and rationale for the identified knowledge and practices, including available research, literature reviews, and relevant projects conducted by RSA or other Federal or non-government entities. Applicants responding to topic area 5, Underserved Populations, must also provide supporting data regarding their selected population group(s) and identified barriers to VR services and employment outcomes.

(b) Establish a process, including clear and actionable steps as well as specific timelines, to continue assessing innovative practices and training methods for possible incorporation, especially during the initial year of the grant, including stakeholder surveys to identify promising practices that the State VR agencies may already be implementing.

(c) Design an innovative, multifaceted VR counselor training plan to convey the identified knowledge and practices. The training plan must specify the intended participants; proposed curricula, activities, and products, including training modules, communities of practice, research studies, published articles, or videos; instructional and communication technologies, including AI-based methods and tools, if applicable; and knowledge translation methods adapted to diverse learning styles or ethnic and linguistic backgrounds. The training plan must address a broad range of VR professionals—decision-makers, counselors, cross-disciplinary specialists—and pertinent partners and stakeholders, as appropriate.

(d) Establish an advisory panel of one or more VR agencies and other pertinent stakeholders to help develop, implement, and evaluate the project. The applicant must describe the panel membership, structure, and responsibilities. Panel member responsibilities may include identifying

key knowledge requirements, best practices, and innovative approaches for the training curricula and methods; coordinating with other interested parties to disseminate curricula, recruit training participants, engaging additional VR agencies and stakeholders; and participating in the project's continuous feedback, evaluation, and improvement processes.

(e) Prioritize key stakeholder engagement, partnerships, and information-sharing in the innovative training activities, including with IHEs and relevant professional associations. The applicant must identify the stakeholders to be involved within each of the project's particular focus; the purpose and expected benefits of stakeholder involvement; anticipated communities of practices to facilitate stakeholder involvement; and the innovative or advanced convening or communication technologies to be used, as applicable.

(f) Establish continuous feedback, evaluation, and improvement processes, including action steps and clear timelines, to ensure that the training curricula and resources are responsive to the needs of the current and aspiring VR professionals and stakeholders; meet the project scope and objectives; and reflect evolving research, promising practices, and innovative training methods during the life of the grant.

(g) Disseminate, replicate, and sustain the innovative training curricula and resources. The applicant must post completed training curricula and related resources on National Clearinghouse of Rehabilitation Training Materials (NCRTM) and other appropriate venues on an ongoing basis; facilitate replication of training curricula by interested VR agencies, IHEs, or other interested parties; sustain and maintain the training curriculum beyond the life of the grant; and present innovative training curricula, resources, outcomes, and lessons learned in at least one national forum during the final year of the grant.

References

- Chun, J., Zhou, K., Rumrill, S., & Tittelbach, T. (2023). STEM career pathways for transition-age youth with disabilities. *Rehabilitation Research, Policy, and Education*, v37 n1 p36–48
- Dutta, A., Chan, F., Kundu, M.M., Kaya, C., Brooks, J., Sánchez, J., & Tansey, T.N. (2017). Assessing vocational rehabilitation engagement of people with disabilities: A factor-analytic approach. *Rehabilitation Counseling Bulletin*, 60(3), 145–154. <https://doi.org/10.1177/0034355215626698>
- Torres, A., Frain, M., Tansey, T. (2019). The Impact of Motivational Interviewing

- Training on Rehabilitation Counselors: Assessing Working Alliance and Client Engagement. A Randomized Controlled Trial. <https://psycnet.apa.org/doiLanding?doi=10.1037%2Frep0000267>
- Fayer, S., Lacey, A., & Watson, A. (2017, January). *Science, technology, engineering, and mathematics (STEM) occupations: Past, present, and future*. U.S. Bureau of Labor Statistics. <https://www.bls.gov/spotlight/2017/science-technology-engineering-and-mathematics-stem-occupations-past-present-and-future/home.htm>
- Krutsch, E. & Roderick, V. (2022). U.S. Department of Labor Blog: STEM Day: Explore Growing Careers, November, Source: U.S. Bureau of Labor Statistics Employment Projections. <https://blog.dol.gov/2022/11/04/stem-day-explore-growing-careers>
- U.S. Bureau of Labor Statistics. (2024). Employment in STEM occupations. Projections 2023 to 2033. STEM Occupations Projection link (bls.gov)
- National Science Board, National Science Foundation. (2024). Science and engineering indicators 2024: The state of U.S. science and engineering. NSB—2024–3. <https://ncses.nsf.gov/pubs/nsb20243>
- Johnson, R.L., Floyd, M., Pilling, D., Boyce, M.J., Grove, B., Secker, J., Schneider, J., & Slade, J. (2009). Service users' perceptions of the effective ingredients in supported employment. *Journal of Mental Health*, 18(2), 121–128. <https://doi.org/10.1080/09638230701879151>
- Southwick, J., & Schultz, J. (2019). Participant engagement in public vocational rehabilitation programs: An analysis of counselor ratings. *The Journal of Rehabilitation*, 85(2), 13–22
- Shaewitz, D.M. & Yin, M. (2021). Serving all consumers: Identifying racial disparities in the vocational rehabilitation system. https://iel.org/wp-content/uploads/2021/12/Serving-All-Consumers-Identifying-Racial-Disparities-in-the-Vocational-Rehabilitation_FINAL_508c.pdf.

Final Priority and Requirements

We will announce the final priorities and requirements in a document in the **Federal Register**. We will determine the final priorities and requirements after considering public comments on the proposed priority and requirements and other information available to the Department. This document does not preclude us from proposing additional eligibility criteria, priorities, requirements, definitions, and selection criteria subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use one or more of these proposed priorities and these requirements, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866, 13563, and 14094

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$200 million or more (adjusted every three years by the Administrator of Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues for which centralized review would meaningfully further the President’s priorities, or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866, as amended by Executive Order 14094. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” OIRA has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing this proposed priority and these proposed requirements only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with these Executive Orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department’s programs and activities.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum “Plain Language in Government Writing” require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make this proposed priority and requirements easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed priority and requirements clearly stated?

- Do the proposed priority and requirements contain technical terms or other wording that interferes with their clarity?

- Does the format of the proposed priority and requirements (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

- Would the proposed priority and requirements be easier to understand if we divided them into more (but shorter) sections?

- Could the description of the proposed priority and requirements in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed priority and requirements easier to understand? If so, how?

- What else could we do to make the proposed priority and requirements easier to understand?

To send any comments about how the Department could make this proposed priority and requirements easier to understand, see the instructions in the **ADDRESSES** section.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Regulatory Flexibility Act

Certification: The Secretary certifies that this proposed priority and these proposed requirements would not have a significant economic impact on a substantial number of small entities. Participation in the Innovative Rehabilitation Training program is voluntary. In addition, the only eligible entities for this program are State agencies or their equivalents under State law, Public, Private and Nonprofit Entities, including Indian Tribes and Institutions of Higher Education, which do not meet the definition of a small entity. We expect that in determining whether to apply for Innovative Rehabilitation Training program funds, an eligible entity would evaluate the requirements of preparing an application and any associated costs and weigh them against the benefits likely to be achieved by receiving a program grant. An eligible entity probably would apply only if it determines that the likely benefits

exceed the costs of preparing an application.

We believe that the proposed priority and requirements would not impose any additional burden on a small entity applying for a grant than the entity would face in the absence of the proposed action. That is, the length of the applications those entities would submit in the absence of the proposed regulatory action and the time needed to prepare an application would likely be the same.

This proposed regulatory action would not have a significant economic impact on a small entity once it receives a grant because it would be able to meet the costs of compliance using the funds provided under this program. We invite comments from eligible small entities as to whether they believe this proposed regulatory action would have a significant economic impact on them and, if so, request evidence to support that belief.

Paperwork Reduction Act of 1995: The proposed priority and requirements contain information collection requirements that are approved by OMB under OMB control number 1894-0006.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotope, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site. You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2024-29996 Filed 12-17-24; 8:45 am]

BILLING CODE 4000-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA-R06-OAR-2024-0232; FRL-12425-01-R6]

Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants; Oklahoma; Control of Emissions From Existing Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve the CAA section 111(d) State plan submitted by the State of Oklahoma for sources subject to the Municipal Solid Waste (MSW) Landfills Emission Guidelines (EG). The Oklahoma MSW landfills plan was submitted to fulfill the State's obligations under CAA section 111(d) to implement and enforce the requirements under the MSW Landfills EG. The EPA is proposing to approve the State plan and amend the agency regulations in accordance with the requirements of the CAA.

DATES: Written comments must be received on or before February 18, 2025.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2024-0232, at <https://www.regulations.gov> or via email to gesualdo.matthew@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact Matthew Gesualdo, (214) 665-6530, gesualdo.matthew@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov. While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

FOR FURTHER INFORMATION CONTACT:

Matthew Gesualdo, EPA Region 6 Office, Air and Radiation Division—State Planning and Implementation Branch, (214) 665–6530, gesualdo.matthew@epa.gov. We encourage the public to submit comments via <https://www.regulations.gov>. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION:

Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

I. Background

Section 111 of the CAA, “Standards of Performance for New Stationary Sources,” directs the EPA to establish emission standards for stationary sources of air pollution that could potentially endanger public health or welfare. These standards are referred to as New Source Performance Standards (NSPS). Section 111(d) addresses the process by which the EPA and States regulate standards of performance for existing sources. When NSPS are promulgated for new sources, section 111(d) and EPA regulations require that the EPA publish an Emission Guideline (EG) to regulate the same pollutants from existing facilities. While NSPS are directly applicable to new sources, EG for existing sources (designated facilities) are intended for States to use to develop a State plan to submit to the EPA.

State plan submittal and revisions under CAA section 111(d) must be consistent with the applicable EG and the requirements of 40 CFR part 60, subpart B, and part 62, subpart A. The regulations at 40 CFR part 60, subpart B, contain general provisions applicable to the adoption and submittal of State plans under CAA section 111(d). Additionally, 40 CFR part 62, subpart A, provides the procedural framework by which the EPA will approve or disapprove such plans submitted by a state. Once approved by the EPA, the State plan becomes federally enforceable. If a State does not submit an approvable State plan to the EPA, the EPA is responsible for developing,

implementing, and enforcing a federal plan.

The MSW landfills NSPS for new landfills and EG for existing landfills were first promulgated by EPA on March 12, 1996, in 40 CFR part 60, subparts WWW and Cc, respectively (61 FR 9905). On August 29, 2016, the EPA finalized revisions to the MSW landfills NSPS and EG in 40 CFR part 60, subparts XXX and Cf, respectively (81 FR 59332; 81 FR 59313). The 2016 EG revision updates the control requirements and monitoring, reporting, and recordkeeping provisions for existing MSW landfill sources.

The current MSW landfills EG, found at 40 CFR part 60, subpart Cf, concerns the regulation of landfill gas and its components, including methane, from MSW landfills for which construction, reconstruction, or modification was commenced on or before July 17, 2014. The deadline to submit a State plan to the EPA was May 30, 2017. On May 21, 2021, EPA finalized the MSW landfills Federal plan in 40 CFR part 62, subpart OOO (86 FR 27756). The MSW landfills Federal plan at 40 CFR part 62, subpart OOO, applies to States that do not have an EPA-approved State plan. The MSW landfills Federal plan is currently in effect in Oklahoma.

In order to fulfill obligations under CAA section 111(d), the Oklahoma Department of Environmental Quality (ODEQ) submitted a revised State plan for the control of emissions from existing MSW landfills for the State of Oklahoma on April 30, 2024.¹ The Oklahoma MSW landfills plan implements and enforces the applicable provisions under the MSW landfills EG at 40 CFR part 60, subpart Cf, and additionally meets the relevant requirements of the CAA section 111(d) implementing regulations at 40 CFR part 60, subpart B. The Oklahoma submittal and the supplements are included in the public docket for this rulemaking (Docket No. EPA–R06–OAR–2024–0232).

II. Evaluation

The EPA has evaluated the Oklahoma MSW landfills plan to determine whether the plan meets applicable requirements from the MSW landfills EG at 40 CFR part 60, subpart Cf, and the CAA section 111(d) implementing regulations at 40 CFR part 60, subpart B. The EPA’s detailed rationale and discussion on the Oklahoma MSW landfills plan can be found in the EPA Technical Support Document (TSD),

¹ The Oklahoma plan submitted by ODEQ does cover sources located in Indian country with some exclusions.

located in the docket for this rulemaking.

The State plan submittal package includes all materials necessary to be deemed administratively and technically complete according to the criteria of 40 CFR part 60, subpart B. The State plan document (the “Oklahoma MSW Landfill State Plan”) includes all the necessary authority for the implementation and enforcement of the MSW landfill Emission Guidelines in the State. Specifically, the State appropriately incorporated all applicable EG requirements from 40 CFR part 60, subpart Cf, into the Oklahoma Administrative Code (OAC) 252:100–47, Control of Emissions from Existing Municipal Solid Waste Landfills. Both the adopted State plan document and the relevant OAC regulations, as well as all other relevant plan submittal materials may be found in the docket for this action. Necessary State legal and enforcement authorities required for plan approval are located elsewhere in Oklahoma’s statute, rules and regulations and have been reviewed and approved of by the EPA in the course of prior State implementation plan as well as section 111(d) and/or 129 State plan approvals. See 40 CFR part 52, subpart E, and 40 CFR part 62, subpart E.

The Oklahoma MSW landfills plan has been evaluated in detail in the TSD. Our evaluation demonstrates that the Oklahoma MSW landfills plan meets the requirements in 40 CFR part 60, subpart Cf and subpart B, and is consistent with the requirements for an approvable section 111(d) State plans for MSW landfills.

III. Impact on Areas of Indian Country

Following the U.S. Supreme Court decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Governor of the State of Oklahoma requested approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Public Law 109–59, 119 Stat. 1144, 1937 (August 10, 2005) (“SAFETEA”), to administer in certain areas of Indian country (as defined at 18 U.S.C. 1151) the State’s environmental regulatory programs that were previously approved by the EPA for areas outside of Indian country. The State’s request excluded certain areas of Indian country further described below. In addition, the State only sought approval to the extent that such approval is necessary for the State to administer a program in light of *Oklahoma Dept. of Environmental*

Quality v. EPA, 740 F.3d 185 (D.C. Cir. 2014).²

On October 1, 2020, the EPA approved Oklahoma's SAFETEA request to administer all the State's EPA-approved environmental regulatory programs, including the Oklahoma SIP, in the requested areas of Indian country. As requested by Oklahoma, the EPA's approval under SAFETEA does not include Indian country lands, including rights-of-way running through the same, that: (1) qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. 1151(c); (2) are held in trust by the United States on behalf of an individual Indian or Tribe; or (3) are owned in fee by a Tribe, if the Tribe (a) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party, and (b) never allotted the land to a member or citizen of the Tribe (collectively "excluded Indian country lands").³

The EPA's approval under SAFETEA expressly provided that to the extent EPA's prior approvals of Oklahoma's environmental programs excluded Indian country, any such exclusions are superseded for the geographic areas of Indian country covered by the EPA's approval of Oklahoma's SAFETEA request.⁴ The approval also provided

that future revisions or amendments to Oklahoma's approved environmental regulatory programs would extend to the covered areas of Indian country (without any further need for additional requests under SAFETEA).

As explained earlier in this action, the EPA is proposing to approve the Oklahoma CAA section 111(d) MSW landfill State plan that was submitted by the State of Oklahoma on April 30, 2024. More specifically, we are proposing to approve Oklahoma's MSW landfill plan addressing CAA section 111(d) requirements for MSW under the MSW landfill EG codified at 40 CFR part 60, subpart Cf. The Oklahoma MSW landfill plan applies statewide, but only affects specific types of facilities, as discussed earlier in this document. Consistent with the EPA's October 1, 2020, SAFETEA approval, if this approval is finalized as proposed, this Oklahoma MSW landfill plan will apply to all Indian country within Oklahoma, other than the excluded Indian country lands, as described earlier. EPA has identified multiple existing facilities located within currently recognized reservation areas and not on excluded Indian country lands. These facilities will be subject to the Oklahoma MSW landfill plan we are proposing to approve. Any newly constructed municipal solid waste landfill in these same areas would be subject to the MSW landfill NSPS, not the MSW landfill plan implementing the MSW landfill EG requirements.

IV. Proposed Action

The EPA is proposing to approve the Oklahoma MSW landfill plan submitted by ODEQ in accordance with the requirements of section 111(d) of the CAA and to amend 40 CFR part 62, subpart E, to codify EPA's approval. The EPA is proposing to find that the Oklahoma MSW landfill plan is at least as protective as the Federal requirements provided under the MSW landfills EG, codified at 40 CFR part 60, subpart Cf. Once approved by the EPA, the Oklahoma MSW landfills plan will become federally enforceable.

V. Environmental Justice Considerations

Information on Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994), Executive Order 14094 (Revitalizing Our Nation's Commitment

to Environmental Justice for All, 88 FR 25251, April 26, 2023), and how EPA defines environmental justice can be found in the section titled "Statutory and Executive Order Reviews" in this proposed rule.⁵ EPA is providing additional analysis of environmental justice associated with this action. The results of this analysis are being provided for informational and transparency purposes, not as a basis of our proposed action.

EPA conducted screening analyses using EJSCREEN, an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining various environmental and demographic indicators.⁶ The EJSCREEN tool presents these indicators at a Census block group (CBG) level or a larger user-specified "buffer" area that covers multiple CBGs.⁷ An individual CBG is a cluster of contiguous blocks within the same census tract and generally contains between 600 and 3,000 people. EJSCREEN is not a tool for performing in-depth risk analysis, but is instead a screening tool that provides an initial representation of indicators related to environmental justice and is subject to uncertainty in some underlying data (e.g., some environmental indicators are based on monitoring data which are not uniformly available; others are based on self-reported data).⁸ To help mitigate this uncertainty, we have summarized EJSCREEN data within larger "buffer" areas covering multiple block groups and representing the average resident within the buffer areas surrounding the MSW landfills. We present EJSCREEN environmental indicators to help screen for locations where residents may experience a higher overall pollution burden than would be expected for a block group with the same total population. These indicators of overall pollution burden include estimates of ambient particulate matter (PM_{2.5}) and ozone concentration, a score for traffic proximity and volume, percentage of pre-1960 housing units (lead paint

² In *ODEQ v. EPA*, the D.C. Circuit held that under the CAA, a state has the authority to implement a SIP in non-reservation areas of Indian country in the state, where there has been no demonstration of Tribal jurisdiction. Under the D.C. Circuit's decision, the CAA does not provide authority to states to implement SIPs in Indian reservations. *ODEQ* did not, however, substantively address the separate authority in Indian country provided specifically to Oklahoma under SAFETEA. That separate authority was not invoked until the State submitted its request under SAFETEA, and was not approved until EPA's decision, described in this section, on October 1, 2020.

³ In accordance with Executive Order 13990, EPA is currently reviewing our October 1, 2020, SAFETEA approval. On December 22, 2021, EPA proposed to withdraw and reconsider the October 1, 2020, SAFETEA approval. See <https://www.epa.gov/ok/proposed-withdrawal-and-reconsideration-and-supporting-information>. EPA expects to have further discussions with Tribal governments and State of Oklahoma as part of this reconsideration. EPA also notes that the October 1, 2020, approval is the subject of a pending challenge in Federal court. *Pawnee Nation of Oklahoma v. Regan*, No. 20-9635 (10th Cir.). Pending completion of EPA's review, EPA is proceeding with this proposed action in accordance with the October 1, 2020, approval. EPA may make further changes to the approval of Oklahoma's plan to reflect the outcome of the proposed withdrawal and reconsideration of the October 1, 2020 SAFETEA approval. To the extent any change occurs in the scope of Oklahoma's CAA 111(d)/129 authority in Indian country before the finalization of this proposed rule, such a change may affect the scope of the EPA's final action on the proposed rule.

⁴ EPA's prior approvals relating to Oklahoma's CAA section 111(d)/129 plans did not apply in

areas of Indian country located in the state. See, e.g., 70 FR 57764 (October 4, 2005). Such prior expressed limitations are superseded by the EPA's approval of Oklahoma's SAFETEA request.

⁵ See <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

⁶ The EJSCREEN tool is available at <https://www.epa.gov/ejscreen>.

⁷ See <https://www.census.gov/programs-surveys/geography/about/glossary.html>.

⁸ In addition, EJSCREEN relies on the five-year block group estimates from the U.S. Census American Community Survey. The advantage of using five-year over single-year estimates is increased statistical reliability of the data (i.e., lower sampling error), particularly for small geographic areas and population groups. For more information, see https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs_general_handbook_2020.pdf.

indicator), and scores for proximity to Superfund sites, risk management plan (RMP) sites, and hazardous waste facilities.⁹ EJSCREEN also provides information on demographic indicators, including percent low-income, communities of color, linguistic isolation, and less than high school

education. The EPA prepared EJSCREEN reports covering buffer areas of approximately 3-mile radii around the existing MSW landfills in Oklahoma. Table 1 presents a summary of results from the EPA's screening-level analysis for the areas surrounding each MSW landfill compared to the U.S. as

a whole, where the landfill was located in an area where one or more of the EJ indices were greater than the 80th percentiles (the full, detailed EJSCREEN reports are provided in the docket for this rulemaking).

TABLE 1—EJSCREEN ANALYSIS SUMMARY FOR EXISTING OKLAHOMA MSW LANDFILLS WITH EJ INDICES ABOVE 80%ILE

Variables	Values for buffer areas (radius) for each MSW landfill and the U.S. (percentile within U.S. where indicated)							
	Enid City Landfill (Garfield, 3 miles)	Great Plains (Pocasset) Landfill (Grady, 3 miles)	Ponca City Landfill (Kay, 3 miles)	Newcastle Landfill (McClain, 3 miles)	Muskogee Community Landfill (Muskogee, 3 miles)	Osage Landfill (Osage, 3 miles)	Quarry Landfill (Waste Management of OK) (Tulsa, 3 miles)	U.S.
<i>Pollution Burden Indicators</i>								
Particulate matter (PM _{2.5}), annual average	8.97 µg/m ³ (74th %ile)	9.01 µg/m ³ (75th %ile)	9.19 µg/m ³ (78th %ile)	9.81 µg/m ³ (86th %ile)	8.88 µg/m ³ (71st %ile)	8.69 µg/m ³ (66th %ile)	9.38 µg/m ³ (81st %ile)	8.45 µg/m ³ (—)
Ozone, summer seasonal average of daily 8-hour max	58.9 ppb (42nd %ile)	59.2 ppb (46th %ile)	57.2 ppb (33rd %ile)	60.8 ppb (52nd %ile)	53.7 ppb (15th %ile)	59.1 ppb (43rd %ile)	59.4 ppb (44th %ile)	61.8 ppb (—)
Traffic proximity (daily traffic count/distance to road)	180,000 (23rd %ile)	57,000 (13th %ile)	45,000 (11th %ile)	250,000 (28th %ile)	200,000 (24th %ile)	180,000 (24th %ile)	680,000 (46th %ile)	1,700,000 (—)
Lead paint (percentage pre-1960 housing)	0.52% (75th %ile)	0.14% (41st %ile)	0.43% (69th %ile)	0.045% (25th %ile)	0.30% (58th %ile)	0.66% (84th %ile)	0.074% (31st %ile)	0.30% (—)
Superfund proximity score*	0.00 (0%ile)	0.00 (0%ile)	0.00 (0%ile)	0.00 (0%ile)	0.099 (59th %ile)	0.99 (91st %ile)	0.00 (0%ile)	0.39 (—)
RMP proximity score *	1.20 (85th %ile)	0.22 (46th %ile)	1.30 (86th %ile)	0.28 (50th %ile)	0.16 (40th %ile)	0.95 (79th %ile)	1.60 (90th %ile)	0.57 (—)
Hazardous waste proximity score *	0.00 (0%ile)	0.13 (20th %ile)	0.36 (29th %ile)	0.27 (26th %ile)	0.15 (21st %ile)	1.00 (45th %ile)	4.60 (77th %ile)	3.5 (—)
<i>Demographic Indicators</i>								
People of color population	39% (57th %ile)	15% (29th %ile)	35% (53rd %ile)	23% (40th %ile)	53% (68th %ile)	30% (48th %ile)	24% (42nd %ile)	40% (—)
Low-income population	49% (80th %ile)	23% (43rd %ile)	47% (78th %ile)	20% (37th %ile)	55% (85th %ile)	46% (77th %ile)	32% (58th %ile)	30% (—)
Linguistically isolated population	2% (65th %ile)	1% (57th %ile)	1% (58th %ile)	0% (0%ile)	2% (64th %ile)	1% (58th %ile)	2% (62nd %ile)	5% (—)
Population with less than high school education	18% (79th %ile)	7% (48th %ile)	13% (69th %ile)	9% (55th %ile)	15% (72nd %ile)	11% (63rd %ile)	9% (53rd %ile)	11% (—)
Population under 5 years of age	7% (73rd %ile)	4% (38th %ile)	4% (46th %ile)	7% (69th %ile)	8% (75th %ile)	8% (78th %ile)	5% (50th %ile)	5% (—)
Population over 64 years of age	10% (25th %ile)	31% (89th %ile)	15% (46th %ile)	12% (32nd %ile)	17% (53rd %ile)	15% (45th %ile)	29% (86th %ile)	18% (—)

* The traffic proximity and volume indicator is a score calculated by daily traffic count divided by distance in meters to the road. The Superfund proximity, RMP proximity, and hazardous waste proximity indicators are all scores calculated by site or facility counts divided by distance in kilometers.

EPA proposes to approve Oklahoma's MSW Landfills Plan, received on April 30, 2024, in accordance with section 111(d) of the CAA. The Oklahoma MSW Landfills Plan incorporates Federal requirements for MSW landfills, as specified in the MSW landfills EG at 40 CFR part 60, subpart Cf, which are also implemented under the MSW Landfills Federal Plan at 40 CFR part 62, subpart

OOO. The MSW Landfills Federal Plan was implemented by EPA in Oklahoma as Oklahoma did not have an approved MSW landfills plan addressing applicable EG requirements. These EG requirements implemented under the MSW Landfills Federal Plan and now incorporated by Oklahoma in its MSW landfills plan is designed to result in significant emissions reductions for

MSW landfills, as described in the **Federal Registers** for the MSW landfill rules (80 FR 52100; 81 FR 59276). Landfill gas is a natural byproduct of the decomposition of organic material in landfills and is composed of roughly 50% methane, 50% carbon dioxide (CO₂), and less than 1% non-methane organic compounds (NMOC) by volume, which include volatile organic

⁹ For additional information on environmental indicators and proximity scores in EJSCREEN, see "EJSCREEN Environmental Justice Mapping and

Screening Tool: EJSCREEN Technical Documentation," Chapter 3 and Appendix C (September 2019) at https://www.epa.gov/sites/default/files/2021-04/documents/ejscreen_technical_document.pdf.

compounds (VOC) and various organic hazardous air pollutants (HAP).¹⁰ VOC emissions are precursors to both fine particulate matter (PM_{2.5}) and ozone formation; exposure to PM_{2.5} and ozone is associated with significant public health effects, including (1) cardiovascular morbidity such as heart attacks, (2) respiratory morbidity such as asthma attacks, acute bronchitis, (3) hospital admissions and emergency room visits, and (4) premature mortality.¹¹ Hazardous air pollutants may cause cancer or other serious health effects, such as reproductive effects or birth defects.¹² In addition, methane is a potent greenhouse gas with a global warming potential 28–36 times greater than CO₂. Therefore, we believe that these requirements for existing MSW landfills and resulting emissions reductions have climate benefits and have contributed to reduced environmental and health impacts on all populations impacted by emissions from these sources in Oklahoma, including communities with environmental justice concerns, and will continue to do so under Federal oversight. This proposed rule is not anticipated to have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns because it is not anticipated to result in or contribute to emissions increases in Oklahoma. If finalized as proposed, EPA's approval of the Oklahoma MSW Landfills Plan will make the Plan and the corresponding MSW landfills EG requirements incorporated into the Plan federally enforceable by EPA as of the effective date of the final rulemaking.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a CAA section 111(d) submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and Cf; and 40 CFR part 62, subpart A. Thus, in reviewing CAA section 111(d) State plan submissions, the EPA's role is to approve State plans that meet the criteria of the CAA and implementing regulations. Accordingly, this action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those

imposed by State law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This proposed approval of revisions to the Oklahoma 111(d) State plan in accordance with section 111(d) of the CAA as discussed more fully elsewhere in this document will apply, if finalized as proposed, to certain areas of Indian country as discussed in the preamble, and therefore has Tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). However, this action will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. This action will not impose substantial direct compliance costs on federally recognized Tribal governments because no actions will be required of Tribal governments. This action will also not preempt Tribal law as no Oklahoma tribe implements a regulatory program under the CAA, and thus does not have applicable or related Tribal laws. Consistent with the EPA

Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA has engaged with Tribal governments that may be affected by this action and provided information about this action.

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on communities with environmental justice (EJ) concerns to the greatest extent practicable and permitted by law. Executive Order 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251, April 26, 2023) builds on and supplements E.O. 12898 and defines EJ as, among other things, “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, or Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment.”

The air agency did not evaluate EJ considerations as part of its submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA performed an EJ analysis, as is described in the section titled, “Environmental Justice Considerations.” The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898/14096 of achieving EJ for communities with EJ concerns.

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

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

Dated: December 9, 2024.

Earthea Nance,

Regional Administrator, Region 6.

[FR Doc. 2024–29454 Filed 12–17–24; 8:45 am]

BILLING CODE 6560–50–P

¹⁰ See 80 FR 52099, August 27, 2015.

¹¹ *Id.*

¹² See <https://www.epa.gov/air-quality-management-process/managing-air-quality-human-health-environmental-and-economic#what>.

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Consultation with State, Local, and Tribal Governments in Regulatory Policymaking; Request for Comments; Public Listening Sessions

AGENCY: Administrative Conference of the United States (ACUS).

ACTION: Notice; request for comments; public listening sessions.

SUMMARY: The Office of the Chair of ACUS is requesting public input on Federal agency processes for consulting with State, local, and Tribal governments when agencies engage in regulatory policymaking. ACUS is accepting written comments and will hold two virtual public listening sessions. Responses to this request may inform an ongoing ACUS project, *Consultation with State, Local, and Tribal Governments in Regulatory Policymaking*, which, if warranted, may recommend best practices for agencies to use.

DATES: Written comments must be received no later than 10 a.m. (ET) January 17, 2025.

Two virtual public listening sessions will be held on Wednesday, January 8, 2025 (3 p.m.–5 p.m. ET), and Wednesday, January 15, 2025 (3 p.m.–5 p.m. ET).

ADDRESSES: You may submit written comments by email to info@acus.gov (with “Consultation with State, Local, and Tribal Governments in Regulatory Policymaking” in the subject line of the message), or by U.S. Mail addressed to Consultation with State, Local, and Tribal Governments in Regulatory Policymaking, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036. ACUS will ordinarily post comments on the project web page (<https://www.acus.gov/projects/consultation-state-local-and-tribal-governments-regulatory>).

policymaking) as they are received. Commenters should not include information, such as personal information or confidential business information, that they do not wish to appear on the ACUS website. For the full ACUS public comment policy, please visit <https://www.acus.gov/policy/public-comment-policy>.

In addition to receiving written comments, ACUS plans to hold two virtual public listening sessions, addressing the themes specified, on the following dates:

Listening Session 1—Wednesday, January 8, 2025 (3 p.m.–5 p.m. ET). This listening session will focus on issues pertaining to consultation with State and local governments.

Listening Session 2—Wednesday, January 15, 2025 (3 p.m.–5 p.m. ET). This listening session will focus on issues pertaining to consultation with tribal governments.

Registration is required for each virtual public listening session. To register, please send an email to info@acus.gov by January 2, 2025 (with “Consultation with State, Local, and Tribal Governments in Regulatory Policymaking” in the subject line of the message). In the email, please: (1) provide your name and organization, if any; (2) indicate which listening session(s) you would like to attend; and (3) indicate whether you would like to speak during the listening session(s). Online and dial-in information for the listening sessions will be shared with registered participants before each session.

FOR FURTHER INFORMATION CONTACT:

Becaja Caldwell, Attorney Advisor, Administrative Conference of the United States, 1120 20th Street NW, Suite 706 South, Washington, DC 20036; Telephone (202) 480–2080; email bcaldwell@acus.gov.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about

the Conference and its activities, see www.acus.gov.

Consultation With State, Local, and Tribal Governments in Regulatory Policymaking

Consultation requirements represent an important way through which Congress and presidents have defined, structured, and institutionalized the Federal Government’s relationship with State and local governments and its unique nation-to-nation relationship with Tribal governments. The Unfunded Mandates Reform Act requires agencies to develop processes by which representatives of State, local, and tribal governments can “provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.”¹ Executive Order (E.O.) 13132, *Federalism*, requires agencies to consult with State and local government officials when “formulating and implementing policies that have federalism implications.”² E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, similarly requires agencies to consult with Tribal government officials when “formulating and implementing policies with Tribal implications.”³

The President and Office of Management and Budget have periodically issued additional directives and guidance regarding consultation with State, local, and Tribal governments. Recent directives include President Biden’s Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships⁴ and Memorandum on Uniform Standards for Tribal Consultation.⁵

¹ 2 U.S.C. 1534(a).

² 64 FR 43255 (Aug. 4, 1999). “‘Policies that have federalism implications’ refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” *Id.*

³ 65 FR 67249 (Nov. 9, 2000). “‘Policies that have tribal implications’ refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.*

⁴ 86 FR 7491 (Jan. 29, 2021).

⁵ 87 FR 74479 (Nov. 30, 2022).

ACUS has also emphasized the importance of effective consultation with State, local, and Tribal officials, recommending, for example, that agencies adopt best practices for consulting with State and local governments in cases of potential preemption of State law;⁶ consider how State, local, and Tribal governments will be involved in the retrospective review of agency rules;⁷ and codify regulations describing how they obtain feedback from State, local, and Tribal governments.⁸

Agencies have adopted a variety of approaches to consulting with State, local, and Tribal governments, and there is still more that can be learned from a comprehensive study of agency consultation practices. To that end, ACUS is undertaking a project to examine when and how agencies consult with State, local, and Tribal officials on regulatory policymaking. Among other topics, the project will address agency policies and procedures for consulting with State, local, and Tribal governments; agencies' approaches to identifying and engaging with appropriate State, local, and Tribal officials; methods for utilizing feedback from State, local, and Tribal governments in agency decision making; and common issues and challenges that agencies face in developing and implementing accountable processes for consultation.

Specific Topics for Public Comment

ACUS welcomes views, information, and data on all aspects of strategies that agencies are using or might use to consult with State, local, and/or Tribal governments when they engage in regulatory policymaking. ACUS also seeks specific feedback on the following questions related to agencies' consultation efforts:

1. What has been your experience regarding consultations with a Federal agency engaging in regulatory policymaking? For example, if you are (or were) a State, local, or Tribal government official, was any portion of the process especially easy or particularly difficult? Do you have specific suggestions for increasing the effectiveness of consultations in regulatory policymaking?

2. If you have been involved in a consultation, how often are (or were) you contacted by Federal agencies to consult on a particular regulatory policy? How often do (or did) you contact Federal agencies to request a consultation on a given regulatory policy? What was your experience with requesting a consultation? What tasks do (or did) you undertake as part of the consultation effort? At what stage in the regulatory policymaking process were you consulted by a Federal agency? In your experience, was that consultation timed too early, appropriately, or too late?

3. If you have been involved in a consultation, how did you feel your feedback during the consultation process was used by Federal agencies? Were you satisfied with how your input was used? Why or why not? Do you recall whether the Federal agency explained to you how they incorporated your feedback into the regulatory policymaking process? Do you have specific suggestions for incorporating feedback into the regulatory policymaking process?

4. In your experience, are there certain types of information that may be useful to share during consultation but which you may not want to disclose, for example confidential or culturally sensitive information? If so, do you have any specific recommendations for how Federal Government agencies can best manage this information as it considers a regulatory policy that may have federalism or Tribal implications?

5. In your experience, how easy or difficult was it to locate the appropriate agency official with responsibility for State, local, or Tribal government matters when seeking to or engaging in consultation efforts? How, if at all, did this impact consultation efforts? Do you have any specific recommendations to facilitate communication among Federal, State, local, and Tribal government officials for consultations on regulatory policymaking?

6. If you are familiar with agency policies on State, local, or Tribal government consultation, what are your thoughts on such policies?

7. In your experience, what makes a consultation successful? What makes a consultation unsuccessful? Do you have any specific recommendations on reducing barriers to effective and meaningful consultation among and between Federal, State, local, and Tribal government officials?

8. In your opinion, what role can State, local, and government officials play to facilitate consultation, and how should Federal Government agencies encourage such actions, if at all?

Dated: December 12, 2024.

Shawne C. McGibbon,

General Counsel.

[FR Doc. 2024–29931 Filed 12–17–24; 8:45 am]

BILLING CODE 6110–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual briefing.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a virtual briefing via *ZoomGov* on Wednesday, January 15, 2025, for the purpose of hearing testimony on civil rights implications of immigrant detention centers in the state.

DATES: The virtual briefing will take place on:

- PANEL II: Wednesday, January 15, 2025, from 1 p.m.–3 p.m. MT.

ADDRESSES: Zoom Webinar Link to Join: https://www.zoomgov.com/webinar/register/WN_om0T0CDWRNm1MKY6rV8doA.

FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO), at bpeery@usccr.gov or (202) 701–1376.

SUPPLEMENTARY INFORMATION:

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

⁶ Admin. Conf. of the U.S., Recommendation 2010–1, *Agency Procedures for Considering Preemption of State Law*, 76 FR 81 (Jan. 3, 2011).

⁷ Admin. Conf. of the U.S., Recommendation 2014–5, *Retrospective Review of Agency Rules*, 79 FR 75114 (Dec. 17, 2014).

⁸ Admin. Conf. of the U.S., Recommendation 2020–1, *Rules on Rulemakings*, 86 FR 6613 (Jan. 22, 2021).

atrevino@usccr.gov at least ten (10) days prior to the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Brooke Peery (DFO) at bpeery@usccr.gov.

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

Agenda

- I. Welcoming Opening Remarks
- II. Panelist Remarks
- III. Committee Q&A
- IV. Public Comment
- V. Adjournment

Dated: December 13, 2024.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2024-29987 Filed 12-17-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Business Trends and Outlook Survey (BTOS)

AGENCY: Census Bureau, Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act (PRA) of 1995, invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment on the proposed revisions to the BTOS prior to the submission of the

information collection request (ICR) to OMB for approval.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 18, 2025.

ADDRESSES: Interested persons are invited to submit written comments by email to Thomas.J.Smith@census.gov. Please reference BTOS in the subject line of your comments. You may also submit comments, identified by Docket Number USCB-2024-0034, to the Federal e-Rulemaking Portal: <http://www.regulations.gov>. All comments received are part of the public record. No comments will be posted to <http://www.regulations.gov> for public viewing until after the comment period has closed. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. You may submit attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or specific questions related to collection activities should be directed to Catherine Buffington, Chief, Economic Indicator Division, 301-763-1838, and catherine.d.buffington@census.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau plans to request a 3-year extension with revisions from the Office of Management and Budget (OMB) for the Business Trends and Outlook Survey (BTOS). The BTOS has produced data products on a bi-weekly basis since October 2022. This continuous near real time data collection and publication provides a baseline of the U.S. economy and measures change as a result of current and future economic shocks.

BTOS uses ongoing data collection to produce high frequency, timely, and granular information about current economic conditions and trends. BTOS is the only biweekly business tendency survey produced by the federal statistical system, providing unique and detailed data during times of economic or other emergencies. The BTOS target population is all nonfarm employer businesses with receipts of \$1,000 or more in the United States, the District of Columbia, and Puerto Rico. The current sample consists of approximately 1.2 million businesses

divided into six panels. A new sample collection is conducted each year. Data collection occurs every two weeks, and businesses in each panel are asked to report once every 12 weeks for one year. Data are released every 2 weeks and are available by 2017 North American Industry Classification System (NAICS) sector, state, the 25 most populous Metropolitan Statistical Areas and employment size. Data are also available by subsector (3-digit NAICS) and sector by employment size.

Data from BTOS are currently used to provide timely data to understand the economic conditions being experienced by businesses; BTOS provides near real time data on key items such as revenue, paid employees, hours worked as well as inventories. BTOS also provides high level information on the changing share of businesses facing difficulties stemming from supply chain issues, interest rate changes, and/or weather-related events. Previously, there had been few data sources available to policymakers, media outlets, and academia that delivered near real time insights into economic trends and outlooks. BTOS data has consistently been used by the Small Business Administration to evaluate the impact of regulatory changes.

The BTOS collects the following high-level topics for the previous two weeks, and the items in bold have 6-month future projections:

- Overall performance
- Revenue
- Employment
- Hours worked
- Artificial Intelligence
- Operating status
- Inventories
- Delivery time
- Demand
- Output prices
- Input prices
- Interest Rates
- Loss—Weather Event

For the first year of BTOS, the content remained unchanged at 26 questions. For the second sample year, the BTOS moved to a set of core questions and supplemental content. Supplemental content is designed to provide urgently needed data on an emerging or current issue. For the first collection of supplemental content, the topic was on business use of artificial intelligence. Due to vast demand to continue this data series, the Census Bureau plans to request a revision to include the artificial intelligence supplement again for the fourth sample year of BTOS.

BTOS data is collected in near real time and disseminated as experimental products. BTOS data is experimental

with the goal of meeting Census Bureau quality standards for regularly occurring, non-experimental statistics.

II. Method of Collection

The first time each biweekly panel is in sample, businesses are contacted either by email or letter with an invitation to respond to the survey. For each biweekly survey panel, initial letters are sent on the Friday before the 2-week period while initial emails are sent on the first Monday of the 2-week period. Starting with the second time each biweekly panel is in sample, businesses are contacted only by email with an invitation to respond to the survey. Both letter and email invitations describe the purpose of the survey collection, include the link to the online reporting tool, and contain the access code.

III. Data

OMB Control Number: 0607–1022.
Form Number(s): None.

Type of Review: Regular submission, Request for a Revision of a Currently Approved Collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 795,000 responses collected annually.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 132,500.

Estimated Total Annual Cost to Public: \$0 (This is not the cost of respondents' time, but the indirect costs respondents may incur for such things as purchases of specialized software or hardware needed to report, or expenditures for accounting or records maintenance services required specifically by the collection.)

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Sections 131 and 182.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include, or summarize, each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Departmental PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–29834 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; 2025 National Household Food Acquisition and Purchase Survey (FoodAPS) Pilot Test

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. This notice allows for 30 days for public comments.

Agency: U.S. Census Bureau, Commerce.

Title: 2025 National Household Food Acquisition and Purchase Survey (FoodAPS) Pilot Test.

Form Number(s): None. All information will be collected electronically.

Type of Request: Regular submission.
Number of Respondents: 5,000.
Average Hours per Response: 49 minutes.

Burden Hours: 4,092.

Needs and Uses: The National Household Food Acquisition and Purchase Survey (FoodAPS) fills a

critical data gap and supports research that informs policymaking on key national priorities, including health and obesity, hunger, and nutrition assistance policy. The survey captures unique and comprehensive data about household food purchases and acquisitions, along with factors that influence household food choices.

The Census Bureau plans to request Office of Management and Budget (OMB) approval to conduct the 2025 FoodAPS Pilot Test is to examine and gain knowledge about all areas of the survey life cycle for this study, with the goal of fielding a full scale, nationally representative FoodAPS survey starting in CY2027. Additionally, the 2025 FoodAPS Pilot Test will test the feasibility of using model-based estimates to identify populations of interests. Previous iterations used a mailing-based screener. Another purpose is to determine whether administering the 2025 FoodAPS Pilot Test via self-response only can achieve the desired response rate. Previous versions of the FoodAPS used field representatives to solicit respondent participation and collect data.

The target populations for the 2025 FoodAPS Pilot Test are Supplemental Nutrition Assistance Program (SNAP) participants; Women, Infants, and Children (WIC) recipients; and low-income households. Respondent materials and survey instruments for the 2025 FoodAPS Pilot Test will be available in English and Spanish.

Affected Public: Individuals or households.

Frequency: This is a pilot survey in preparation for a full survey in CY2027.

Respondent's Obligation: Voluntary.

Legal Authority: The National Household Food Study is authorized under Title 7, Section 3171 and 2026 (a) (1) of the United States Code. The Census Bureau, conducting this study for the United States Department of Agriculture under 13 U.S.C. 8(b), is required by law to keep your information confidential and can use your responses for statistical purposes only (Title 13, U.S. Code, Section 9). Responding to the survey is voluntary. You may stop participating at any time, and there are no penalties for nonparticipation. Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data. For more information on the Census Bureau's Data Protection and Privacy principles, please see our data protection website at <https://www.census.gov/privacy/>.

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the collection or the OMB Control Number 0607–0971.

Sheleen Dumas,

Departmental PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–29839 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–6–2024]

Proposed Foreign-Trade Zone—Iberia Parish, Louisiana Under Alternative Site Framework; Invitation for Public Comment on Response to Preliminary Recommendation

Pursuant to Section 400.33(e)(2) of the Foreign-Trade Zones (FTZ) Board’s regulations (15 CFR part 400), the FTZ Board is inviting public comment on the response to the preliminary recommendation pertaining to the application of the Port of Iberia District to establish a foreign-trade zone in Iberia Parish, Louisiana, under the alternative site framework.

Public comment is invited through January 17, 2025. Rebuttal comments in response to material submitted during the foregoing period may be submitted through February 3, 2025. Submissions shall be addressed to the FTZ Board’s Executive Secretary and sent to: ftz@trade.gov.

A copy of the response will be available for public inspection in the “Online FTZ Information Section” section of the FTZ Board’s website,

which is accessible via www.trade.gov/ftz.

For further information, contact Camille Evans at Camille.Evans@trade.gov.

Dated: December 13, 2025.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–30028 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–218–2024]

Foreign-Trade Zone 240; Application for Subzone; Premium Guard, Inc.; Weirton, West Virginia

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the West Virginia Economic Development Authority, grantee of FTZ 240, requesting subzone status for the facility of Premium Guard, Inc., located in Weirton, West Virginia. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on December 11, 2024.

The proposed subzone (28.6 acres) is located at 491 Park Drive, Weirton, West Virginia. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 240.

In accordance with the FTZ Board’s regulations, Kolade Osho of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board’s Executive Secretary and sent to: ftz@trade.gov. The closing period for their receipt is January 27, 2025. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 11, 2025.

A copy of the application will be available for public inspection in the

“Online FTZ Information Section” section of the FTZ Board’s website, which is accessible via www.trade.gov/ftz.

For further information, contact Kolade Osho at Kolade.Osho@trade.gov.

Dated: December 12, 2024.

Camille R. Evans,

Acting Executive Secretary.

[FR Doc. 2024–29909 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders with November anniversary dates. In accordance with Commerce’s regulations, we are initiating those administrative reviews.

DATES: Applicable December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Brenda E. Brown, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders with November anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Respondent Selection

In the event that Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based either on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR) or questionnaires in which we request the quantity and value (Q&V) of sales, shipments, or exports during the POR. Where Commerce selects respondents based on CBP data, we intend to place the CBP data on the record within five days of publication of the initiation notice. Where Commerce selects respondents based on Q&V data, Commerce intends to place the Q&V questionnaire on the record of the review within five days of publication of the initiation notice. In either case, we intend to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data (and/or Q&V data (where applicable)) and respondent selection should be submitted within seven days after the placement of the CBP data/submission of the Q&V data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

In the event that Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether particular companies should be “collapsed” (e.g., treated as a single entity for purposes of calculating AD rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this AD proceeding (e.g., investigation, administrative review, new shipper review, or changed circumstances review). For any

company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Q&V Questionnaire for purposes of respondent selection, in general, each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Notice of No Sales

With respect to AD administrative reviews, we intend to rescind the review where there are no suspended entries for a company or entity under review and/or where there are no suspended entries under the company-specific case number for that company or entity. Where there may be suspended entries, if a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it may notify Commerce of this fact within 30 days of publication of this notice in the **Federal Register** for Commerce to consider how to treat suspended entries under that producer’s or exporter’s company-specific case number.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of a particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.¹ Section 773(e) of the Act states that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.” When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single AD deposit rate. It is Commerce’s policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

¹ See Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below. In addition, all firms that wish to qualify for separate rate status in the administrative reviews of AD orders in which a Q&V Questionnaire is issued must complete, as appropriate, either a Separate Rate Application or Certification, and respond to the Q&V Questionnaire.

For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at <https://access.trade.gov/Resources/nme/nme-sep-rate.html> on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase

and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding² should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,³ should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on Commerce's website at <https://access.trade.gov/Resources/nme/nme-sep-rate.html> on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Exporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for individual examination. Furthermore, exporters and producers who submit a Separate Rate Application

² Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (e.g., an ongoing administrative review, new shipper review, etc.) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

³ Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

or Certification and subsequently are selected as mandatory respondents will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Certification Eligibility

Commerce may establish a certification process for companies whose exports to the United States could contain both subject and non-subject merchandise. Companies under review that were deemed to not be eligible to participate in the certification program of that proceeding may submit a Certification Eligibility Application to establish that they maintain the necessary systems to track their sales to the United States of subject and non-subject goods.

All firms listed below that are not currently eligible to certify but wish to establish certification eligibility are required to submit a Certification Eligibility Application. The Certification Eligibility Application will be available on Commerce's website at <https://access.trade.gov/Resources/Certification-Eligibility-Application.pdf>. Certification Eligibility Applications must be filed according to Commerce's regulations and are due to Commerce no later than 30 calendar days after the publication of the **Federal Register** notice.

Exporters and producers that are not currently eligible to certify, who submit a Certification Eligibility Application, and are subsequently selected as mandatory respondents must respond to all parts of the questionnaire as mandatory respondents for Commerce to consider their Certification Eligibility Application.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than November 30, 2025.

	Period to be reviewed
AD Proceedings	
ARGENTINA: Oil Country Tubular Goods, A-357-824	11/1/23-10/31/24
Siderca S.A.I.C.	
Tenaris Global Services S.A.	
Tubos de Acero de Mexico S.A.	
AUSTRIA: Strontium Chromate, A-433-813	11/1/23-10/31/24
Habich GmbH.	
BRAZIL: Certain Aluminum Foil, A-351-856	11/1/23-10/31/24
Companhia Brasileira de Alumínio.	
CBA Itapissuma Ltda.	
FRANCE: Strontium Chromate, A-427-830	11/1/23-10/31/24
Societe Nouvelle des Couleurs Zinciques.	
GERMANY: Thermal Paper, A-428-850	11/1/23-10/31/24
Akon Rulo Kagit Plastik Imalat IHR İTH. SAN. TİC. A.Ş.	
Amtress (M) Sdn. Bhd.	
Besto Sdn. Bhd.	
Convertidoras PCM, S.A. de C.V.	
Dor Etiket San VE Tic. Ltd.	
Engin Kagit Mamulleri San. Tic.	
Formas para Negocios, S.A. de C.V.	
Formularios de México S.A. de C.V.	
Kagit Mamulleri San. Tic. Ltd., Stl.	
Koehler Oberkirch GmbH.	
Koehler Paper SE; Koehler Kehl GmbH.	
Kooka Paper Manufacturing Sdn. Bhd.	
Matra Atlantic GmbH.	
Papeles y Conversiones de Mexico, S.A. de C.V.	
Sailing Paper (Malaysia) Sdn. Bhd.	
ShenZhen Sailing Paper Co., Ltd.	
Tele-Paper (M) Sdn. Bhd.	
Wellden (M) Sdn. Bhd.	
Wingle Industrial (Malaysia) Sdn. Bhd.	
INDIA: Paper File Folders, A-533-910	5/17/23-10/31/24
Navneet Education Limited.	
Kokuyo Riddhi Paper Products Private Limited.	
INDIA: Stainless Steel Flanges, A-533-977	10/1/23-9/30/24
Cetus Engineering Private Limited ⁴ .	
INDIA: Welded Stainless Pressure Pipe, A-533-867	11/1/23-10/31/24
Jindal Saw Limited.	
Prakash Steelage Ltd. of India; Seth Steelage Pvt. Ltd.	
Ratnamani Metals & Tubes Ltd.	
Suncity Metals & Tubes Private Ltd.	
MEXICO: Certain Circular Welded Non-Alloy Steel Pipe, A-201-805	11/1/23-10/31/24
Abastecedora y Perfiles y Tubos, S.A. de C.V.	
ArcelorMittal Tubular Products Monterrey, S.A. de C.V.	
Arceros El Aguila y Arco Metal, S.A. de C.V.	
Burner Systems International De Mexico, S.A. de C.V.	
Conduit, S.A. de C.V.	
Fabricaciones Industriales Tumex, S.A. de C.V.	
fischer Mexicana Stainless Steel Tubing S.A. de C.V.	
fischer Tubtech Mexicana, S.A de C.V.	
Forza Steel, S.A. de C.V.	
Galvak, S.A. de C.V.	
Impulsora Tlaxcalteca de Industrias, S.A. de C.V.	
Industrias Monterrey S.A. de C.V.	
La Metálica S.A. de C.V.	
Lamina y Placa Comercial, S.A. de C.V.	
Mach 1 Aero Servicios, S. de R.L. de C.V.	
Mach 1 Global Services, Inc.	
Maquilacero, S.A. de C.V.	
Metalsa S.A.	
Mueller Comercial de Mexico, S. de R.L. de C.V.	
Nacional de Acero, S.A de C.V.	
Nova Tube and Coil de Mexico, S. de R.L. de C.V.	
Perfiles y Herrajes LM, S.A. de C.V.	
Precitubo S.A de C.V.	
Productos Especializados de Acero, S.A. de C.V.	
Productos Laminados de Monterrey, S.A. de C.V.	
PYTCO, S.A. de C.V.	
Regiomontana de Perfiles y Tubos, S.A. de C.V.	
Servicios Swecomex, S.A. de C.V.	
Talleres Acerorey, S.A. de C.V.	
Ternium Mexico, S.A. de C.V.	

	Period to be reviewed
Tubac, S.A. de C.V. Tubacero S. R.L. de C.V. Tubería Laguna, S.A. de C.V. Tuberías Procarsa, S.A. de C.V. Tubesa, S.A. de C.V. Tubos Omega.	
MEXICO: Certain Freight Rail Couplers and Part Thereof, A-201-857	5/3/23-10/31/24
Amsted Rail Company, Inc.; ASF-K de Mexico, S. de R.L. de C.V. BNSF Railway. CAI Rail Inc.. Canadian National Railway Company. Canadian Pacific Kansas City Limited. Chicago Freight Car Leasing Company. CIT Rail (First Citizens Bank). CSX Transportation Corp. Freightcar America, Inc. GATX de Mexico. Mitsui de Mexico, S. de R.L. de C.V. Modern Rail Capital. National Steel Car, Ltd. Norfolk Southern Railway. Strato, Inc. The Greenbrier Companies, Inc. Trinity Rail Group LLC. TTX Company. Tubos Acero Mexico. Union Pacific Railroad. Union Tank Car Company. Wabtec Corporation. Wells Fargo Rail.	
MEXICO: Oil Country Tubular Goods, A-201-856	11/1/23-10/31/24
Siderca S.A.I.C. Tenaris Global Services, S.A. Tubos de Acero de Mexico, S.A. Vallourec Oil & Gas Mexico, S.A. de C.V.	
MEXICO: Steel Concrete Reinforcing Bar, A-201-844	11/1/23-10/31/24
Deacero S.A.P.I. de C.V.; I.N.G.E.T.E.K.N.O.S. Estructurales, S.A. de C.V. Grupo Acerero S.A. de C.V. Grupo Simec S.A.B. de C.V.; Aceros Especiales Simec Tlaxcala, S.A. de C.V.; Compania Siderurgica del Pacifico S.A. de C.V.; Fundiciones de Acero Estructurales, S.A. de C.V.; Grupo Chant, S.A.P.I. de C.V.; Operadora de Perfiles Sigosa, S.A. de C.V.; Orge S.A. de C.V.; Perfiles Comerciales Sigosa, S.A. de C.V.; RRLC S.A.P.I. De C.V.; Siderurgica del Occidente y Pacifico S.A. de C.V.; Siderurgicos Noroeste, S.A. de C.V.; Simec International, S.A. de C.V.; Simec International 6 S.A. de C.V.; Simec International 7, S.A. de C.V.; and Simec International 9 S.A. de C.V. Sidertul S.A. de C.V.	
OMAN: Certain Aluminum Foil, A-523-815	11/1/23-10/31/24
Oman Aluminium Rolling Company SPC.	
SPAIN: Thermal Paper, A-469-824	11/1/23-10/31/24
Torraspapel S.A.	
REPUBLIC OF KOREA: Certain Circular Welded Non-Alloy Steel Pipe, A-580-809	11/1/23-10/31/24
Aju Besteel. Bookook Steel. Chang Won Bending. Dae Ryung Corporation. Daiduck Piping Co. Ltd. Dongbu Steel Co., Ltd. Dong Yang Steel Pipe. EEW Korea Company. HiSteel Co., Ltd. Husteel Co., Ltd. Hyundai RB. Hyundai Steel Pipe Co., Ltd.; Hyundai Steel Company ⁵ . Kiduck Industries. Kumkang Kind Co., Ltd. Kumsoo Connecting Co., Ltd. Miju Steel Manufacturing. NEXTEEL Co., Ltd. Samkang M&T. SeAH FS. SeAH Steel Corporation. Steel Flower Co., Ltd. YCP Co., Ltd.	
REPUBLIC OF KOREA: Thermal Paper, A-580-911	11/1/23-10/31/24
Akon Rulo Kagit Plastik Imalat IHR ITH. SAN. TIC. A.S.	

	Period to be reviewed
Amtress (M) Sdn. Bhd. Besto Sdn. Bhd. Convertidoras PCM, S.A. de C.V. Dor Etiket San VE Tic. Ltd. Engin Kagir Mamulleri San. Tic. Formas para Negocios, S.A. de C.V. Formularios de México S.A. de C.V. Hansol Paper Company. Kagit Mamulleri San. Tic. Ltd., Stl. Kooka Paper Manufacturing Sdn. Bhd. Papeles y Conversiones de Mexico, S.A. de C.V. Sailing Paper (Malaysia) Sdn. Bhd. ShenZhen Sailing Paper Co., Ltd. Tele-Paper (M) Sdn. Bhd. Wellden (M) Sdn. Bhd. Wingle Industrial (Malaysia) Sdn. Bhd. REPUBLIC OF TÜRKİYE: Certain Aluminum Foil, A-489-844 Assan Aluminyum Sanayi ve Ticaret A.S., Ispak Esnek Ambalaj Sanayi A.S., and Kibar Dis Ticaret A.S. ASAS Alüminyum Sanayi ve Ticaret A.Ş. Panda Alüminyum A.Ş. THE PEOPLE'S REPUBLIC OF CHINA: Diamond Sawblades and Parts Thereof, A-570-900	11/1/23-10/31/24 11/1/23-10/31/24
ASHINE Diamond Tools Co., Ltd. Bosch Power Tools China Co Ltd. Bosun Tools Co., Ltd. Chengdu Huifeng New Material Technology Co., Ltd. Danyang City Ou Di Ma Tools Co., Ltd. Danyang Hantronic Import & Export Co., Ltd. Danyang Huachang Diamond Tool Manufacturing Co., Ltd. Danyang Like Tools Manufacturing Co., Ltd. Danyang NYCL Tools Manufacturing Co., Ltd. Danyang Realsharp Tools Co., Ltd. Danyang Tongyu Tools Co., Ltd. Danyang Tsunda Diamond Tools Co., Ltd. Danyang Weiwang Tools Manufacturing Co., Ltd. Diamond Tools Technology (Thailand) Co., Ltd. Fujian Quanzhou Aotu Precise Machine Co., Ltd. Guangdong Sun Rising Tools Co., Ltd. Guilin Tebon Superhard Material Co., Ltd. Hailian Saw Technology Co., Ltd. Hangzhou Deer King Industrial and Trading Co., Ltd. Hangzhou Greatstar Industrial Co., Ltd. Hangzhou Huike Import and Export. Hangzhou Kingburg Import & Export Co., Ltd. Hangzhou Xinweiye Tools Co., Ltd. Hebei XMF Tools Group Co., Ltd. Henan Huanghe Whirlwind International Co., Ltd. Hong Kong Hao Xin International Group Limited. Hubei Changjiang Precision Engineering Materials Technology Co., Ltd. Hubei Sheng Bai Rui Diamond Tools Co., Ltd. Husqvarna (Hebei) Co., Ltd. Huzhou Gu's Import & Export Co., Ltd. Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd. Jiangsu Fengtai Diamond Tools Co., Ltd. Jiangsu Huachang Diamond Tools Manufacturing Co., Ltd. Jiangsu Inter-China Group Corporation. Jiangsu Jinfeida Power Tools. Jiangsu Yaofeng Tools Co., Ltd. Jiangsu Youhe Tool Manufacturer Co., Ltd. MaxxTools (Suzhou) Corp., Ltd. Orient Gain International Limited. Pantos Logistics (HK) Company Limited. Protec Tools Co., Ltd. Pujiang Talent Diamond Tools Co., Ltd. Qingdao Hyosung Diamond Tools Co., Ltd. Qingdao Shinhan Diamond Industrial Co., Ltd. Qingyuan Shangtai Diamond Tools Co., Ltd. Quanzhou Sunny Superhard Tools Co., Ltd. Quanzhou Zhongzhi Diamond Tool Co., Ltd. Rizhao Hein Saw Co., Ltd. Saint-Gobain Abrasives (Shanghai) Co., Ltd. Shanghai Jingquan Industrial Trade Co., Ltd. Shanghai Lanshi Trading Co., Ltd. Shanghai Starcraft Tools Co. Ltd.	

	Period to be reviewed
Shanghai Vinon Tools Industrial Co. Sino Tools Co., Ltd. Suzhou Blade Tech Tool Co Ltd. Tangshan Metallurgical Saw Blade Co., Ltd. Weihai Xiangguang Mechanical Industrial Co., Ltd. Wuhan Baiyi Diamond Tools Co., Ltd. Wuhan Sadia Trading Co., Ltd. Wuhan Wanbang Laser Diamond Tools Co., Ltd. Wuhan ZhaoHua Technology Co., Ltd. Xiamen ZL Diamond Technology Co., Ltd. Zhejiang Shall Tools Co., Ltd. Zhejiang Wanli Tools Group Co., Ltd. Zhenjiang Luckyway Tools Co., Ltd. ZL Diamond Technology Co., Ltd. ZL Diamond Tools Co., Ltd. ZZW Precision Tool Supply. THE PEOPLE'S REPUBLIC OF CHINA: Monosodium Glutamate, A-570-992 Ajinoriki MSG (Malaysia) Sdn Bhd.	11/1/23-10/31/24
CVD Proceedings	
INDIA: Welded Stainless Pressure Pipe, C-533-868 Prakash Steelage Ltd. Seth Steelage Pvt. Ltd. Sun Mark Stainless Private Limited; Shah Foils Ltd.; Sunrise Stainless Private Limited.	1/1/23-12/31/23
REPUBLIC OF KOREA: Oil Country Tubular Goods, C-580-913 AJU Besteel Co., Ltd. ILJIN Steel Corporation. Hyundai Steel Pipe Co., Ltd. Kumkang Kind Co., Ltd. NEXTEEL Co., Ltd. SeAH Steel Corporation; SeAH Steel Holding Corporation ⁶ .	1/1/23-12/31/23
OMAN: Certain Aluminum Foil, C-523-816 Oman Aluminium Rolling Company LLC.	1/1/23-12/31/23
REPUBLIC OF TÜRKİYE: Certain Aluminum Foil, C-489-845 Assan Alüminyum Sanayi ve Ticaret A.Ş.; Ispak Esnek Ambalaj Sanayi A.Ş.; and Kibar Dis Ticaret A.Ş. ASAS Alüminyum Sanayi ve Ticaret A.Ş. Panda Alüminyum A.Ş.	1/1/23-12/31/23
REPUBLIC OF TÜRKİYE: Steel Concrete Reinforcing Bar; C-489-819 Colakoglu Metalurji A.Ş.; Colakoglu Dis Ticaret A.Ş. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.Ş. Kaptan Demir Celik Endustrisi ve Ticaret A.Ş.; Kaptan Metal Dis Ticaret ve Nakliyat A.Ş.	1/1/23-12/31/23
THE PEOPLE'S REPUBLIC OF CHINA: Chlorinated Isocyanurates, C-570-991 A.H.A International Co., Ltd. Anhui Hongze New Material Technology. Canaxy Asia Limited. Centurion Chemicals Co Ltd. Chemball (Hangzhou) Chemicals Co., Ltd. Dalian Trico Chemical Co Ltd. Eastar International Trading (Shanghai). Gigacloud Technology (Suzhou) Company. Hangzhou Keli Chemical Co., Ltd. Hebei Ferturea Trade Co., Ltd. Hebei Fuhui Water Treatment Co., Ltd. Hebei Haida Chemical Industry Co Ltd. Hebei Higwi Trade Co Ltd. Hebei Jiheng Chemical Co., Ltd. Henan QX Trade Co., Ltd. Henan Saifu Trading Co., Ltd. Henan Zerui New Material. Heze Huayi Chemical Co., Ltd. Huangshan Jinfeng Industrial Co., Ltd. Hydrotech Investment Corporation. Jinchang International Forwarding. Juancheng Kangtai Chemical Co., Ltd. Orient Express Container (Shanghai). Presafer Qingyuan Phosphor Chemical. Qingdao Best Chemical Company Limited. Qingdao Hot Chemicals Co., Ltd. Qingdao Huaxijin Industry and Trade. Qingdao Sinosalt Chemical Co., Ltd. RS Logistics Limited. Safety Shield (Qingdao) Technology. Shandong Jianbang New Material.	1/1/23-12/31/23

	Period to be reviewed
Shandong Lichen Chemical Co., Ltd. Shandong Orange Joy Co., Ltd. Shandong QC Industry Co., Ltd. Shandong Wolan Biologic Group Co. Shanghai JiuHan Trading Co Ltd. Tech-Power (Huangshan) Ltd.. Tianjin DSC International Trade Co. Ultrafast Chemical Logistics (Shanghai). Weifang Longshuo Chemical Co., Ltd. Yiwu Leixi Trading Company. Ynnovate Sanzheng (Yingkou).	
Suspension Agreements	
None.	

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether ADs have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant “gap” period of the order (*i.e.*, the period following the expiry of

provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce’s regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce’s regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of

factual information being submitted. Please review the *Final Rule*,⁷ available at <https://www.govinfo.gov/content/pkg/FR-2013-07-17/pdf/2013-17045.pdf>, prior to submitting factual information in this segment. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).⁸

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule*.⁹ Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by Commerce.¹⁰ In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual

⁷ See *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*); see also the frequently asked questions regarding the *Final Rule*, available at https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

⁸ See *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023).

⁹ See section 782(b) of the Act; see also *Final Rule*; and the frequently asked questions regarding the *Final Rule*, available at https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.

¹⁰ See 19 CFR 351.302.

⁴ This company was inadvertently omitted from the initiation notice that published on November 14, 2024 (89 FR 89955).

⁵ Commerce determined that Hyundai Steel Pipe Co., Ltd. is the successor-in-interest to Hyundai Steel Company. See also *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Certain Oil Country Tubular Goods from the Republic of Korea; Welded Line Pipe from the Republic of Korea; and Large Diameter Welded Pipe from the Republic of Korea: Notice of Final Results of Antidumping Duty Changed Circumstances Reviews*, 89 FR 89962 (November 14, 2024).

⁶ Commerce previously found SeAH Steel Holding Corporation to be a cross-owned affiliate of SeAH Steel Corporation. See *Oil Country Tubular Goods from the Republic of Korea and the Russian Federation: Countervailing Duty Orders*, 87 FR 70782 (November 21, 2022). Accordingly, we are initiating this review with respect to SeAH Steel Corporation and its cross-owned entity, SeAH Steel Holding Corporation, listed in this notice.

information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, standalone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule*, available at <https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>, prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: December 12, 2024.

Scot Fullerton,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–30029 Filed 12–17–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–943, C–570–944]

Oil Country Tubular Goods From the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from the Committee on Pipe and Tube Imports Subcommittee for OCTG (the CPTI OCTG Subcommittee) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC

(USW) (collectively, the requestors), the U.S. Department of Commerce (Commerce) is initiating a country-wide circumvention inquiry to determine whether imports of seamless oil country tubular goods (OCTG) from the People's Republic of China (China) which are completed in Thailand from steel billets produced in China are circumventing the antidumping (AD) and countervailing duty (CVD) orders on OCTG from China.

DATES: Applicable December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Barb Rawdon, AD/CVD Office of Policy, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0474.

SUPPLEMENTARY INFORMATION:

Background

On July 18, 2024, pursuant to section 781(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.226(i), the requestors¹ filed a circumvention inquiry request alleging that OCTG completed in Thailand using steel billets manufactured in China, is circumventing the AD and CVD orders on OCTG from China² and, accordingly, should be included within the scope of the *Orders*.³ On August 20, 2024, we extended the deadline to initiate this circumvention inquiry in accordance with 19 CFR 351.226(d)(1).⁴

On September 6, 2023, we issued a supplemental (deficiency) questionnaire to the requestors, directing them to re-submit their inquiry requests and provide additional information.⁵ In our request for information, we clarified that

we issued the request because we had found that the request to conduct the circumvention inquiry was insufficient for purposes of initiation, in accordance with 19 CFR 351.226(d)(1). Additionally, we clarified that the 30-day time period for Commerce to consider whether to initiate on the requestors' circumvention inquiry will begin with the requestors' response to Commerce's September 6, 2024, letter.⁶ On September 25, 2024, the requestors filed their response.⁷ On October 23, 2024, Commerce issued a second supplemental questionnaire.⁸ In our request for information, we clarified that we issued the request because we had found that the request to conduct the circumvention inquiry was insufficient for purposes of initiation, in accordance with 19 CFR 351.226(d)(1). Additionally, we clarified that the 30-day time period for Commerce to consider whether to initiate on the requestors' circumvention inquiry will begin with the requestors' response to Commerce's October 23, 2024, letter.⁹ On November 12, 2024, the requestors responded to Commerce's request for information.¹⁰ Thus, we consider the inquiry request to have been filed on November 12, 2024.

Scope of the Orders

The merchandise covered by the scope of the *Orders* is OCTG, which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish. For a full description of the scope of the *Orders*, see the Circumvention Initiation Checklist.¹¹

Merchandise Subject to the Circumvention Inquiry

The circumvention inquiry covers seamless OCTG completed in Thailand using Chinese-produced steel billets, and subsequently exported from Thailand to the United States.

Initiation of Circumvention Inquiry

Section 351.226(d) of Commerce's regulations states that if Commerce determines that a request for a circumvention inquiry satisfies the

⁶ *Id.*

⁷ See Requestors' Letter, "Request for Circumvention Inquiry," dated September 25, 2024.

⁸ See Commerce's Letter, "Supplemental Questionnaire," dated October 23, 2024.

⁹ *Id.*

¹⁰ See Circumvention Request.

¹¹ See Initiation Checklist, "OCTG Completed in Thailand Circumvention Initiation Checklist," dated concurrently with, and hereby adopted by, this notice (Circumvention Initiation Checklist) at Attachment I.

¹ The Requestors are the Committee on Pipe and Tube Imports Subcommittee for OCTG (CPTI OCTG Subcommittee) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (USW). The individual members of the CPTI OCTG Subcommittee are Axis Pipe and Tube, Benteler Steel & Tube Corporation, Borusan Mannesmann Pipe US Inc., PTC Liberty Tubulars LLC, Vallourec Star, and Welded Tube USA, Inc. See Requestors' Letter, "Response to Second Request for Information," dated November 12, 2024 (Circumvention Request).

² See *Certain Oil Country Tubular Goods from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 FR 28551 (May 21, 2010); see also *Certain Oil Country Tubular Goods from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 3203 (January 20, 2010) (collectively, *Orders*).

³ See Requestor's Letter, "Request for Circumvention Inquiry," dated July 18, 2024.

⁴ See Memorandum, "Extension of Time to Determine Whether to Initiate Circumvention Inquiry," dated August 20, 2024.

⁵ See Commerce's Letter, "Supplemental Questionnaire," dated September 6, 2024.

requirements of 19 CFR 351.226(c), then Commerce “will accept the request and initiate a circumvention inquiry.” Section 351.226(c)(1) of Commerce’s regulations, in turn, requires that each circumvention inquiry request allege “that the elements necessary for a circumvention determination under section 781 of the Act exist” and be “accompanied by information reasonably available to the interested party supporting these allegations.” The requestors alleged circumvention pursuant to section 781(b) of the Act (merchandise completed or assembled in other foreign countries).

Section 781(b)(1) of the Act provides that Commerce may find circumvention of an order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting a circumvention inquiry, under section 781(b)(1) of the Act, Commerce relies on the following criteria: (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of an AD or CVD order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or is produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in section (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the AD or CVD order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

In determining whether the process of assembly or completion in a foreign country is minor or insignificant under section 781(b)(1)(C) of the Act, section 781(b)(2) of the Act directs Commerce to consider: (A) the level of investment in the foreign country; (B) the level of research and development in the foreign country; (C) the nature of the production process in the foreign country; (D) the extent of production facilities in the foreign country; and (E) whether or not the value of processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States. However, no single factor, by itself, controls Commerce’s determination of whether the process of assembly or completion in a foreign

country is minor or insignificant.¹² Accordingly, Commerce will evaluate each of these five factors as they exist in the foreign country, depending on the particular circumvention scenario.

In addition, section 781(b)(3) of the Act sets forth additional factors to consider in determining whether to include merchandise assembled or completed in a foreign country within the scope of an AD or CVD order. Specifically, Commerce shall take into account such factors as: (A) the pattern of trade, including sourcing patterns; (B) whether the manufacturer or exporter of the merchandise that was shipped to the foreign country is affiliated with the person who, in the foreign country, uses the merchandise to complete or assemble the merchandise which is subsequently imported into the United States; and (C) whether imports of the merchandise into the foreign country have increased after the initiation of the investigation that resulted in the issuance of such order.

Analysis

Based on our analysis of the requestors’ circumvention inquiry request, we determine that they have satisfied the criteria under 19 CFR 351.226(c), and thus, pursuant to 19 CFR 351.226(d)(1)(iii), we are initiating the requested circumvention inquiry. For a full discussion of the basis for our decision to initiate this circumvention inquiry, see the Circumvention Initiation Checklist. As explained in the Circumvention Initiation Checklist, the information provided by the requestors warrants initiating this circumvention inquiry on a country-wide basis. Commerce has taken this approach in prior circumvention inquiries, where the facts warranted initiation on a country-wide basis.¹³

Consistent with the approach in the prior circumvention inquiries that we initiated on a country-wide basis, Commerce intends to issue questionnaires to solicit information from producers and exporters in Thailand concerning their shipments of OCTG made from Chinese-origin steel billets to the United States.

Respondent Selection

Commerce intends to base respondent selection on responses to quantity and value (Q&V) questionnaires. Commerce intends to identify the companies to

which it will issue the Q&V questionnaire, in part, based on U.S. Customs and Border Protection (CBP) data. Parties to which Commerce does not issue the Q&V questionnaire may also respond to the Q&V questionnaire, which will be available on Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), before the applicable deadline. ACCESS is available to registered users at <https://access.trade.gov>.

Commerce intends to place the CBP data on the record via ACCESS within five days of the publication of this initiation notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after placement of the CBP data on the record of the inquiry.

Commerce intends to establish a schedule for questionnaire responses after Commerce selects respondents. A company’s failure to completely respond to Commerce’s requests for information may result in the application of facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.

Suspension of Liquidation

Pursuant to 19 CFR 351.226(l)(1), Commerce will notify CBP of this initiation and direct CBP to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation under the *Orders* and to apply the cash deposit rates that would be applicable if the products were determined to be covered by the scope of the *Orders*. Should Commerce issue affirmative preliminary or final circumvention determinations, Commerce will follow the suspension of liquidation rules under 19 CFR 351.226(l)(2)–(4).

Notification to Interested Parties

In accordance with 19 CFR 351.226(d) and section 781(b) of the Act, Commerce determines that the requestors’ request for a circumvention inquiry satisfies the requirements of 19 CFR 351.226(c). Accordingly, Commerce is notifying all interested parties of the initiation of this circumvention inquiry to determine whether OCTG from China, which is completed in Thailand from steel billets produced in China, is circumventing the *Orders*. In addition, we have included a description of the products that are the subject to this inquiry and an explanation of Commerce’s decision to initiate this inquiry as provided in the accompanying Circumvention Initiation

¹² See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, Vol. 1 (1994), at 893.

¹³ See, e.g., *Hydrofluorocarbon Blends from the People’s Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty Order*, 88 FR 74150 (October 30, 2023).

Checklist.¹⁴ In accordance with 19 CFR 351.226(e)(1), Commerce intends to issue its preliminary circumvention determination no later than 150 days from the date of publication of the notice of initiation of this circumvention inquiry in the **Federal Register**.

This notice is published in accordance with section 781(b) of the Act, and 19 CFR 351.226(d)(1)(iii).

Dated: December 12, 2024.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2024–29911 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Request for Information; Data for Marine Spatial Planning Related to Transmission Planning in Texas, Louisiana, Mississippi, and Alabama

AGENCY: National Centers for Coastal Ocean Science, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice; request for information.

SUMMARY: NOAA's National Ocean Service (NOS) National Centers for Coastal Ocean Science (NCCOS), hereafter NOAA, in partnership with the Bureau of Ocean Energy Management (BOEM) and the Department of Energy (DOE) Grid Deployment Office (GDO) and the National Renewable Energy Laboratory (NREL), is working to build on existing spatial planning capacity in the United States (U.S.) Gulf of Mexico region. Through this Request for Information, NOAA is seeking public input to identify coastal and marine spatial data or other critical information to inform spatial analyses for transmission planning in state and Federal waters off Texas, Louisiana, Mississippi, and Alabama. The input we receive from the data development workshop meeting, as well as the responses to the items listed in the **SUPPLEMENTARY INFORMATION** section of this document, will be used to inform potential coastal and ocean development activities in the U.S. Gulf of Mexico region, such as renewable energy development.

DATES: Interested persons are invited to provide input in response to this Request for Information through January

24, 2025. Late-filed input will be considered to the extent practicable.

Verbal input will be accepted during a public meeting to be held at the InterContinental Hotel in New Orleans, Louisiana on January 14–15, 2025.

ADDRESSES: Interested persons are invited to provide input using one of the following methods:

- **Electronic Submission:** Submit electronic written public comments via the Federal e- Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NOS–2024–0138 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NOAA will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

- **Verbal submission:** NOAA will accept verbal input at a data development workshop. The meeting will be held at the InterContinental Hotel in New Orleans, Louisiana on Tuesday, January 14, 2025 from 8 a.m. to 5 p.m. Central Standard Time (CST) and Wednesday, January 15, 2025 from 8 a.m. to 5 p.m. CST. There will be a registration window from 8 a.m. to 9 a.m. CST each day before the start of the meeting. Advanced registration is required for the meeting by completing the registration form at <https://forms.gle/BmTDiD5zV3ZuXHUN8> or by providing an RSVP to Joshua Chastain at joshua.chastain@noaa.gov. The registration deadline is Friday, January 3, 2025.

Reports of meeting results will also be published and made available to the public in the weeks following the meeting. If you are unable to provide electronic written comments or participate in the meeting, please contact Joshua Chastain at joshua.chastain@noaa.gov or (843) 267–5641 for alternative submission methods.

FOR FURTHER INFORMATION CONTACT:

James Morris, NOAA NCCOS, at james.morris@noaa.gov or (252) 666–7433.

SUPPLEMENTARY INFORMATION:

I. Background

NOAA is an agency of the United States Federal Government that works to conserve and manage coastal and

marine ecosystems and resources. NOAA works to make fisheries sustainable and productive, provide safe seafood to consumers, conserve threatened and endangered species and other protected resources, and maintain healthy ecosystems. NOAA has jurisdiction and responsibility for its trust marine resources in the U.S. Gulf of Mexico region as well as significant interest in supporting the resilience of coastal and marine-dependent communities and promoting equity and environmental justice. For these reasons, it is important for NOAA to invest in research that informs marine spatial studies in the U.S. Gulf of Mexico region, including socioeconomic research that ensures meaningful participation of local communities and supports equitable processes for planning and siting of new and existing marine industries and conservation areas.

NOAA has been engaged with the Bureau of Ocean Energy Management (BOEM) to support siting and environmental review for offshore wind energy areas in U.S. Federal waters (<https://www.boem.gov/renewable-energy>) to ensure protection of trust resources in any offshore development activities.

II. Purpose of This Request for Information

The purpose of this Request for Information is to promote data development to inform coastal and marine spatial studies related to transmission planning in Texas, Louisiana, Mississippi, and Alabama, with an emphasis on data needs for offshore wind and transmission planning. In addition to input received from the public through the electronic and verbal submissions, NOAA aims to inform the public about its coastal and ocean planning processes and capabilities, discuss the current data available for each ocean sector (e.g., national security, fisheries, industry, metocean, natural, cultural, and social resources), and gather ideas for other data sources. NOAA hopes to come out of the meetings with a strengthened relationship with the public and a list of best available data and data gaps.

III. Specific Information Requested To Inform Marine Spatial Studies Related to Transmission Planning in Texas, Louisiana, Mississippi, and Alabama

Through this Request for Information, NOAA seeks written public input to inform coastal and marine spatial studies related to transmission planning in the U.S. Gulf of Mexico region. NOAA is particularly interested in

¹⁴ See Circumvention Initiation Checklist at 13.

receiving input concerning the items listed below. Responses to this Request for Information are voluntary, and respondents need not reply to items listed. When providing input, please specify if you are providing general feedback on marine spatial studies and/or if you are responding to one of the specific item number(s) below:

1. Specific datasets related to ocean sectors, natural resources, and/or human activities you recommend NOAA use in coastal and marine spatial studies.

Major concerns you have related to use of any specific datasets that may be used in coastal and marine spatial studies.

2. Major concerns you have related to gaps in scientific knowledge or data that could impact coastal and marine spatial planning efforts.

3. Specific data or information you recommend NOAA or other partners collect, if it is not currently available or has not been previously collected.

4. Ways in which NOAA can better engage and collaborate with the public and local communities to promote economic, social, and ecological resilience as well as protect trust resources.

5. Ways in which NOAA can build upon existing capacity and resources for regional ocean spatial planning.

Sean Corson,

Director, National Centers for Coastal Ocean Science, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2024–30026 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Applications and Reports for Scientific Research and Enhancement Permits Under the Endangered Species Act

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information

collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before February 18, 2025.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at NOAA.PRA@noaa.gov. Please reference OMB Control Number 0648–0402 in the subject line of your comments. All comments received are part of the public record and will generally be posted on <https://www.regulations.gov> without change. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Rob Clapp, Section 7 Coordinator, NOAA Fisheries, 1201 NE Lloyd Blvd. Suite 1100, Portland, OR 97232, (503) 231–2314 or Robert.Clapp@NOAA.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for renewal of an approved information collection. The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) imposes prohibitions against the taking of threatened and endangered species. Section 10 of the ESA allows permits authorizing the taking of such species for research and enhancement purposes. The corresponding regulations established procedures for persons to apply for such permits. In addition, the regulations set forth specific reporting requirements for such permit holders. The regulations thus require two sets of information collections: (1) Applications for research/enhancement permits, and (2) prescribed reports for such permits once they are issued.

The required information is used to evaluate the impacts that research and enhancement activities have on endangered species, to make the determinations required by the ESA before issuing any such permit, and to establish appropriate permit conditions. To issue permits under ESA Section 10(a)(1)(A), the National Marine Fisheries Service (NMFS) must determine that (1) such exceptions were applied for in good faith, (2) if granted and exercised, will not operate to the disadvantage of such endangered

species, and (3) will be consistent with the purposes and policy set forth in Section 2 of the ESA. This collection is not being revised in any way.

II. Method of Collection

Information may be collected through the internet, email, or paper format.

III. Data

OMB Control Number: 0648–0402.

Form Number(s): None.

Type of Review: Regular submission—extension of a current information collection.

Affected Public: Federal government; State, local, or tribal governments; academic institutions; non-profit organizations; businesses or other for-profit organizations.

Estimated Number of Respondents: 176.

Estimated Time per Response: Permit applications, 12 hours; permit modification requests, 6 hours; annual reports, 2 hours.

Estimated Total Annual Burden Hours: 850.

Estimated Total Annual Cost to Public: \$500 in recordkeeping/reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: The Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this information collection request. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While

you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Departmental PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–29864 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Matters Related to First Inventor To File

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comments on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on Wednesday, October 9, 2024 during a 60-day comment period (89 FR 81894). This notice allows for an additional 30 days for public comment.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Matters Related to First Inventor to File.

OMB Control Number: 0651–0071.

Needs and Uses: Section 3 of the Leahy-Smith America Invents Act (AIA), *inter alia*, amended 35 U.S.C. 102 and 103 consistent with the objectives of the AIA, including the conversion of the United States patent system from a “first to invent” system to a “first inventor to file” system. The changes to 35 U.S.C. 102 and 103 in section 3 of the AIA went into effect on March 16, 2013, but apply only to certain applications filed on or after March 16, 2013.

This information collection covers information required by 37 CFR 1.55(k), 1.78(a)(6), and 1.78(d)(6) to assist the USPTO in determining whether an application is subject to 35 U.S.C. 102 and 103 as amended by Section 3 of the AIA, or 35 U.S.C. 102 and 103 as in effect on March 15, 2013. The

information is only required in nonprovisional applications filed on or after March 16, 2013, that claim foreign priority to, or domestic benefit of, an application filed before March 16, 2013. Moreover, the information is not required if the nonprovisional application filed on or after March 16, 2013, claims the benefit of an earlier application in which a statement under 37 CFR 1.55(k), 1.78(a)(6), or 1.78(d)(6) has already been filed. Given the passage of time, it is increasingly rare for a newly filed nonprovisional application to claim foreign priority to, or domestic benefit of, an application filed before March 16, 2013, without also claiming benefit of an earlier application in which the statement has already been filed. Accordingly, the estimated responses for this collection continue to decrease.

For this 30-day notice, the non-hourly cost burdens have been adjusted, for an overall increase of \$1, due to an increase in the postage rate since the 60-day notice was published.

Forms: None.

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Estimated Number of Annual Respondents: 50 respondents.

Estimated Number of Annual Responses: 50 responses.

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public approximately 2 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed item to the USPTO.

Estimated Total Annual Respondent Burden Hours: 100 hours.

Estimated Total Annual Respondent Non-hourly Cost Burden: \$11.

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website, www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of

the information collection or the OMB Control Number, 0651–0071.

Further information can be obtained by:

- *Email:* InformationCollection@uspto.gov. Include “0651–0071 information request” in the subject line of the message.

- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Justin Isaac,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2024–29959 Filed 12–17–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Removal of Designated Chinese Military Companies

AGENCY: Office of the Under Secretary of Defense (Acquisition and Sustainment), Department of Defense.

ACTION: Notice of removal of two companies from the Section 1260H List of Chinese Military Companies Operating in the United States.

SUMMARY: The Deputy Secretary of Defense has determined that the entities listed in the **SUPPLEMENTARY INFORMATION** section of this notice should be removed from the list of “Chinese military companies.”

FOR FURTHER INFORMATION CONTACT: Mr. Devante Brown (GIES), (703) 695–8545.

SUPPLEMENTARY INFORMATION: Section 1260H of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283) requires the Secretary of Defense to continue to list “Chinese military companies” annually until December 31, 2030. Paragraph (b)(2) of this section requires the Secretary of Defense to publish the unclassified portion of such list in the **Federal Register** (FR).

The Deputy Secretary of Defense has determined that the following entities should be removed from the list of “Chinese military companies,” as set out in 89 FR 22698 (April 2, 2024), in accordance with Section 1260H of the William M. (Mac) Thornberry NDAA for FY 2021 (Pub. L. 116–283) based on current information:

IDG Capital Partners Co., Ltd.,
Advanced Micro-Fabrication
Equipment Inc. China.

Dated: December 13, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison
Officer, Department of Defense.

[FR Doc. 2024-30018 Filed 12-17-24; 8:45 am]

BILLING CODE 6001-FR-P

DEPARTMENT OF DEFENSE

Department of the Army

U.S. Army Corps of Engineers

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Notice of Intent To Prepare a Supplemental Environmental Impact Statement (SEIS) for the Columbia River System Operations

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD; Bureau of Reclamation, U.S. Department of the Interior.

ACTION: Notice of intent.

SUMMARY: In 2020, the U.S. Army Corps of Engineers (Corps), Bureau of Reclamation (Reclamation), and Bonneville Power Administration (Bonneville) issued the 2020 Columbia River System Operations Final Environmental Impact Statement (CRSO EIS; DOE/EIS-0529), which addressed the ongoing operations, maintenance, and configuration of fourteen Federal Columbia River System (CRS) multiple purpose dams and related facilities located throughout the Columbia River basin. The Corps and Reclamation (Co-Lead Agencies) intend to prepare a supplemental EIS to address environmental effects from proposed changes to the selected alternative in the CRSO EIS and new circumstances and information about the significance of adverse effects that arose or became available after completion of the CRSO EIS. Bonneville has not elected to serve as a co-lead agency for this SEIS and has instead expressed interest in participating as a cooperating agency.

DATES: The Co-Lead Agencies invite Federal and State agencies, Native American Tribes, local governments, and the public to submit scoping comments relevant to the supplemental National Environmental Policy Act (NEPA) process no later than March 20, 2025. Information will also be provided at public meetings. Information on the public meetings is provided under the **SUPPLEMENTARY INFORMATION** section of this Notice of Intent.

ADDRESSES: Written comments, requests to be placed on the project mailing list,

and requests for information may be mailed by letter to U.S. Army Corps of Engineers Northwestern Division Attn: CRSO SEIS, P.O. Box 2870, Portland, OR 97208-2870; or by email to columbiariver@usace.army.mil. All comment letters will be available via the project website at <https://www.nwd.usace.army.mil/CRSO/>. All comments and materials received, including names and addresses, will become part of the administrative record, and may be released to the public. Interested parties should not submit confidential business or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Tim Fleeger, Columbia River Basin Policy and Environmental Coordinator, Northwestern Division, U.S. Army Corps of Engineers 1 (800) 290-5033 or email columbiariver@usace.army.mil. Additional information can be found at the project website: <https://www.nwd.usace.army.mil/CRSO/Final-EIS>.

SUPPLEMENTARY INFORMATION:

1. *Background:* The fourteen Federal multiple purpose dams and related facilities of the Columbia River System (CRS) are operated as a coordinated system within the interior Columbia River basin in Idaho, Montana, Oregon, and Washington. The Corps was authorized by Congress to construct, operate, and maintain twelve of these projects for multiple purposes (project purposes vary by project), including flood risk management, power generation, navigation, fish and wildlife conservation, recreation, and municipal and industrial water supply: namely, Libby, Albeni Falls, Dworshak, Chief Joseph, Lower Granite, Little Goose, Lower Monumental, Ice Harbor, McNary, John Day, The Dalles, and Bonneville. Reclamation was authorized by Congress to construct, operate, and maintain two of these projects for purposes of flood risk management, power generation, navigation, and irrigation: Hungry Horse and Grand Coulee. Bonneville is responsible for marketing and transmitting power the dams generate. Together, the Corps, Reclamation, and Bonneville are responsible for managing the system for these various purposes.

In 2020, the Corps, Reclamation, and Bonneville completed the CRSO EIS and signed a Record of Decision (ROD) selecting their preferred alternative identified in the CRSO EIS. Multiple parties filed legal challenges to the CRSO EIS and ROD, as well as to the associated biological opinions the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife

Service (FWS) issued in conjunction with the CRSO EIS.

Since 2021, the litigation challenging the CRSO EIS ROD and biological opinions has been stayed or administratively terminated, allowing the U.S. government, including the Corps, Reclamation, Bonneville, FWS, and NMFS and other departments and agencies to engage in mediated discussions with the Confederated Tribes of the Colville Reservation, the Coeur d'Alene Tribe, and the Spokane Tribe of Indians as well as Oregon, Washington, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, local governments, stakeholder groups, and nongovernmental organizations.

In December 2023, the United States Government (USG) signed a Memorandum of Understanding (now called the Resilient Columbia Basin Agreement (RCBA)) with Oregon, Washington, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, and the National Wildlife Federation Plaintiffs. The RCBA provides for a stay of litigation on the CRSO EIS ROD and related biological opinions for up to 10 years and includes agreed upon CRS operations. The RCBA also includes USG commitments to carry out certain analyses related to regional energy needs, Tribal circumstances, water supply replacement, transportation infrastructure, and recreation and public access, as well as commitments on a series of actions to improve conditions for native fish species. As part of the RCBA, and consistent with Corps', Reclamation's, and Bonneville's ongoing responsibilities under NEPA, the USG committed to reviewing existing environmental compliance documents and initiating any supplemental or additional environmental compliance determined to be necessary in fall of 2024.

The Co-Lead Agencies are evaluating triggers for supplementation under NEPA. In determining the scope of supplemental compliance, the Co-Lead Agencies will evaluate new information and circumstances, including any: changes to operations, maintenance, and configuration of the fourteen projects that make up the Columbia River System; new species listed or proposed for listing under the Endangered Species Act (ESA) (e.g., Wolverine); certain USG Commitments associated with the

RCBA; relevant reports, studies, or other information published since the CRSO EIS was completed (including, but not limited to, the Department of the Interior's report, *Historic and Ongoing Impacts of Federal Dams on the Columbia River Basin Tribes*, and other information sources referenced in Attachment 2 of the RCBA); and anticipated changes in Columbia River inflows to the United States from Canada and operational effects in the U.S. related to the modernization of the Columbia River Treaty.

With respect to the latter, the Columbia River's flow at the U.S.-Canada border is affected by how Canada operates storage reservoirs in its portion of the basin. Canada's reservoir operations are affected in part by how the Columbia River Treaty operations are managed for flood risk management, hydropower generation, and ecosystem purposes in coordination with the United States. The CRSO EIS applied 2016 Columbia River Treaty operations as the best-available information. Certain terms of the Columbia River Treaty regarding preplanned flood risk management changed on September 16, 2024, and the countries have been negotiating modernized provisions of the Treaty to address these changes, along with updates to hydropower coordination, the inclusion of ecosystem purposes, and increased Canadian flexibility. The existing Treaty's changes in flood risk management along with expected updates from the modernization process may lead to changed flows across the border from Canada that vary from the assumptions and effects contemplated in the 2020 CRSO EIS under certain hydrological conditions.

2. Purpose and Need for the Proposed Action: The ongoing action under evaluation in this supplemental NEPA process is the long-term coordinated operations, maintenance, and configuration of the Columbia River System. The purpose of this action is to operate the Columbia River System to meet multiple responsibilities including resource, legal, and institutional purposes of the action. The underlying need to which the Co-Lead Agencies are responding in this supplemental NEPA process is the need to evaluate the selected alternative in light of changes to the action and potentially substantial new circumstances and information that arose or became available after completion of the CRSO EIS ROD and are relevant to environmental effects. The Federal decision in this process is to determine whether to modify the selected alternative from the CRSO EIS based on potentially substantial changes

to measures included in the selected alternative, or substantial new information or changed circumstances and conditions about the significance of adverse effects that bear on the analysis.

3. Description of Proposed Action and Alternatives: The CRSO EIS evaluated a range of alternatives developed to meet the Purpose and Need Statement and eight study objectives developed for the EIS. The eight objectives, in tandem with the Purpose and Need Statement, established the framework for evaluating the ability of an alternative to satisfy the Corps', Reclamation's, and Bonneville's numerous legal, institutional, and resource obligations. The agencies used an iterative process to develop a range of alternatives for the future physical configuration, operation, and maintenance of the 14 projects of the CRS. The alternatives were developed to achieve a reasonable balance of competing resource demands for the available water and for the multiple authorized purposes, including evaluating measures to avoid, offset, or minimize impacts to resources affected by managing the CRS in the context of new information and changed conditions in the Columbia River Basin since the System Operation Review EIS in 1997. During the preparation of the CRSO EIS, the agencies developed a reasonable range of four Multiple Objective Action Alternatives (MOs) suitable for analysis in addition to the No Action Alternative. Following analysis and identification of effects for the No Action Alternative and the four MO alternatives, the Corps, Reclamation, and Bonneville used these findings to develop a fifth action alternative, which was described as the agencies' Preferred Alternative in the CRSO Draft and Final EIS. This selected alternative was ultimately chosen in the CRSO EIS ROD (Selected Alternative). This supplemental NEPA process is focused on addressing potentially substantial changes to the Selected Alternative, reviewing potentially substantial new circumstances and information that arose or became available after completion of the CRSO EIS, and preparing a SEIS. The SEIS will evaluate potential benefits and impacts of changes made to the Selected Alternative including direct, indirect, and cumulative effects to the human and natural environments.

4. Summary of Potential Effects: The Corps, Reclamation, and Bonneville issued the CRSO EIS ROD in 2020. Since then, a variety of new circumstances and information about the significance of effects that bear on the NEPA analysis previously conducted have arisen. The Co-Lead

Agencies will use this information to assess and update, as appropriate, the analyses presented in the CRSO EIS. The Co-Lead Agencies will analyze any substantial changes in effects relating to changes in the Proposed Action such as any changes to operations, maintenance, and configuration of the fourteen projects that make up the Columbia River System; new species listed or proposed for listing under the Endangered Species Act (ESA); anticipated changes in Columbia River inflows to the United States from Canada and operational effects in the U.S. related to the modernization of the Columbia River Treaty; and relevant reports, studies, or other information published since the CRSO EIS. This will include an assessment of existing effects analyses and additional effects analyses as necessary to ensure compliance with applicable environmental laws and regulations, including the ESA and the National Historic Preservation Act (NHPA). The Co-Lead Agencies will issue a decision following publication of the final SEIS and completion of consultation, if necessary, under the ESA.

At this early stage, it is unknown the full extent to which effects analyses results may differ from those presented in the CRSO EIS. Because changes and new information involve Columbia River System conditions, a broad range of resources may be affected. Accordingly, the full range of resources that were analyzed in the CRSO EIS will be assessed for potential effects due to proposed changes or changed conditions and circumstances. These resources include: river hydrology and hydraulics; water quality; aquatic habitat, invertebrates, and fish; vegetation, wetlands, wildlife, and floodplains; power generation and transmission; air quality and greenhouse gases; flood risk management; navigation and transportation; recreation; water supply; visual and noise resources; fisheries and passive use; cultural resources; Indian trust assets, tribal perspectives, and tribal interests; environmental justice; and implementation and system costs.

5. Anticipated Permits, Other Authorizations, and Other Directives: For reasons identified above, the Corps, Reclamation, and Bonneville have reinitiated ESA consultation with FWS and are evaluating whether reinitiation of ESA consultation with NMFS is necessary under section 7 of the ESA. During the pendency of the ESA consultation and NEPA processes, Corps, Reclamation, and Bonneville will operate the CRS consistent with the current biological opinions and the

operations identified in the RCBA. Corps, Reclamation, and Bonneville also will work with NMFS and FWS to ensure compliance with the ESA, coordinate environmental reviews, and maintain protections afforded to ESA-listed species and critical habitat under existing environmental compliance documentation.

The Co-lead agencies (and Bonneville when appropriate) will comply with all applicable statutory and regulatory requirements in evaluating the Proposed Action, including but not limited to the ESA, Clean Water Act, Section 106 of the NHPA, and Executive Orders, including E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and E.O. 14096 on Revitalizing Our Nation's Commitment to Environmental Justice For All, and the recent Presidential Memorandum, *Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin*, 88 FR 67617 (October 2, 2023).

The Co-Lead Agencies will also ensure government-to-government consultation with Tribes that honors the U.S. Government's longstanding commitments to Tribal Nations.

6. Schedule for the Decision-Making Process. To the extent feasible, the Co-Lead Agencies will complete the SEIS in compliance with the deadlines and schedules set forth in 40 Code of Federal Regulations (CFR) 1501.10(b). The draft SEIS will be available for public review and comment. A 45-day public review period will be provided for interested parties and agencies to review and comment on this draft document. All interested parties are encouraged to respond to this Notice of Intent and provide a current address if they wish to be notified of the Draft SEIS circulation. The Co-Lead Agencies would issue a decision at the conclusion of the NEPA process, in accordance with 40 CFR 1506.10. Corps, Reclamation, and Bonneville would also determine how to proceed consistent with their Section 7 obligations under the ESA and any resulting biological opinions in accordance with 50 CFR 402.15.

7. Scoping Process/Public Involvement. The Co-Lead Agencies invite all affected Federal, State, and local agencies, affected Tribes, other interested parties, and the general public to participate in the NEPA process during development of the SEIS. Three (3) virtual public scoping meetings will be held the week of February 10, 2025. The specific dates, times, and meeting information will be published on the project website:

<https://www.nwd.usace.army.mil/CRSO/>. Additional public meetings will be scheduled after release of the draft SEIS.

The Co-Lead Agencies are issuing this Notice of Intent to: (1) Advise other Federal and State agencies, Tribes, and the public of their plan to analyze effects related to system operations, maintenance and configuration; (2) obtain suggestions and information that may inform the scope of issues to evaluate in the SEIS; and (3) provide notice and request public input on potential effects on historic properties from system operations, maintenance and configuration due to potential modification of the undertaking in accordance with section 106 of the NHPA (36 CFR 800.2(d)(3) and 800.8(c)(5)). The Co-Lead agencies will also identify any cooperating and participating agencies that the Co-Lead agencies may require information from to facilitate their future decision after completion of the Notice of Intent scoping period.

William C. Hannan,
Brigadier General, US Army, Division Commander.

Jennifer Carrington,
Regional Director, Columbia-Pacific Northwest Region, Bureau of Reclamation.
[FR Doc. 2024-29936 Filed 12-17-24; 8:45 am]

BILLING CODE 3720-58-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, January 16, 2025; 5:30–7 p.m. CST.

ADDRESSES: West Kentucky Community and Technical College, Emerging Technology Center, Room 215, 5100 Alben Barkley Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Robert “Buz” Smith, Federal Coordinator, by Phone: (270) 441-6821 or Email: Robert.Smith@pppo.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and

recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Administrative Activities
- Public Comment Period

Public Participation: The meeting is open to the public. The EM SSAB, Paducah will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert “Buz” Smith in advance of the meeting. The Department of Energy will hear oral public comments during the meeting. A 15-minute public comment period will take place at the end of the agenda. Individual oral comments are to be limited to two minutes per speaker to ensure time for all who wish to speak. Written statements may be filed either before or after the meeting. Written comments submitted by 5 p.m. CST on Friday, January 24, 2025, will be included in the minutes. Please submit written comments to Zachary Boyarski at Zachary.Boyarski@pppo.gov with “Public Comment” in the subject line. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: Minutes will be available by writing or calling Eric Roberts, Board Support Manager, Emerging Technology Center, Room 221, 4810 Alben Barkley Drive, Paducah, KY 42001; Phone: (270) 554-3004. Minutes will also be available at the following website: <https://www.energy.gov/pppo/pgdp-cab/listings/meeting-materials>.

Signing Authority: This document of the Department of Energy was signed on December 12, 2024, by Alyssa Petit, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 12, 2024.

Jennifer Hartzell,

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

[FR Doc. 2024–29868 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Intent to Prepare an Environmental Impact Statement for the Appalachian Hydrogen Hub (ARCH2), (DOE/EIS–0569)

AGENCY: Office of Clean Energy Demonstrations, U.S. Department of Energy.

ACTION: Notice of intent to prepare an environmental impact statement, notice of scoping meetings, request for comments.

SUMMARY: The U.S. Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and applicable NEPA implementing regulations to assess the potential environmental impacts of the proposed action of providing financial assistance to Battelle Memorial Institute (Battelle) to facilitate the design, construction, operation, and maintenance of the Appalachian Hydrogen Hub (also referred to as the Appalachian Regional Clean Hydrogen Hub or ARCH2) in the Appalachian Region including Ohio, Pennsylvania, and West Virginia. DOE is issuing this Notice of Intent to inform the public about the proposed action; announce plans to conduct public scoping meetings; invite public participation in the scoping process; and solicit public comments for consideration in establishing the scope of the EIS, including the range of reasonable alternatives and the potential environmental impacts to be analyzed.

DATES: The public scoping period for the EIS starts with the publication of this notice of intent (NOI) and ends on March 3, 2025. DOE will hold one virtual public scoping meeting at the following date and time (eastern time):

- Thursday, January 16, 2025 at 6 p.m.–8 p.m.

DOE will hold three in-person public scoping meetings. Dates, times, and locations are to be determined and will be shared on the DOE's web page for this EIS no less than 15 days before the meetings.

All meetings are open to the public and free to attend. Details on how to participate in the virtual and in-person public scoping meetings are available on

the DOE's web page for this EIS: <https://www.energy.gov/nepa/doeeis-0569-appalachian-hydrogen-hub-multiple-locations>. In defining the scope of the EIS, DOE will consider all scoping comments received or postmarked by March 3, 2025. Comments received or postmarked after the scoping period end date will be considered to the extent practicable.

ADDRESSES: Oral or written comments may be provided at the public scoping meetings or submitted in any of the following ways:

- Through the *regulations.gov* web portal: Navigate to *www.regulations.gov* and search for Docket No. DOE–HQ–2024–0082 and follow the instructions for submitting comments.

- *Mail or Hand Delivery Service:* Send comments in an envelope labeled “DOE/EIS–0569” and addressed to TRC APPALACHIAN HYDROGEN HUB Coordinator, Teays Corporate Centre, 135 Corporate Center Drive, Suite 540, Scott Depot, West Virginia 25560

FOR FURTHER INFORMATION CONTACT: Sarah Moore, Project Manager, Office of Clean Energy Demonstrations, U.S. Department of Energy, 1000 Independence Ave SW, Washington, DC 20585, email OCED_ARCH2_EIS@hq.doe.gov, or telephone (202) 309–2037.

SUPPLEMENTARY INFORMATION:

Background

In the Infrastructure Investment and Jobs Act, commonly known as the Bipartisan Infrastructure Law (BIL), Congress directed DOE to establish a Regional Clean Hydrogen Hubs (H2Hubs) program to create regional networks of hydrogen producers, consumers, and local connective infrastructure to accelerate the use of hydrogen as a clean energy carrier. The Office of Clean Energy Demonstrations (OCED) within DOE is implementing the Regional Clean Hydrogen Hubs program and will use the NEPA process to help it decide whether to provide financial assistance for the H2Hubs.

Congress directed DOE to select H2Hubs using certain criteria. Specifically, Congress directed DOE to select H2Hubs that will use a diversity of feedstocks to produce clean hydrogen, including at least one H2Hub that will demonstrate the production of clean hydrogen from fossil fuels, one H2Hub that will demonstrate the production of clean hydrogen from renewables, and one H2Hub that will demonstrate the production of clean hydrogen from nuclear energy. Congress also directed DOE to select H2Hubs that will use clean hydrogen in a diversity of

end uses, including at least one H2Hub that will demonstrate the use of clean hydrogen in the following sectors: electric power generation, industrial, residential and commercial heating, and transportation. Congress required that DOE give priority to H2Hubs that are likely to create opportunities for skilled training and long-term employment to the greatest number of residents of the region. Congress also directed DOE to include geographic diversity, directing that DOE locate H2Hubs in different regions of the United States, and that the H2Hubs are to use the energy resources that are abundant in their respective regions. Congress further required DOE to select, to the maximum extent practicable, at least two H2Hubs in the regions of the United States with the greatest natural gas resources.

DOE issued a Funding Opportunity Announcement (FOA–0002779) to solicit applications for H2Hubs. DOE selected the Appalachian Hydrogen Hub for award negotiations following a rigorous Merit Review process to identify meritorious applications to the Regional Clean Hydrogen Hubs Program based on the criteria listed in FOA–0002779. DOE has provided limited funding in support of preliminary Appalachian Hydrogen Hub planning activities.

The Appalachian Hydrogen Hub, as proposed, satisfies certain criteria Congress required in the BIL for the Regional Clean Hydrogen Hubs program. The Appalachian Hydrogen Hub has the potential to demonstrate the production of clean hydrogen from fossil fuels. The Appalachian Hydrogen Hub proposes to use clean hydrogen in a diversity of end uses, including but not limited to industry, power generation, and transportation. Further, the Appalachian Hydrogen Hub would create opportunities for skilled training and long-term employment for residents of the region. In addition, the location of the Appalachian Hydrogen Hub in the Appalachian Region that includes Ohio, Pennsylvania, and West Virginia meets the criterion requiring geographic diversity within the Regional Clean Hydrogen Hubs program. The Appalachian Hydrogen Hub also satisfies the criterion that DOE select a Hub in a region of the United States with the greatest natural gas resources.

The Appalachian Hydrogen Hub is proposed to consist of a suite of demonstration projects involving clean hydrogen production, transportation, and end uses located within the Appalachian Region that includes Ohio, Pennsylvania, and West Virginia. Battelle is the primary funding recipient and lead Appalachian Hydrogen Hub

manager. As currently structured, the Appalachian Hydrogen Hub encompasses 12 proposed projects, including hydrogen production facilities that could produce at least 1,700 metric tons per day of clean hydrogen (autothermal reformation facilities with carbon capture, biomass pyrolysis facilities, electrolysis facilities, and facilities for recovering hydrogen from waste gases), hydrogen liquefiers, and a range of end uses including residential fuel cells, materials handling equipment, mobility, and industrial uses, including production of ammonia, urea, and low-carbon aviation fuel.

Purpose and Scope of the EIS

DOE will prepare an EIS (DOE/EIS-0569) to evaluate the potential impacts to the human environment associated with funding the Appalachian Hydrogen Hub. The EIS will evaluate the potential impacts associated with the types of hydrogen infrastructure and technologies proposed in the Appalachian Hydrogen Hub, such as impacts from electricity and water usage and rates of emissions, that are inherent to the technologies and infrastructure regardless of where they may be deployed. The EIS will help inform DOE's decision as to whether to carry the Appalachian Hydrogen Hub forward for project-specific funding decisions but will not directly authorize funding for specific Appalachian Hydrogen Hub projects.

If DOE decides to provide funding for the construction and operation of the Appalachian Hydrogen Hub, DOE will complete additional NEPA reviews to evaluate the potential site-specific impacts of individual proposed projects to make site-specific funding decisions. In addition to being subject to DOE's NEPA review, with associated public scoping and comment periods as appropriate, individual projects will be required to adhere to the requirements of all applicable Federal, State, and local laws and regulations.

Purpose and Need for the Proposed Action

The purpose and need for DOE's action is to comply with its statutory mandate in BIL to catalyze investment in the production, processing, delivery, storage, and end-use of clean hydrogen; and contribute to the development of a national clean hydrogen network. The proposed action of funding the Appalachian Hydrogen Hub would fulfill this mandate by accelerating the deployment of clean hydrogen technologies and enabling infrastructure to attract greater investments from the private sector and promote substantial

U.S. manufacturing of numerous hydrogen technologies.

DOE's purpose and need in funding the Appalachian Hydrogen Hub also includes funding a clean hydrogen hub that meets certain BIL criteria for the H2Hubs. The proposed Appalachian Hydrogen Hub meets these criteria by:

- Demonstrating feedstock diversity by including the production of clean hydrogen from fossil fuels.
- Demonstrating end use diversity by including the use of clean hydrogen in the electric power generation, industry, and transportation sectors.
- Enabling DOE to meet the geographic diversity criterion by being located in the Appalachian Region and using energy resources that are abundant in that region.
- Being one of at least two H2Hubs located in regions of the United States with the greatest natural gas resources.
- Creating opportunities for skilled training and long-term employment for residents in the region.

Proposed Action, No Action, and Preliminary Alternatives

Proposed Action

DOE's proposed action is to provide funding to support the construction and operation of the Appalachian Hydrogen Hub, as proposed by Battelle, in the Appalachian region that includes Ohio, Pennsylvania, and West Virginia. The proposed Appalachian Hydrogen Hub would include the production, storage, delivery, and end-use of clean hydrogen using a variety of technologies. Hydrogen production technologies being considered include autothermal reforming with carbon capture, electrolysis, pyrolysis, and capture and purification of hydrogen byproduct from chlor-alkali processes. Methods of hydrogen storage may include above-ground tanks, tube trailers, and/or underground storage. Delivery options may include refueling stations, liquefaction, and trucking, as well as the delivery of hydrogen derivatives such as ammonia, urea, or low-carbon aviation fuel which could include delivery via rail, barge, truck, or pipeline. The Appalachian Hydrogen Hub is considering a broad variety of end-use applications, including vehicles (buses, medium and heavy-duty trucks), materials handling equipment, industrial heat, blending to natural gas distribution systems, power generation, stationary fuel cells, and production of hydrogen derivatives, including ammonia, urea, and low-carbon aviation fuel. Appalachian Hydrogen Hub projects and site locations are in development. DOE will evaluate

specific projects and site locations in subsequent tiered NEPA reviews.

No Action Alternative

Under the No Action Alternative, DOE would not provide funding to Battelle for the construction and operation of the Appalachian Hydrogen Hub, with the assumption that the H2Hub would not be developed. The no action alternative provides a benchmark for comparison with environmental impacts of the other alternatives.

Preliminary Action Alternatives

The EIS will evaluate reasonable alternatives that are technically and economically feasible and meet the purpose and need for the proposed action. Preliminarily, DOE has identified three alternatives that potentially address the purpose and need stated above:

(1) DOE funding for the proposed Appalachian Hydrogen Hub: The proposed action alternative as described above.

(2) DOE funding for an expanded Appalachian Hydrogen Hub: An action alternative that considers the hydrogen technologies and infrastructure in the proposed action plus reasonably foreseeable clean hydrogen technologies and infrastructure that, while not currently considered in the proposed action, could be proposed for DOE funding.

(3) DOE funding for a reduced Appalachian Hydrogen Hub: An action alternative that is smaller in scope wherein DOE would fund only a portion of the proposed action.

Summary of Potential Impacts

DOE's analysis in the EIS will focus on potentially significant environmental impacts from construction and operation of the Appalachian Hydrogen Hub's proposed types of hydrogen technologies and infrastructure, as well as the potential cumulative impacts resulting from reasonably foreseeable past, present, and future projects in the same region. Accordingly, in the EIS, DOE anticipates evaluating potential non-site-specific impacts related to: (1) land use and infrastructure, (2) atmospheric conditions and air quality, (3) climate change and greenhouse gasses, (4) hydrologic conditions and water quality, (5) geology, seismicity and soils, (6) socioeconomic conditions, (7) environmental justice, (8) energy resources, (9) noise and vibration, (10) transportation and accidents, (11) intentional destructive acts, and (12) human health and safety. This list is not intended to be all-inclusive or to imply a predetermination of potential

significant impacts. DOE invites interested stakeholders to suggest specific issues, including possible mitigation measures, within these general categories or others, to be considered in the EIS.

Anticipated Permits and Authorizations

DOE does not anticipate that permits and authorizations will be needed for agency action because the EIS would not authorize the construction and operation of any project in the Appalachian Hydrogen Hub. The permits and authorizations required for the Appalachian Hydrogen Hub projects would be identified in subsequent site-specific NEPA analyses for those projects.

Schedule for Decision-Making Process

After the draft EIS is completed, DOE will publish a notice of availability (NOA) and request public comments on the draft EIS. DOE currently expects to issue the NOA in October 2025. After the public comment period ends, DOE will review and respond to comments received and will develop the final EIS. DOE currently expects to make the final EIS available to the public in April 2026. A record of decision will be completed no sooner than 30 days after the final EIS is released, in accordance with applicable laws and regulations.

Scoping Process

This NOI commences the public scoping process to identify issues and potential alternatives for consideration in the EIS. Throughout the scoping process, Federal agencies, Tribes, State and local governments, and the public have the opportunity to help DOE identify significant resources and issues, reasonable alternatives, mitigation measures, and other pertinent information that DOE should consider in the EIS. DOE will hold public scoping meetings at the times and dates described above under the **DATES** section. DOE will post information on how to participate in the virtual and in-person public meetings on the EIS website listed previously, in advance of the meetings. The public will have the opportunity to comment on the scope of the EIS. DOE representatives will be available to answer questions and provide additional information on the NEPA process to meeting attendees. In addition to providing comments at the public scoping meetings, stakeholders may submit written comments as described in the **ADDRESSES** section.

Comments may be broad in nature or restricted to specific areas of concern, but they should be directly relevant to the NEPA process, or potential

environmental impacts. The scoping process allows the public and interested parties to shape the EIS impact analysis, focusing on the areas of greatest importance and identifying areas requiring less attention. DOE will consider the comments received on the scope of the EIS during the 75-day scoping period as it prepares the draft EIS.

OCED does not consider anonymous scoping comments. Please include your name and address as part of your scoping comment. All scoping comments, including the names, addresses, and other personally identifiable information included in the comment, will be part of the administrative record. DOE will protect privileged or confidential information that you submit when required by Exemption 4 of the Freedom of Information Act (FOIA), which applies to trade secrets and commercial or financial information that is privileged or confidential. Please label privileged or confidential information “Contains Confidential Information” and consider submitting such information as a separate attachment. Information that is not labeled as privileged or confidential may be regarded by DOE as suitable for public release. DOE will invite Tribal government-to-government consultations.

Request for Comment on Alternatives and Effects, as Well as on Relevant Information, Studies, or Analyses With Respect to the Proposed Action

Federal, State, and local agencies, along with Indian Tribal Nations and other stakeholders that may be interested in or affected by the proposed action, are invited to participate in the scoping process and, if eligible, may request or be requested by the DOE to participate in the development of the environmental analysis as a cooperating agency. DOE requests data, comments, views, information, analysis, alternatives, or suggestions relevant to the proposed action from the public; affected Federal, Tribal, State, and local governments, agencies, and offices; the scientific community; industry; or any other interested party.

Specifically, DOE requests information on the following topics:

(1) Potential effects that the proposed action could have on biological, physical, socioeconomic, cultural, or other resources.

(2) Other potential reasonable alternatives to the proposed action that DOE should consider, including additional or alternative avoidance, minimization, and mitigation measures.

(3) Information on other current or planned activities in, or in the vicinity of, the proposed action, that could impact one another or contribute to cumulative impacts.

(4) Other information, studies, or analyses relevant to the proposed action and its impacts on the human environment.

To promote informed decision-making, comments should be as specific as possible and should provide as much detail as necessary to meaningfully and fully inform DOE of why the issues raised are important to the agency's review of the proposed action.

The draft EIS will include as an appendix a summary of issues raised in public scoping comments that DOE considered in preparing the EIS and comments outside the scope of the analysis.

Signing Authority

This document of the Department of Energy was signed on December 11, 2024, by Kelly Cummins, Acting Director, Office of Clean Energy Demonstrations, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 13, 2024.

Treena V. Garrett,

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

[FR Doc. 2024-29976 Filed 12-17-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Privacy Act of 1974; System of Records

AGENCY: U.S. Department of Energy.

ACTION: Notice of a modified system of records.

SUMMARY: As required by the Privacy Act of 1974 and the Office of Management and Budget (OMB) Circulars A-108 and A-130, the Department of Energy (DOE or the Department) is publishing notice of a modification to an existing Privacy Act

System of Records. DOE proposes to amend System of Records DOE-28 General Training Records. This System of Records Notice (SORN) is being modified to align with new formatting requirements, published by OMB, and to ensure appropriate Privacy Act coverage of business processes and Privacy Act information.

DATES: This modified SORN will become applicable following the end of the public comment period on January 17, 2025 unless comments are received that result in a contrary determination.

ADDRESSES: Written comments should be sent to Ken Hunt, Chief Privacy Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Rm 8H-085, Washington, DC 20585, by facsimile at (202) 586-8151, or by email at privacy@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Ken Hunt, Chief Privacy Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Rm 8H-085, Washington, DC 20585, by facsimile at (202) 586-8151, by email at privacy@hq.doe.gov, or by telephone at (240) 686-9485.

SUPPLEMENTARY INFORMATION: On January 9, 2009, DOE published a Compilation of its Privacy Act Systems of Records, which included System of Records DOE-28 General Training Records. This notice proposes amendments to the system locations section of that system of records by removing the following system locations where DOE-28 is no longer applicable: four (4) Bonneville Power Administration locations (Lower Columbia Area, Puget Sound Area, Snake River Area, Upper Columbia Area), two (2) Office of Science locations (Chicago and Oak Ridge), two (2) Office of Energy Efficiency and Renewable Energy locations (Boston and Philadelphia Support Offices), Alaska Power Administration, Office of Amarillo Site Operations, Atlanta Support Office, Continuous Electron Beam Accelerator Facility, Dayton Area Office, Kansas City Site Office, Kansas City Support Office, National Nuclear Security Administration (NNSA) Sandia Site Office, NNSA Los Alamos Site Office, NNSA Los Alamos National Laboratory, Strategic Petroleum Reserve Project Management Office, New York Support Office, NNSA Nevada Site Office, and the Office of Scientific and Technical Information (OSTI). The following addresses have been updated: Golden Field Office, John A. Gordon Albuquerque Complex, Office of River Protection, and the Southwestern Power Administration. The following addresses have been added: two (2)

National Energy Technology Laboratory locations (Morgantown and Albany). In the "Routine Uses" section, this modified notice deletes a previous routine use concerning efforts responding to a suspected or confirmed loss of confidentiality of information as it appears in DOE's compilation of its Privacy Act systems of records (January 9, 2009) and replaces it with one to assist DOE with responding to a suspected or confirmed breach of its records of Personally Identifiable Information (PII), modeled with language from OMB's Memorandum M-17-12, "Preparing for and Responding to a Breach of Personally Identifiable Information" (January 3, 2017). Further, this notice adds one new routine use to ensure that DOE may assist another agency or entity in responding to the other agency's or entity's confirmed or suspected breach of PII, as appropriate, as aligned with OMB's Memorandum M-17-12. In addition to these routine uses, this notice adds three other routine uses (eight, nine, and ten). These routine uses permit the disclosure of information to union officials acting in their official capacity, for the purpose of an investigation, settlement of claims, or the preparation and conduct of litigation, and to a contractor of the Department, or a subcontractor to a Department contractor, who is authorized to disclose the record. The "System Manager" section has been revised to clarify that the system manager is the "Office of the Chief Human Capital Officer." In the "Purpose(s) of the System" section, "employee" has been struck from the phrase "employee training and development." The "Categories of Individuals Covered by the System" section now includes "detailees and assignees to DOE, including NNSA, and individuals seeking access to DOE/NNSA information, resources, or facilities." The "Categories of Records in the System" section now includes "employer identification number, office location/room number, business phone, business cell phone, and business email address." Additionally, "quarterly" has been struck from "quarterly training." "Record Source Categories" now includes "training instructors or vendors." "Policies and Practices for Retrieval of Records" now includes "other unique identifier, such as employee ID." An administrative change required by the FOIA Improvement Act of 2016 extends the length of time a requestor is permitted to file an appeal under the Privacy Act from 30 to 90 days. Both the "System Locations" and "Administrative,

Technical and Physical Safeguards" sections have been modified to reflect the Department's usage of cloud-based services for records storage. Language throughout the SORN has been updated to align with applicable Federal privacy laws, policies, procedures, and best practices.

SYSTEM NAME AND NUMBER:

DOE-28 General Training Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Systems leveraging this SORN may exist in multiple locations. All systems storing records in a cloud-based server are required to use government-approved cloud services and follow National Institute of Standards and Technology (NIST) security and privacy standards for access and data retention. Records maintained in a government-approved cloud server are accessed through secure data centers in the continental United States.

U.S. Department of Energy, Headquarters, Forrestal Building, Office of the Chief Human Capital Officer, 1000 Independence Avenue SW, Washington, DC 20585.

U.S. Department of Energy, Headquarters, Germantown, 19901 Germantown Road, Germantown, MD 20585.

U.S. Department of Energy, Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208.

U.S. Department of Energy, Environmental Management Consolidated Business Center (EMCBC), 550 Main Street, Rm 7-010, Cincinnati, OH 45202.

U.S. Department of Energy, Golden Field Office, 15013 Denver West Parkway, Golden, CO 80401.

U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, Idaho Falls, ID 83415.

U.S. Department of Energy, National Energy Technology Laboratory (Pittsburgh), P.O. Box 10940, 626 Cochran Mill Road, Pittsburgh, PA 15236.

U.S. Department of Energy, National Energy Technology Laboratory (Morgantown), 3610 Collins Ferry Road, Morgantown, WV 26505.

U.S. Department of Energy, National Energy Technology Laboratory (Albany), 1450 Queen Avenue SW, Albany, OR 97321.

U.S. Department of Energy, NNSA Naval Reactors Field Office, Pittsburgh Naval Reactors, P.O. Box 109, West Mifflin, PA 15122-0109.

U.S. Department of Energy, NNSA Naval Reactors Field Office,

Schenectady Naval Reactors, P.O. Box 1069, Schenectady, NY 12301.

U.S. Department of Energy, Pittsburgh Naval Reactors Office, Idaho Branch Office, P.O. Box 2469, Idaho Falls, ID 83403-2469.

U.S. Department of Energy, John A. Gordon Albuquerque Complex, 24600 20th Street SE, Albuquerque, NM 87116.

U.S. Department of Energy, Hanford Field Office, P.O. Box 550, Richland, WA 99352.

U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

U.S. Department of Energy, Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635-6711.

U.S. Department of Energy, Southwestern Power Administration, One West Third Street, Suite 1500, Tulsa, OK 74103.

U.S. Department of Energy, Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East, New Orleans, LA 70123.

U.S. Department of Energy, Western Area Power Administration, P.O. Box 281213, Lakewood, CO 80228-8213.

U.S. Department of Energy, Western Area Power Administration, Billings Area Office, P.O. Box 35800, Billings, MT 59107-5800.

U.S. Department of Energy, Western Area Power Administration, Loveland Area Office, P.O. Box 3700, Loveland, CO 80539-3003.

U.S. Department of Energy, Western Area Power Administration, Salt Lake City Area Office, P.O. Box 11606, Salt Lake City, UT 84147-0606.

SYSTEM MANAGER(S):

Headquarters: Director, Training and Human Resource Development, Office of the Chief Human Capital Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585-0702.

Field Offices: The Directors, Training and Human Resource Development of the "System Locations" listed above are the system managers for their respective portions of this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; Nuclear Waste Policy Act of 1982 (Pub. L. 97-425); Nuclear Waste Policy Amendment Act of 1987 (Pub. L. 100-203); Government Employees Training Act of 1958; and title 5 CFR parts 410 and 412.

PURPOSE(S) OF THE SYSTEM:

Records in this system are maintained and used by the Department to document planning, completion,

funding and effectiveness of training and development. Appropriate local, State, and Federal agencies use certain records maintained in this system to ensure Departmental compliance with other regulatory requirements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All DOE employees, including NNSA employees and contractor employees, detailees, and assignees to DOE, including NNSA, and individuals seeking access to DOE/NNSA information, resources, or facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, resume, assigned number, occupational series, training requests and authorizations, grade, organization, date of birth, Social Security or employer identification number, office location/room number, business phone, business cell phone, and business email address, home address and telephone number, special interest area, education completed, course name, justification for attending the course, direct and indirect costs of training, coded information dealing with purpose, type, source of training, training evaluations, course evaluation forms, training examinations, training attendance records, lesson plans, training assignment sheets, reading assignment sheets, position qualification statement, self-study sheet, position descriptions, accounting records, and training reports.

RECORD SOURCE CATEGORIES:

The subject individuals, their supervisors, training instructors or vendors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. A record from this system may be disclosed as a routine use to Federal agencies, including the Office of Personnel Management, for purposes of determining eligibility or suitability for training and as source documents for training reports; to training institutions that personnel have requested to attend; and to other Federal agencies as necessary for verification of completion or payment of training costs.

2. A record from this system may be disclosed as a routine use to State and local governments, the Nuclear Regulatory Commission (NRC), and other Federal agencies that conduct research, investigations, or audits to determine whether DOE or contractor personnel satisfy quality assurance requirements for activities necessary to obtain a license from the NRC for the construction, operation and closing of a nuclear waste repository or a Monitored

Retrievable Storage facility. These activities also include research and development, site characterization, transportation, waste packaging, handling, design, maintenance, performance confirmation, inspection, fabrication, and development and production of repository waste forms.

3. A record from this system may be disclosed as a routine use to Federal, State, Tribal, or local government officials where the regulatory program being implemented is applicable to the DOE or contractor program and requires that such access be provided for the conduct of the regulatory agencies' activities. Those provided information under this routine use are subject to the same limitations applicable to DOE officers and employees under the Privacy Act.

4. A record from this system may be disclosed as a routine use to the appropriate local, Tribal, State, or Federal agency when records, alone or in conjunction with other information, indicate a violation or potential violation of law whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program pursuant thereto.

5. A record from this system may be disclosed as a routine use to a member of Congress submitting a request involving a constituent when the constituent has requested assistance from the member concerning the subject matter of the record. The member of Congress must provide a copy of the constituent's signed request for assistance.

6. A record from this system may be disclosed as a routine use to appropriate agencies, entities, and persons when (1) the Department suspects or has confirmed that there has been a breach of the system of records; (2) the Department has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOE (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. A record from this system may be disclosed as a routine use to another Federal agency or Federal entity, when the Department determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or

remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

8. A record from this system may be disclosed as a routine use to union officials acting in their official capacity as a representative of the grievant or affected employees.

9. A record from this system may be disclosed as a routine use for the purpose of an investigation, settlement of claims, or the preparation and conduct of litigation to (1) a person representing the Department, Contractor, or assisting in such representation; (2) others involved in the matter, their representatives, and persons assisting such persons; and (3) witnesses, potential witnesses, their representatives and assistants, and any other persons possessing information pertaining to the matter when it is necessary to obtain information or testimony relevant to the matter.

10. A record from this system may be disclosed as a routine use to a contractor of the Department, or a subcontractor to a Department contractor. Those provided information under this routine use are subject to the same limitations applicable to Department officers and employees under the Privacy Act.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored as paper records or electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, Social Security number, or other unique identifier, such as employee ID.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Retention and disposition of these records is in accordance with the National Archives and Records Administration-approved records disposition schedule with retentions of 10 years to 250 years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic records may be secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and Federal Information Security Modernization Act (FISMA) hosting environment. Data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handling data

at rest and in transit are in accordance with DOE encryption standards. Records are protected from unauthorized access through the following appropriate safeguards:

- *Administrative:* Access to all records is limited to lawful government purposes only, with access to electronic records based on role and either two-factor authentication or password protection. The system requires passwords to be complex and to be changed frequently. Users accessing system records undergo frequent training in Privacy Act and information security requirements. Security and privacy controls are reviewed on an ongoing basis.

- *Technical:* Computerized records systems are safeguarded on Departmental networks configured for role-based access based on job responsibilities and organizational affiliation. Privacy and security controls are in place for this system and are updated in accordance with applicable requirements as determined by NIST and DOE directives and guidance.

- *Physical:* Computer servers on which electronic records are stored are located in secured Department facilities, which are protected by security guards, identification badges, and cameras. Paper copies of all records are locked in file cabinets, file rooms, or offices and are under the control of authorized personnel. Access to these facilities is granted only to authorized personnel and each person granted access to the system must be an individual authorized to use or administer the system.

RECORD ACCESS PROCEDURES:

The Department follows the procedures outlined in 10 CFR 1008.4. Valid identification of the individual making the request is required before information will be processed, given, access granted, or a correction considered, to ensure that information is processed, given, corrected, or records disclosed or corrected only at the request of the proper person.

CONTESTING RECORD PROCEDURES:

Any individual may submit a request to the System Manager and request a copy of any records relating to them. In accordance with 10 CFR 1008.11, any individual may appeal the denial of a request made by him or her for information about or for access to or correction or amendment of records. An appeal shall be filed within 90 calendar days after receipt of the denial. When an appeal is filed by mail, the postmark is conclusive as to timeliness. The appeal shall be in writing and must be signed

by the individual. The words "PRIVACY ACT APPEAL" should appear in capital letters on the envelope and the letter. Appeals relating to DOE records shall be directed to the Director, Office of Hearings and Appeals (OHA), 1000 Independence Avenue SW, Washington, DC 20585.

NOTIFICATION PROCEDURES:

In accordance with the DOE regulation implementing the Privacy Act, 10 CFR part 1008, a request by an individual to determine if a system of records contains information about themselves should be directed to the U.S. Department of Energy, Headquarters, Privacy Act Officer. The request should include the requester's complete name and the time period for which records are sought.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:
None.

HISTORY:

This SORN was last published in the **Federal Register**, 74 FR 1029–1030, on January 9, 2009.

Signing Authority

This document of the Department of Energy was signed on December 12, 2024, by Ann Dunkin, Senior Agency Official for Privacy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, December 13, 2024.

Treena V. Garrett,
*Federal Register Liaison Officer, U.S.
Department of Energy.*

[FR Doc. 2024–29995 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the

Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 15, 2025; 4–8:45 p.m. PST. The opportunity for public comment is at 4:10 p.m. PST. This time is subject to change; please contact the Nevada Site Specific Advisory Board (NSSAB) Administrator at nssab@emcbc.doe.gov for confirmation of time prior to the meeting.

ADDRESSES: Valley Electric Association's Valley Conference Center, 800 E Highway 372, Pahrump, Nevada 89048. This meeting will be open to the public in-person at the Valley Conference Center or virtually via Microsoft Teams. To attend virtually, please contact Barbara Ulmer, NSSAB Administrator, by email nssab@emcbc.doe.gov or phone (702) 523–0894, no later than 4 p.m. PST on Monday, January 13, 2025.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, NSSAB Administrator, by phone: (702) 523–0894 or email: nssab@emcbc.doe.gov or visit the Board's internet homepage at www.nnss.gov/NSSAB/.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Public Comment Period
- Update from Deputy Designated Federal Officer
- Update from National Nuclear Security Administration/Nevada Field Office
- Updates from NSSAB Liaisons
- Presentations

Public Participation: The in-person/online virtual hybrid meeting is open to the public either in-person at the Valley Conference Center or via Microsoft Teams. To sign-up for public comment, please contact the NSSAB Administrator (above) no later than 4 p.m. PST on Monday, January 13, 2025. In addition to participation in the live public comment session identified above, written statements may be filed with the Board either before or within

seven days after the meeting by sending them to the NSSAB Administrator at the aforementioned email address. Written public comment received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so in 2-minute segments for the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: <https://www.nnss.gov/nssab/nssab-meetings/>.

Signing Authority: This document of the Department of Energy was signed on December 12, 2024, by Alyssa Petit, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 12, 2024.

Jennifer Hartzell,

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

[FR Doc. 2024–29867 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Intent To Prepare an Environmental Impact Statement for the Pacific Northwest Hydrogen Hub (PNWH2), (DOE/EIS–0571)

AGENCY: Office of Clean Energy Demonstrations, U.S. Department of Energy.

ACTION: Notice of intent to prepare an environmental impact statement, notice of scoping meetings, request for comments.

SUMMARY: The U.S. Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and

applicable NEPA implementing regulations to assess the potential environmental impacts of the proposed action of providing financial assistance to the Pacific Northwest Hydrogen Association (also referred to as the PNWH2 Association) to facilitate the design, construction, operation and maintenance of the Pacific Northwest Regional Hydrogen Hub including in the states of Washington, Oregon and Montana. DOE is issuing this Notice of Intent to inform the public about the proposed action; announce plans to conduct public scoping meetings; invite public participation in the scoping process; and solicit public comments for consideration in establishing the scope of the EIS, including the range of reasonable alternatives and the potential environmental impacts to be analyzed.

DATES: The public scoping period for the EIS starts with the publication of this Notice of Intent (NOI) and ends on March 3, 2025. DOE will hold one virtual public scoping meeting at the following date and time (pacific time):

- Wednesday, January 22, 2024 at 6 p.m.–8 p.m.

DOE will hold two in-person public scoping meetings. Dates, times, and locations are to be determined and will be shared on the DOE's web page for this EIS no less than 15 days before the meetings.

All meetings are open to the public and free to attend. Details on how to participate in the virtual and in-person public scoping meetings are available on the DOE's web page for this EIS: <https://www.energy.gov/nepa/doeeis-0571-pacific-northwest-hydrogen-hub-multiple-locations>. In defining the scope of the EIS, DOE will consider all scoping comments received or postmarked by March 3, 2025. Comments received or postmarked after the scoping period end date will be considered to the extent practicable.

ADDRESSES: Oral or written comments may be provided at the public scoping meetings or submitted in any of the following ways:

- Through the *regulations.gov* web portal: Navigate to www.regulations.gov and search for Docket No. DOE–HQ–2024–0094 and follow the instructions for submitting comments.

- *Mail or Hand Delivery Service:* Send comments in an envelope labeled “DOE/EIS–0571” and addressed to c/o AECOM, 3005 Center Green Drive, Ste 250, Boulder, CO 80301.

FOR FURTHER INFORMATION CONTACT: Katie O'Shea, Project Manager, Office of Clean Energy Demonstrations, U.S. Department of Energy, 1000 Independence Ave. SW, Washington,

DC 20585, email: OCED_PNWH2_EIS@hq.doe.gov or telephone (240) 477-0431.

SUPPLEMENTARY INFORMATION:

Background

In the Infrastructure Investment and Jobs Act, commonly known as the Bipartisan Infrastructure Law (BIL), Congress established and funded a Regional Clean Hydrogen Hubs (H2Hubs) program to create regional networks of hydrogen producers, consumers, and local connective infrastructure to accelerate the use of hydrogen as a clean energy carrier. The Office of Clean Energy Demonstrations (OCED) within DOE is implementing the Regional Clean Hydrogen Hubs program and will use the NEPA process to help it decide whether to provide financial assistance for the H2Hubs.

Congress directed DOE to select H2Hubs using certain criteria. Specifically, Congress directed DOE to select H2Hubs that will use a diversity of feedstocks to produce clean hydrogen, including at least one H2Hub that will demonstrate the production of clean hydrogen from fossil fuels, one H2Hub that will demonstrate the production of clean hydrogen from renewables, and one H2Hub that will demonstrate the production of clean hydrogen from nuclear energy.

Congress also directed DOE to select H2Hubs that will use clean hydrogen in a diversity of end uses, including at least one H2Hub that will demonstrate the use of clean hydrogen in the following sectors: electric power generation, industrial, residential and commercial heating, and transportation. Congress required that DOE give priority to regional clean hydrogen hubs that are likely to create opportunities for skilled training and long-term employment to the greatest number of residents of the region. Congress also directed DOE to include geographic diversity, directing that DOE locate H2Hubs in different regions of the United States, and that the H2Hubs are to use the energy resources that are abundant in their respective regions. Congress further required DOE to select, to the maximum extent practicable, at least two H2Hubs in the regions of the United States with the greatest natural gas resources.

DOE issued a Funding Opportunity Announcement (FOA-0002779) to solicit applications for H2Hubs. DOE selected the Pacific Northwest Hub for award negotiations following a rigorous Merit Review process to identify meritorious applications to the Regional Clean Hydrogen Hubs Program based on the criteria listed in FOA-0002779. DOE has provided limited funding in support

of preliminary Pacific Northwest Hub planning activities.

The Pacific Northwest Hub as proposed satisfies certain criteria Congress required in the BIL for the Regional Clean Hydrogen Hubs program. The Pacific Northwest Hub has the potential to demonstrate the production of clean hydrogen from renewable energy resources. The Pacific Northwest Hub will use clean hydrogen in a diversity of end uses, including but not limited to industry, power generation, and transportation. Further, the Pacific Northwest Hub would create opportunities for skilled training and long-term employment for residents of the region. In addition, the location of the Hub in the Pacific Northwest region meets the criterion requiring geographic diversity within the Regional Clean Hydrogen Hubs program. The Pacific Northwest Hub also satisfies the criterion that DOE select hubs that use the energy resources that are abundant in their respective regions.

The Pacific Northwest Hub is proposed to consist of a suite of demonstration projects involving clean hydrogen production, transportation, and end uses located within the Pacific Northwest. The Pacific Northwest Association is the primary funding recipient and lead Pacific Northwest Hub manager. As currently structured, the Hub encompasses approximately 10 projects, including clean hydrogen production facilities that could produce 300–400 metric tons per day of clean hydrogen, hydrogen liquefiers, connective infrastructure including refueling stations and pipelines, and a range of end uses including fuel cell electric trucks, fuel cell electric buses, cargo handling equipment, and stationary fuel cells.

Purpose and Scope of the EIS

DOE will prepare an EIS (DOE/EIS-0571) to evaluate the potential impacts to the human environment associated with funding the Pacific Northwest Hub. The EIS will evaluate the potential impacts associated with the types of hydrogen infrastructure and technologies proposed in the Pacific Northwest Hub, such as impacts from electricity and water usage and rates of emissions, that are inherent to the technologies and infrastructure regardless of where they may be deployed. The EIS will help inform DOE's decision as to whether to carry the Pacific Northwest Hub forward for project-specific funding decisions but will not directly authorize funding for specific Pacific Northwest Hub projects.

If DOE decides to provide funding for the construction and operation of the

Pacific Northwest Hub, DOE will analyze the potential site-specific environmental effects of individual proposed projects and make site-specific funding decisions. In addition to being subject to DOE's NEPA review, with associated public scoping and comment periods as appropriate, individual projects will be required to adhere to the requirements of all applicable Federal, State, and local laws and regulations.

Purpose and Need for the Proposed Action

The purpose and need for DOE's action is to comply with its statutory mandate in BIL to catalyze investment in the production, processing, delivery, storage, and end-use of clean hydrogen; and contribute to the development of a national clean hydrogen network. The proposed action of funding the Pacific Northwest Hub would fulfill this mandate by accelerating the deployment of clean hydrogen technologies and enabling infrastructure to attract greater investments from the private sector and promote substantial U.S. manufacturing of numerous hydrogen technologies.

DOE's purpose and need in funding the Pacific Northwest Hub also includes funding a clean hydrogen hub that meets certain BIL criteria for the regional hubs program. The proposed Pacific Northwest Hub meets these criteria by:

- Demonstrating feedstock diversity by including the production of clean hydrogen from renewable energy sources.
- Demonstrating end use diversity by including the use of clean hydrogen in the electric power generation, industry, and transportation sectors.
- Enabling DOE to meet the geographic diversity criterion by being located in the Pacific Northwest region and using energy resources that are abundant in that region.
- Creating opportunities for skilled training and long-term employment for residents in the region.

Proposed Action, No Action, and Preliminary Alternatives

Proposed Action

DOE's proposed action is to provide funding to support the development of the Pacific Northwest Hub, as proposed by PNWH2 Association. The Pacific Northwest Hub intends to produce clean hydrogen through a variety of hydrogen production technologies, storage, delivery, and end-use applications, all within the Pacific Northwest region. Hydrogen production technologies being considered include various forms of electrolysis, the application of

electrical energy to water to generate pure oxygen and hydrogen. Methods of hydrogen storage may include above-ground tanks, tube trailers, and/or storage using “line pack”, in which a pipeline holds hydrogen when the pipeline is not in use for transporting hydrogen. Delivery options being considered include pipelines, refueling stations, liquefaction, and trucking. A broad variety of end-use applications are being considered, including fuel cell electric trucks, fuel cell electric buses, cargo handling equipment, industrial heat, blending to natural gas distribution systems, power generation, data centers, stationary fuel cells, and production of hydrogen derivatives, including ammonia.

Specific Pacific Northwest Hub project details and site locations are in development. DOE will evaluate specific projects and site locations in subsequent tiered NEPA reviews.

No Action Alternative

Under the No Action Alternative, DOE would not provide funding to the PNWH2 Association for the construction and operation of the Pacific Northwest Hub, with the assumption that the H2Hub would not be developed. The no action alternative provides a benchmark for comparison with environmental impacts of the other alternatives.

Preliminary Action Alternatives

The EIS will evaluate reasonable alternatives that are technically and economically feasible and meet the purpose and need for the proposed action. Preliminarily, DOE has identified three alternatives that potentially address the purpose and need stated above:

1. DOE funding for the proposed Pacific Northwest Hub: The proposed action alternative as described above.

2. DOE funding for an expanded Pacific Northwest Hub: An action alternative that considers the hydrogen technologies and infrastructure in the proposed action plus reasonably foreseeable clean hydrogen technologies and infrastructure that, while not currently considered in the proposed action, could be proposed for DOE funding.

3. DOE funding for a reduced Pacific Northwest Hub: An action alternative that is smaller in scope wherein DOE would fund only a portion of the proposed action.

Summary of Potential Impacts

DOE’s analysis in the EIS will focus on potentially significant environmental impacts from construction and

operation of the Pacific Northwest Hub’s proposed types of hydrogen technologies and infrastructure, as well as the potential cumulative impacts resulting from reasonably foreseeable past, present, and future projects in the same region. Accordingly, in the EIS, DOE anticipates evaluating potential non-site-specific impacts related to: (1) land use and infrastructure, (2) atmospheric conditions and air quality, (3) climate change and greenhouse gasses, (4) hydrologic conditions and water quality, (5) geology, seismicity and soils, (6) socioeconomic conditions, (7) environmental justice, (8) energy resources, (9) noise and vibration, (10) transportation and accidents, (11) intentional destructive acts, and (12) human health and safety. This list is not intended to be all-inclusive or to imply a predetermination of potential impacts. DOE invites interested stakeholders to suggest specific issues, including possible mitigation measures, within these general categories or others, to be considered in the EIS.

Anticipated Permits and Authorizations

DOE does not anticipate that permits and authorizations will be needed for agency action because it will not authorize the construction and operation of any project to be included in the Pacific Northwest Hub. The permits and authorizations required for those projects will be identified in subsequent site-specific NEPA analyses for those projects.

Schedule for Decision-Making Process

After the draft EIS is completed, DOE will publish a notice of availability (NOA) and request public comments on the draft EIS. DOE currently expects to issue the NOA in August 2025. After the public comment period ends, DOE will review and respond to comments received and will develop the final EIS. DOE currently expects to make the final EIS available to the public in April 2026. A record of decision will be completed no sooner than 30 days after the final EIS is released, in accordance with applicable laws and regulations.

Scoping Process

This NOI commences the public scoping process to identify issues and potential alternatives for consideration in the EIS. Throughout the scoping process, Federal agencies, Tribes, State and local governments, and the public have the opportunity to help DOE identify significant resources and issues, reasonable alternatives, mitigation measures, and other pertinent information that DOE should consider in the EIS. DOE will hold public

scoping meetings at the times and dates described above under the **DATES** section. DOE will post information on how to participate in the virtual and in-person public meetings on the EIS website listed previously, in advance of the meetings. The public will have the opportunity to comment on the scope of the EIS. DOE representatives will be available to answer questions and provide additional information on the NEPA process to meeting attendees. In addition to providing comments at the public scoping meetings, stakeholders may submit written comments as described in the **ADDRESSES** section.

Comments may be broad in nature or restricted to specific areas of concern, but they should be directly relevant to the NEPA process, or potential environmental impacts. The scoping process allows the public and interested parties to shape the EIS impact analysis, focusing on the areas of greatest importance and identifying areas requiring less attention. DOE will consider the comments received on the scope of the EIS during the 75-day scoping period as it prepares the draft EIS.

OCED does not consider anonymous scoping comments. Please include your name and address as part of your scoping comment. All scoping comments, including the names, addresses, and other personally identifiable information included in the comment, will be part of the administrative record. DOE will protect privileged or confidential information that you submit when required by Exemption 4 of the Freedom of Information Act (FOIA), which applies to trade secrets and commercial or financial information that is privileged or confidential. Please label privileged or confidential information “Contains Confidential Information” and consider submitting such information as a separate attachment. Information that is not labeled as privileged or confidential may be regarded by DOE as suitable for public release. DOE will invite Tribal government-to-government consultations.

Request for Comment on Alternatives and Effects, as Well as on Relevant Information, Studies, or Analyses With Respect to the Proposed Action

Federal, State, and local agencies, along with Indian Tribal Nations and other stakeholders that may be interested in or affected by the proposed action, are invited to participate in the scoping process and, if eligible, may request or be requested by DOE to participate in the development of the environmental analysis as a cooperating

agency. DOE requests data, comments, views, information, analysis, alternatives, or suggestions relevant to the proposed action from the public; affected Federal, Tribal, State, and local governments, agencies, and offices; the scientific community; industry; or any other interested party.

Specifically, DOE requests information on the following topics:

1. Potential effects that the proposed action could have on biological, physical, socioeconomic, cultural, or other resources.
2. Other potential reasonable alternatives to the proposed action that DOE should consider, including additional or alternative avoidance, minimization, and mitigation measures.
3. Information on other current or planned activities in, or in the vicinity of, the proposed action, that could impact one another or contribute to cumulative impacts.
4. Other information, studies, or analyses relevant to the proposed action and its impacts on the human environment.

To promote informed decision-making, comments should be as specific as possible and should provide as much detail as necessary to meaningfully and fully inform DOE of why the issues raised are important to the agency's review of the proposed action.

The draft EIS will include as an appendix a summary of issues raised in public scoping comments that DOE considered in preparing the EIS and comments outside the scope of the analysis.

Signing Authority

This document of the Department of Energy was signed on December 13, 2024, by Kelly Cummins, Acting Director, Office of Clean Energy Demonstrations, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 13, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–29994 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Intent To Prepare an Environmental Impact Statement for the California Hydrogen Hub (ARCHES), (DOE/EIS–0570)

AGENCY: Office of Clean Energy Demonstrations, U.S. Department of Energy.

ACTION: Notice of intent to prepare an environmental impact statement, notice of scoping meetings, request for comments.

SUMMARY: The U.S. Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) and applicable NEPA implementing regulations to assess the potential environmental impacts of the proposed action of providing financial assistance to the Alliance for Renewable Clean Hydrogen Energy Systems (also referred to as ARCHES) to facilitate the design, construction, operation and maintenance of the California Hydrogen Hub in the state of California. DOE is issuing this Notice of Intent to inform the public about the proposed action; announce plans to conduct public scoping meetings; invite public participation in the scoping process; and solicit public comments for consideration in establishing the scope of the EIS, including the range of reasonable alternatives and the potential environmental impacts to be analyzed.

DATES: The public scoping period for the EIS starts with the publication of this notice of intent (NOI) and ends on March 3, 2025. DOE will hold one virtual public scoping meeting at the following date and time (pacific time):

- Tuesday, January 28, 2025 from 4:30–7:30 p.m. Pacific Time.

DOE will hold three in-person public scoping meetings. Dates, times, and locations are to be determined and will be shared on the DOE's web page for this EIS no less than 15 days before the meetings.

In addition, DOE will have an open virtual public meeting space available for the public. This public meeting space will open on Monday January 20, 2025, at [acedarcheseis.com](https://www.acedarcheseis.com) and stay

open through the duration of the scoping period.

All meetings are open to the public and free to attend. Details on how to participate in the virtual and in-person public scoping meetings are available on the DOE's web page for this EIS: <https://www.energy.gov/nepa/doeeis-0570-california-hydrogen-hub-multiple-locations>. In defining the scope of the EIS, DOE will consider all scoping comments received or postmarked by March 3, 2025. Comments received or postmarked after the scoping period end date will be considered to the extent practicable.

ADDRESSES: Oral or written comments may be provided at the public scoping meetings or submitted in any of the following ways:

- Through the *regulations.gov* web portal: Navigate to www.regulations.gov and search for Docket No. DOE–HQ–2024–0087 and follow the instructions for submitting comments; or
- *Mail or Hand Delivery Service:* Send comments in an envelope labeled “DOE/EIS–0570” and addressed to Jacobs, Attention: Rosa Esquivel, 2600 Michelson Drive, Suite 500, Irvine, CA 92612–6506.

FOR FURTHER INFORMATION CONTACT: Kristin Welch, Project Manager, Office of Clean Energy Demonstrations, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585, email OCED_ARCHES_EIS@hq.doe.gov, or telephone (240) 981–0461.

SUPPLEMENTARY INFORMATION:

Background

In the Infrastructure Investment and Jobs Act, commonly known as the Bipartisan Infrastructure Law (BIL), Congress established and funded a Regional Clean Hydrogen Hubs (H2Hubs) program to create regional networks of hydrogen producers, consumers, and local connective infrastructure to accelerate the use of hydrogen as a clean energy carrier. The Office of Clean Energy Demonstrations (OCED) within DOE is implementing the Regional Clean Hydrogen Hubs program and will use the NEPA process to help it decide whether to provide financial assistance for the H2Hubs.

Congress directed DOE to select H2Hubs using certain criteria. Specifically, Congress directed DOE to select H2Hubs that will use a diversity of feedstocks to produce clean hydrogen, including at least one H2Hub that will demonstrate the production of clean hydrogen from fossil fuels, one H2Hub that will demonstrate the production of clean hydrogen from

renewables, and one H2Hub that will demonstrate the production of clean hydrogen from nuclear energy. Congress also directed DOE to select H2Hubs that will use clean hydrogen in a diversity of end uses, including at least one H2Hub that will demonstrate the use of clean hydrogen in the following sectors: electric power generation, industrial, residential and commercial heating, and transportation. Congress required that DOE give priority to regional clean hydrogen hubs that are likely to create opportunities for skilled training and long-term employment to the greatest number of residents of the region. Congress also directed DOE to include geographic diversity, directing that DOE locate H2Hubs in different regions of the United States, and that the H2Hubs are to use the energy resources that are abundant in their respective regions. Congress further required DOE to select, to the maximum extent practicable, at least two H2Hubs in the regions of the United States with the greatest natural gas resources.

DOE issued a Funding Opportunity Announcement (FOA-0002779) to solicit applications for H2Hubs. DOE selected the California Hydrogen Hub for award negotiations following a rigorous Merit Review process to identify meritorious applications to the Regional Clean Hydrogen Hubs Program based on the criteria listed in FOA-0002779. DOE has provided limited funding in support of preliminary California Hydrogen Hub planning activities.

The California Hydrogen Hub, as proposed, satisfies certain criteria Congress required in the BIL for the Regional Clean Hydrogen Hubs program. The California Hydrogen Hub has the potential to demonstrate the production of clean hydrogen from renewable energy resources. The California Hydrogen Hub proposes to use clean hydrogen in a diversity of end uses including but not limited to electric power generation and transportation. Further, the California Hydrogen Hub would create opportunities for skilled training and long-term employment for residents of the region. In addition, the location of the California Hydrogen Hub in the state of California meets the criterion requiring geographic diversity within the Regional Clean Hydrogen Hubs program. The California Hydrogen Hub also satisfies the criterion that DOE select hubs that use the energy resources that are abundant in their respective regions.

The California Hydrogen Hub is proposed to consist of a suite of demonstration projects involving clean

hydrogen production, transportation, and end uses located within California. ARCHES is the primary funding recipient and lead California Hydrogen Hub manager. As currently structured, the California Hydrogen Hub encompasses approximately 35 projects including clean hydrogen production facilities that could produce 450–500 metric tonnes per day of clean hydrogen from renewable electricity and biogenic sources, connective infrastructure including refueling stations and pipelines, and a range of end uses including fuel-cell electric trucks, fuel-cell electric buses, a marine vessel, cargo handling equipment, power generation via turbines, and stationary fuel cells.

Purpose and Scope of the EIS

DOE will prepare an EIS (DOE/EIS-0570) to evaluate the potential impacts to the human environment associated with funding the California Hydrogen Hub. The EIS will evaluate the potential impacts associated with the types of hydrogen infrastructure and technologies proposed in the California Hydrogen Hub, such as impacts from electricity and water usage and rates of emissions, that are inherent to the technologies and infrastructure regardless of where they may be deployed. The EIS will help inform DOE's decision as to whether to carry the California Hydrogen Hub forward for project-specific funding decisions but will not directly authorize funding for specific California Hydrogen Hub projects.

If DOE decides to provide funding for the construction and operation of the California Hydrogen Hub, DOE will analyze the potential site-specific environmental effects of individual proposed projects and make site-specific funding decisions. In addition to being subject to DOE's NEPA review, with associated public scoping and comment periods as appropriate, individual projects will be required to adhere to the requirements of all applicable Federal, State, and local laws and regulations.

Purpose and Need for the Proposed Action

The purpose and need for DOE's action is to comply with its statutory mandate in BIL to catalyze investment in the production, processing, delivery, storage, and end-use of clean hydrogen, and contribute to the development of a national clean hydrogen network. The proposed action of funding the California Hydrogen Hub would fulfill this mandate by accelerating the deployment of clean hydrogen technologies and enabling infrastructure

to attract greater investments from the private sector and promote substantial U.S. manufacturing of numerous hydrogen technologies.

DOE's purpose and need in funding the California Hydrogen Hub also includes funding a clean hydrogen hub that meets certain BIL criteria for the Regional Clean Hydrogen Hubs program. The proposed California Hydrogen Hub meets these criteria by:

- Demonstrating feedstock diversity by including the production of clean hydrogen from renewable energy sources.
- Demonstrating end use diversity by including the use of clean hydrogen in the electric power generation and transportation sectors.
- Enabling DOE to meet the geographic diversity criterion by being located in the California region and using energy resources that are abundant in that region.
- Creating opportunities for skilled training and long-term employment for residents in the region.

Proposed Action, No Action, and Preliminary Alternatives

Proposed Action

DOE's proposed action is to provide funding to support the development of the California Hydrogen Hub, as proposed by ARCHES. The proposed California Hydrogen Hub would include a variety of hydrogen production technologies, storage, delivery, and end-use applications. Hydrogen production technologies being considered include electrolysis utilizing renewable energy sources, and generation from biogenic sources (with possible carbon-dioxide capture). Methods of hydrogen storage may include above-ground tanks and/or tube trailers. Delivery options may include pipelines, trucking, and refueling stations, as well as the delivery of hydrogen derivatives such as ammonia. A broad variety of end-use applications are being considered including fuel-cell electric trucks, fuel-cell electric buses, a marine vessel, cargo handling equipment, power generation via turbines, stationary fuel cells, aviation, trains, other fuel-cell electric vehicles, and ammonia synthesis.

California Hydrogen Hub projects and site locations are in development. DOE will evaluate specific projects and site locations in subsequent tiered NEPA reviews.

No Action Alternative

Under the No Action Alternative, DOE would not provide funding to ARCHES for the construction and

operation of the California Hydrogen Hub, with the assumption that the H2Hub would not be developed. The no action alternative provides a benchmark for comparison with environmental impacts of the other alternatives.

Preliminary Action Alternatives

The EIS will evaluate reasonable alternatives that are technically and economically feasible and meet the purpose and need for the proposed action. Preliminarily, DOE has identified three alternatives that potentially address the purpose and need stated previously:

(1) DOE funding for the proposed California Hydrogen Hub: The proposed action alternative as described above.

(2) DOE funding for an expanded California Hydrogen Hub: An action alternative that considers the hydrogen technologies and infrastructure in the proposed action plus reasonably foreseeable clean hydrogen technologies and infrastructure that, while not currently considered in the proposed action, could be proposed for DOE funding.

(3) DOE funding for a reduced California Hydrogen Hub: An action alternative that is smaller in scope wherein DOE would fund only a portion of the proposed action.

Summary of Potential Impacts

DOE's analysis in the EIS will focus on potentially significant environmental impacts from construction and operation of the California Hydrogen Hub's proposed types of hydrogen technologies and infrastructure, as well as the potential cumulative impacts resulting from reasonably foreseeable past, present, and future projects in the same region. Accordingly, in the EIS, DOE anticipates evaluating potential non-site-specific impacts related to: (1) land use and infrastructure, (2) atmospheric conditions and air quality, (3) climate change and greenhouse gasses, (4) hydrologic conditions and water quality, (5) geology, seismicity and soils, (6) socioeconomic conditions, (7) environmental justice, (8) energy resources, (9) noise and vibration, (10) transportation and accidents, (11) intentional destructive acts, and (12) human health and safety. This list is not intended to be all-inclusive or to imply a predetermination of potential impacts. DOE invites interested stakeholders to suggest specific issues, including possible mitigation measures, within these general categories or others, to be considered in the EIS.

Anticipated Permits and Authorizations

DOE does not anticipate that permits and authorizations will be needed for agency action because it will not authorize the construction and operation of any project to be included in the California Hydrogen Hub. The permits and authorizations required for the California Hydrogen Hub projects will be identified in subsequent site-specific NEPA analyses for those projects.

Schedule for Decision-Making Process

After the draft EIS is completed, DOE will publish a notice of availability (NOA) and request public comments on the draft EIS. DOE currently expects to issue the NOA in October 2025. After the public comment period ends, DOE will review and respond to comments received and will develop the final EIS. DOE currently expects to make the final EIS available to the public in April 2026. A record of decision will be completed no sooner than 30 days after the final EIS is released, in accordance with applicable laws and regulations.

Scoping Process

This NOI commences the public scoping process to identify issues and potential alternatives for consideration in the EIS. Throughout the scoping process, Federal agencies, Tribes, State and local governments, and the public have the opportunity to help DOE identify significant resources and issues, reasonable alternatives, mitigation measures, and other pertinent information that DOE should consider in the EIS. DOE will hold public scoping meetings at the times and dates described above under the **DATES** section. DOE will post information on how to participate in the virtual and in-person public meetings on the EIS website listed previously, in advance of the meetings. The public will have the opportunity to comment on the scope of the EIS. DOE representatives will be available to answer questions and provide additional information on the NEPA process to meeting attendees. In addition to providing comments at the public scoping meetings, stakeholders may submit written comments as described in the **ADDRESSES** section.

Comments may be broad in nature or restricted to specific areas of concern, but they should be directly relevant to the NEPA process, or potential environmental impacts. The scoping process allows the public and interested parties to shape the EIS impact analysis, focusing on the areas of greatest importance and identifying areas requiring less attention. DOE will

consider the comments received on the scope of the EIS during the 75-day scoping period as it prepares the draft EIS.

OCED does not consider anonymous scoping comments. Please include your name and address as part of your scoping comment. All scoping comments, including the names, addresses, and other personally identifiable information included in the comment, will be part of the administrative record. DOE will protect privileged or confidential information that you submit when required by Exemption 4 of the Freedom of Information Act (FOIA), which applies to trade secrets and commercial or financial information that is privileged or confidential. Please label privileged or confidential information "Contains Confidential Information" and consider submitting such information as a separate attachment. Information that is not labeled as privileged or confidential may be regarded by DOE as suitable for public release.

DOE will invite Tribal government-to-government consultations.

Request for Comment on Alternatives and Effects, as Well as on Relevant Information, Studies, or Analyses With Respect to the Proposed Action

Federal, State, and local agencies, along with Indian Tribal Nations and other stakeholders that may be interested in or affected by the proposed action, are invited to participate in the scoping process and, if eligible, may request or be requested by DOE to participate in the development of the environmental analysis as a cooperating agency. DOE requests data, comments, views, information, analysis, alternatives, or suggestions relevant to the proposed action from the public; affected Federal, Tribal, State, and local governments, agencies, and offices; the scientific community; industry; or any other interested party.

Specifically, DOE requests information on the following topics:

(1) Potential effects that the proposed action could have on biological, physical, socioeconomic, cultural, or other resources.

(2) Other potential reasonable alternatives to the proposed action that DOE should consider, including additional or alternative avoidance, minimization, and mitigation measures.

(3) Information on other current or planned activities in, or in the vicinity of, the proposed action, that could impact one another or contribute to cumulative impacts.

(4) Other information, studies, or analyses relevant to the proposed action

and its impacts on the human environment.

To promote informed decision-making, comments should be as specific as possible and should provide as much detail as necessary to meaningfully and fully inform DOE of why the issues raised are important to the agency's review of the proposed action.

The draft EIS will include as an appendix a summary of issues raised in public scoping comments that DOE considered in preparing the EIS and comments outside the scope of the analysis.

Signing Authority

This document of the Department of Energy was signed on December 11, 2024, by Kelly Cummins, Acting Director, Office of Clean Energy Demonstrations, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 13, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–30020 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), U.S. Department of Energy (DOE).

ACTION: Notice of requests for comments.

SUMMARY: DOE submitted an information collection request for extension as required by the Paperwork Reduction Act of 1995. The information collection requests a three-year extension, with changes, to the Form NWP-830G “Appendix G—Standard Remittance Advice for Payment of Fees”, including annex A to appendix G, under OMB Control Number 1901–

0260. Form NWP-830G is part of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste. Generators and owners of spent nuclear fuel and high-level radioactive waste of domestic origin paid fees into the Nuclear Waste Fund based on net electricity generated and sold as defined in the Standard Contract.

DATES: Comments regarding this proposed information collection must be received on or before January 17, 2025. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, please advise the DOE Desk Officer at OMB of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4718.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: If you need additional information, contact Guang Wei, Office of Standard Contract Management, U.S. Department of Energy, telephone (240) 388–5685, or by email at standardcontracts@hq.doe.gov. The forms and instructions are available on DOE's website at <https://www.energy.gov/gc/office-standard-contract-management> and at EIA's website at www.eia.gov/survey/.

SUPPLEMENTARY INFORMATION: This information collection request contains:

- (1) OMB No.: 1901–0260;
- (2) *Information Collection Request Title:* Form NWP-830G, *Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, Appendix G*;
- (3) *Type of Request:* Three-year extension with changes;
- (4) *Purpose:* The Form NWP-830G survey included in the *Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, Appendix G*, collects information on energy resource reserves, production, demand, technology, and related economic and statistical information.

The Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*) and the DOE Organization Act (42 U.S.C. 7101 *et seq.*) require EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information

on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer-term domestic demands.

As part of its effort to comply with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), EIA provides the general public and other federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with EIA. Also, EIA will later seek approval for this collection by OMB under Section 3507(a) of the Paperwork Reduction Act of 1995.

The Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 *et seq.*) required that DOE enter into Standard Contracts with all generators or owners of spent nuclear fuel and high-level radioactive waste of domestic origin. Form NWP-830G *Appendix G—Standard Remittance Advice for Payment of Fees*, including annex A to appendix G, is an Appendix to this Standard Contract. Appendix G and annex A to appendix G are commonly referred to as Remittance Advice (RA) forms. RA forms must be submitted quarterly by generators and owners of spent nuclear fuel and high-level radioactive waste of domestic origin who signed the Standard Contract. Appendix G is designed to serve as the source document for entries into DOE accounting records to transmit data to DOE concerning payment of fees into the Nuclear Waste Fund for spent nuclear fuel and high-level waste disposal. Annex A to appendix G is used to provide data on the amount of net electricity generated and sold, upon which these fees are based.

(4a) *Changes to Information Collection:* The reduction of 20 annual burden hours for Form NWP-830G results from the reduction of the number of total respondents representing reactors that decreased from 95 to 94. One reactor permanently shut down since the last clearance cycle and no longer is required to pay fees into the Nuclear Waste Fund nor respond to this survey.

(5) *Annual Estimated Number of Respondents:* 94.

(6) *Annual Estimated Number of Total Responses:* 376.

(7) *Annual Estimated Number of Burden Hours:* 1,880.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* \$171,381 (1,880 estimated number of burden hours times \$91.16 per hour current average loaded wage rate). DOE estimates that respondents will have no additional costs associated with the

surveys other than the burden hours and the maintenance of the information during the normal course of business.

Statutory Authority: 15 U.S.C. 772(b), 42 U.S.C. 7101, and 42 U.S.C. 10101 *et seq.*

Signed in Washington, DC, on December 12, 2024.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2024–29986 Filed 12–17–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP25–277–000.

Applicants: Bear Creek Storage Company, L.L.C.

Description: Compliance filing: Annual Fuel Summary 2024 to be effective N/A.

Filed Date: 12/11/24.

Accession Number: 20241211–5053.

Comment Date: 5 p.m. ET 12/23/24.

Docket Numbers: RP25–278–000.

Applicants: Columbia Gas Transmission, LLC.

Description: Compliance filing: Penalty Revenue Crediting Report 2024 to be effective N/A.

Filed Date: 12/12/24.

Accession Number: 20241212–5128.

Comment Date: 5 p.m. ET 12/24/24.

Docket Numbers: RP25–279–000.

Applicants: Columbia Gulf Transmission, LLC.

Description: Compliance filing: Penalty Revenue Crediting Report 2024 to be effective N/A.

Filed Date: 12/12/24.

Accession Number: 20241212–5147.

Comment Date: 5 p.m. ET 12/24/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP24–744–000

Applicants: Southern Natural Gas Company, L.L.C.

Description: Report Filing: SNG Rate Case 45-Day Update Filing to correct filing type to be effective N/A.

Filed Date: 12/12/24

Accession Number: 20241212–5094

Comment Date: 5 p.m. ET 12/24/24

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <https://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: December 12, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024–29980 Filed 12–17–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG25–60–000.

Applicants: Redfield PV I, LLC.

Description: Redfield PV I, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 12/11/24.

Accession Number: 20241211–5231.

Comment Date: 5 p.m. ET 1/1/25.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL25–37–000.

Applicants: Voltus, Inc. v. Midcontinent Independent System Operator, Inc.

Description: Complaint of Voltus, Inc. v. Midcontinent Independent System Operator, Inc.

Filed Date: 12/11/24.

Accession Number: 20241211–5134.

Comment Date: 5 p.m. ET 12/31/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2881–040; ER10–2882–040; ER10–2883–038; ER10–2884–038; ER17–2401–010; ER17–2404–010; ER16–2509–009; ER17–2400–010; ER17–2403–010.

Applicants: SP Pawpaw Solar, LLC, SP Butler Solar, LLC, Rutherford Farm, LLC, SP Sandhills Solar, LLC, SP Decatur Parkway Solar, LLC, Georgia Power Company, Mississippi Power Company, Southern Power Company, Alabama Power Company.

Description: Supplement to 06/30/2023 Triennial Market Power Analysis for Southeast Region of Alabama Power Company et al.

Filed Date: 12/11/24.

Accession Number: 20241211–5295.

Comment Date: 5 p.m. ET 1/1/25.

Docket Numbers: ER24–1906–001.

Applicants: Cheyenne Light, Fuel and Power Company.

Description: Compliance filing: Order Nos. 2023 and 2023—A Further Compliance Filing to be effective 7/1/2024.

Filed Date: 12/12/24.

Accession Number: 20241212–5184.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER24–2825–001.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Compliance Filing Revising SPP Tariff to Implement JTIQ Framework to be effective 11/14/2024.

Filed Date: 12/12/24.

Accession Number: 20241212–5040.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER24–2871–002.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2024–12–12 JTIQ Compliance to be effective 11/14/2024.

Filed Date: 12/12/24.

Accession Number: 20241212–5199.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER24–3049–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Response to Deficiency Letter to be effective 8/15/2024.

Filed Date: 12/12/24.

Accession Number: 20241212-5077.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER25-695-000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2024-12-12 SA 3436 Entergy Mississippi-Ragsdale Solar 2nd Rev GIA (J830) to be effective 12/3/2024.

Filed Date: 12/12/24.

Accession Number: 20241212-5078.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER25-696-000.

Applicants: Ameren Illinois Company.

Description: § 205(d) Rate Filing: 2024-12-12 SA 4410 Ameren IL-Camp Creek Wind E&P (J1701) to be effective 12/13/2024.

Filed Date: 12/12/24.

Accession Number: 20241212-5080.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER25-697-000.

Applicants: Midcontinent

Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2024-12-12 SA 4288 Ameren IL-Panther Solar B912 1st Rev GIA (J1306) to be effective 2/11/2025.

Filed Date: 12/12/24.

Accession Number: 20241212-5129.

Comment Date: 5 p.m. ET 1/2/25.

Docket Numbers: ER25-698-000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: § 205(d) Rate Filing: 2024-12-12 BUFO SISA 765-0.0.0 to be effective 12/13/2024.

Filed Date: 12/12/24.

Accession Number: 20241212-5135.

Comment Date: 5 p.m. ET 1/2/25.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: December 12, 2024.

Carlos D. Clay,

Acting Deputy Secretary.

[FR Doc. 2024-29979 Filed 12-17-24; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2020-0505; FRL-12496-01-OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NESHAP for Carbon Black Production (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), NESHAP for Carbon Black Production (EPA ICR Number 2677.03, OMB Control Number 2060-0738) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** on August 6, 2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 17, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OAR-2020-0505, to EPA online using <https://www.regulations.gov/> (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit electronically to www.regulations.gov any information you consider to be CBI, proprietary business information (PBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Muntasir Ali, Sector Policies and Program Division (D243-05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-0833; email address: ali.muntasir@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2024. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on April 23, 2024, during a 60-day comment period (89 FR 30358). This notice allows for an additional 30 days for public comments. Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at <https://www.regulations.gov> or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Generic Maximum Achievable Control Technology (GMACT) Standards published at (40 CFR part 63, subpart YY) were promulgated on July 12, 2002 (67 FR 46257), and amended on April 13, 2005

(70 FR 19266). These regulations apply to existing and new carbon black (CB), cyanide (CY), ethylene (ET), and spandex (SP) facilities that would be subject to the major source provisions specified under the GMACT NESHAP. New facilities include those that commenced construction or reconstruction after the date of proposal. This information is being collected to assure compliance with 40 CFR part 63, subpart YY. In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NESHAP.

Form Numbers: 5900–484.

Respondents/affected entities:

Owners and operators of carbon black production facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart YY).

Estimated number of respondents: 15 (total).

Frequency of response: Annually, semiannually.

Total estimated burden: 240 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$84,300 (per year), includes \$51,500 annualized capital or operation & maintenance costs.

Changes in the Estimates: The increase in burden from the most recently approved ICR is due to a revised application of costs when compared to the final RTR ICR. In the previous ICR renewal, semiannual reports were incorrectly labeled as occurring once per year. This line item is now adjusted to occur twice per year. Additionally, there is an increase in costs, which is due to the use of updated labor rates. This ICR uses labor rates from the most recent Bureau of Labor Statistics report (December 2023) to calculate respondent burden costs. Capital/Startup and O&M costs also increased due to a revised application of costs when compared to the final RTR ICR. The Capital/Startup and O&M costs were increased from 2021 \$ to 2023 \$ using the CEPCI Index.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024–29953 Filed 12–17–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2011–0371; FRL–12495–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request National Volatile Organic Compound Emission Standards for Architectural Coatings (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), National Volatile Organic Compound Emission Standards for Architectural Coatings (EPA ICR Number 1750.10, OMB Control Number 2060–0393) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** on May 18, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 17, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2011–0371 to EPA online using <https://www.regulations.gov/> (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and

Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0833; email address: ali.muntasir@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2024. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on April 23, 2024, during a 60-day comment period (89 FR 30358). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The EPA is required under section 183(e) of the Clean Air Act (CAA) to regulate volatile organic compound (VOC) emissions from the use of consumer and commercial products. Pursuant to CAA section 183(e)(3), the EPA published a list of consumer and commercial products and a schedule for their regulation (60 FR 15264). Architectural and industrial maintenance coatings are included on the list, and the standards for such coatings are codified at 40 CFR part 59, subpart D. The information collection includes initial reports and periodic recordkeeping necessary for the EPA to ensure compliance with federal standards for VOC in architectural coatings. Respondents are manufacturers, distributors, and importers of architectural coatings. Responses to the collection are mandatory under 40 CFR part 59, subpart D—National Volatile Organic Compound Emission Standards for Architectural Coatings. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Form Numbers: None.

Respondents/affected entities: Manufacturers and importers of architectural coatings.

Respondent's obligation to respond: Mandatory (40 CFR part 59, subpart D)

Estimated number of respondents: 520 (total).

Frequency of response: Initially, annually.

Total estimated burden: 24,500 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$1,550,000 (per year), includes \$0 annualized capital or operation & maintenance costs.

Changes in the Estimates: The increase in burden from the most recently approved ICR is due to an adjustment(s). The adjustment increase in burden from the most recently approved ICR is due to an increase in the number of respondents due to growth in the industry. There is an increase in costs from the most recently approved ICR due to the increased respondent count and the use of updated labor rates. This ICR uses labor rates from the most recent Bureau of Labor Statistics report (September 2022) to calculate respondent burden costs.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29961 Filed 12-17-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2024-0093; FRL-12084-01-OCSPP]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations and/or Amend Registrations To Terminate Certain Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing

a notice of receipt of requests by the registrants to voluntarily cancel certain pesticide products and/or to amend certain pesticide product registrations to terminate one or more uses. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been cancelled and/or use terminated only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before January 17, 2025.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2024-0093, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-2707; email address: green.christopher@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical

industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through <https://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. What action is the Agency taking?

This notice announces receipt by EPA of requests from registrants to cancel certain pesticide product registrations and/or terminate certain uses of pesticide product registrations. The affected products and the registrants making the requests are identified in tables 1–3 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling and/or amending the affected registrations.

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredients
279-9546	279	F6119 Turf and IVM Herbicide	2,4-D, 2-ethylhexyl ester (030063/1928-43-4)—(65.52%), Carfentrazone-ethyl (128712/128639-02-1)—(1.44%).
7401-38	7401	Ferti-Lome Liquid Carbaryl Home Garden Spray	Carbaryl (056801/63-25-2)—(23.7%).
7401-69	7401	Ferti Lome Garden Dust	Carbaryl (056801/63-25-2)—(5%).
7401-166	7401	Hi-Yield 10% Carbaryl Garden Dust	Carbaryl (056801/63-25-2)—(10%).
8378-10	8378	Shaw's Crabgrass Control and Fertilizer	Benfluralin (084301/1861-40-1)—(1.15%).
8378-11	8378	Shaw's Professional Crabgrass Control and Fertilizer.	Benfluralin (084301/1861-40-1)—(92%).
8378-31	8378	Shaw's Sevin 430 Turf Insect Granules + Fertilizer ..	Carbaryl (056801/63-25-2)—(4.3%).
8378-35	8378	Balan 2.5G	Benfluralin (084301/1861-40-1)—(2.5%).

TABLE 1—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Company No.	Product name	Active ingredients
8378–36	8378	Shaw's Sevin 143 Turf Insect Granules + Fertilizer ..	Carbaryl (056801/63–25–2)—(1.43%).
9198–234	9198	The Andersons Bicarb Lawn Insect Killer Granules	Bifenthrin (128825/82657–04–3)—(.058%), Carbaryl (056801/63–25–2)—(2.3%).
70804–1	70804	UltraFloc AlgaeSolve II	Copper sulfate pentahydrate (024401/7758–99–8)—(25%).
94278–4	94278	Ethephon 75% MUP	Ethephon (099801/16672–87–0)—(75%).
PA–160001	56228	Gonacon—Equine	Gonadotropin Releasing Hormone (116800/9034–40–6)—(.032%).
TX–090006	59639	Esteem Ant Bait	Pyriproxyfen (129032/95737–68–1)—(.5%).
WA–070007	62719	DMA 4 IVM	2,4–D, dimethylamine salt (030019/2008–39–1)—(46.3%).
WA–080009	70506	Ethephon 2	Ethephon (099801/16672–87–0)—(21.7%).
WA–200004	68506	UVASYS	Sodium metabisulfite (111409/7681–57–4)—(36.5%).

TABLE 2—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT

Registration No.	Company No.	Product name	Active ingredient	Uses to be terminated
42750–400	42750	Albaugh Thiamethoxam Technical.	Thiamethoxam (060109/153719–23–4)—(98.5%).	Non-seed treatment uses.
61842–27	61842	Sinbar WDG Agricultural Herbicide.	Terbacil (012701/5902–51–2)—(80%).	Grass seed crops and pears.
74712–5	74712	Avancid GL 45M	Glutaraldehyde (043901/111–30–8)—(45%).	Beet sugar mills and beet sugar mill process water systems. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water based coatings for food contact paper and paperboard. Aqueous metalworking fluids. Animal production facilities and farm equipment.
74712–6	74712	Avancid GL 25	Glutaraldehyde (043901/111–30–8)—(25%).	Dairy sweet water systems. Hydrostatic sterilizers and retorts. Pasteurizers and warmers. Beet sugar mills and beet sugar mill process water system. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water based coatings for food contact paper and paperboard. Aqueous metalworking fluids. In-can preservative for food contact adhesives and mineral slurries used in papermaking.
74712–7	74712	Avancid GL 45	Glutaraldehyde (043901/111–30–8)—(45%).	Dairy sweet water systems. Hydrostatic sterilizers and retorts. Pasteurizers and warmers. Beet sugar mills and beet sugar mill process water systems. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water based coatings for food contact paper and paperboard. Aqueous metalworking fluids. In-can preservative for food contact adhesives and mineral slurries used in papermaking.
74712–8	74712	Avancid GL 50M	Glutaraldehyde (043901/111–30–8)—(50%).	Beet sugar mills and beet sugar mill process water systems. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water bases coatings for food contact paper and paperboard. Aqueous metalworking fluids. Animal production facilities and farm equipment.

TABLE 2—PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR AMENDMENT—Continued

Registration No.	Company No.	Product name	Active ingredient	Uses to be terminated
74712–9	74712	Avancid GL 50	Glutaraldehyde (043901/111–30–8)—(50%).	Dairy sweet water systems. Hydrostatic sterilizers and retorts. Pasteurizers and warmers. Beet sugar mills and beet sugar mill process water systems. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water based coatings for food contact paper and paperboard. Aqueous metalworking fluids. In-can preservative for food contact adhesives and mineral slurries used in papermaking.
74712–10	74712	Avancid GL 15	Glutaraldehyde (043901/111–30–8)—(15%).	Dairy sweet water systems. Hydrostatic sterilizers and retorts. Pasteurizers and warmers. Beet sugar mills and beet sugar mill process water systems. Paper mills and paper mill process water systems. Pigments and filler slurries for food contact paper and paperboard. Water based coatings for food contact paper and paperboard. Aqueous metalworking fluids. In-can preservative for food contact adhesives and mineral slurries used in papermaking.
87811–1	87811	Willowood Tebuconazole Technical.	Tebuconazole (128997/107534–96–3)—(98.5%).	Wood protection uses.
101563–130	101563	Spirotetramat 240 SC Greenhouse and Nursery Insecticide/Miticide.	Spirotetramat (392201/203313–25–1)—(22.4%).	All crop uses, non-bearing fruit and nut trees, and vegetable plants.

Table 3 of this unit includes the names and addresses of record for the registrants of the products listed in table 1 and table 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in table 1 and table 2 of this unit.

TABLE 3—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA company No.	Company name and address
279	FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.
7401	Voluntary Purchasing Groups, Inc., Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.
8378	Knox Fertilizer Company, Inc., Agent Name: Wagner Regulator Associates, P.O. Box: 640, Hockessin, DE 19707–0640.
9198	The Andersons, Inc., 1947 Briarfield Blvd., P.O. Box: 119, Maumee, OH 43537.
42750	Albaugh, LLC, 1525 NE 36th Street, Ankeny, IA 50021.
56228	U.S. Department of Agriculture, Animal and Plant Health Inspection Service, 4700 River Road, Unit 149, Riverdale, MD 20737.
59639	Valent U.S.A., LLC, 4600 Norris Canyon Road, P.O. Box: 5075, San Ramon, CA 94583.
61842	Tessengerlo Kerley, Inc., Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.
62719	Corteva Agriscience, LLC, 9330 Zionsville Road, Indianapolis, IN 46268.
68506	Tessara (Pty) Ltd., Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.
70506	Arysta LifeScience North America, LLC, Agent Name: UPL NA, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
70804	USALCO, LLC, 2601 Cannery Avenue, Baltimore, MD 21226.
74712	Special Materials Company, Agent Name: Toxcel, LLC, 7140 Heritage Village Plaza, Gainesville, VA 20155.
87811	Willowood Tebuconazole, LLC, Division Name: C/O Generic Crop Science, LLC, 1887 Whitney Mesa Drive, #9740, Henderson, NV 89014–2069.
94278	Oasis Chemicals, LLC, 4511 11th Street, Lubbock, TX 79416.
101563	Environmental Science U.S., LLC, 5000 Centregreen Way, Suite 400, Cary, NC 27513.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide

registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section

6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants have requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use termination should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for voluntary cancellation and/or amendments to terminate uses are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to these requests for cancellation of product registrations and/or for amendments to terminate uses, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in tables 1 and 2 of unit II.

For voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1 year after the effective date of the cancellation, which will be the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in table 1 of unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Once EPA has approved product labels reflecting the requested amendments to terminate uses, registrants will be permitted to sell or distribute products under the previously

approved labeling for a period of 18 months after the date of **Federal Register** publication of the cancellation order, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the terminated uses identified in table 2 of unit II, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products and/or products whose labels include the terminated uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products and/or terminated uses.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 11, 2024.

Daniel Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2024–29933 Filed 12–17–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0121; FRL–12493–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Comment Request; NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (EPA ICR Number 1564.12, OMB Control Number 2060–0202) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2024. Public comments were previously requested via the **Federal Register** (88 FR 31748) on May 18, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Additional comments may be submitted on or before January 17, 2025.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2023–0121, to EPA online using <https://www.regulations.gov/> (our preferred method), by email to a-and-r-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0833; email address: ali.muntasir@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2024. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on April 23, 2024, during a 60-day comment period (89 FR 30358). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The New Source Performance Standards (NSPS) for Small Industrial-Commercial-Institutional Steam Generation Units (40

CFR part 60, subpart Dc) were proposed on June 9, 1989; promulgated on September 12, 1990; and amended last on February 16, 2012. These regulations apply to existing facilities and new industrial-commercial-institutional steam generating units with a maximum design heat input capacity of 29 megawatts (MW) (100 MMBtu/hr) or less, but greater than or equal to 2.9 MW (10 MMBtu/hr), commencing construction, modification, or reconstruction after June 9, 1989. New facilities include those that commenced construction, modification or reconstruction after the date of the proposal. This information is being collected to assure compliance with 40 CFR part 60, subpart Dc.

Form Numbers: None.

Respondents/affected entities: Small industrial-commercial-institutional steam generators.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart Dc).

Estimated number of respondents: 356 (total).

Frequency of response: Semiannually.

Total estimated burden: 241,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$51,700,000 (per year), includes \$21,300,000 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the respondent burden, and capital and O&M costs from the most-recently approved ICR. This increase is not due to any program changes. The change in burden and costs is due to an increase in the number of respondents. This ICR assumes an industry growth rate of 11 respondents per year, or an increase of 33 respondents, since the last ICR renewal period, which results in an increase in burden and the number of responses submitted. The industry growth also results in an increase in capital O&M costs. There is also an increase in costs, due to the use of updated labor rates. This ICR uses labor rates from the most recent Bureau of Labor Statistics report (September 2022) to calculate respondent burden costs. There is an additional increase in capital and O&M costs due to an adjustment to increase from 2007 to 2022 \$ using the CEPCI Equipment Cost Index.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2024-29965 Filed 12-17-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-ORD-2017-0497; FRL-12395-01-ORD]

Availability of the Draft IRIS Toxicological Review of Chloroform (Inhalation)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 60-day public comment period associated with release of the draft Integrated Risk Information System (IRIS) Toxicological Review of Chloroform (Inhalation). The draft document was prepared by the Center for Public Health and Environmental Assessment (CPHEA) within EPA's Office of Research and Development (ORD).

EPA is releasing this draft IRIS assessment for public comment in advance of a Science Advisory Board (SAB) managed peer review. SAB will convene a public meeting to discuss the draft assessment with the public during Step 4 of the IRIS Process. The external peer reviewers will consider public comments submitted to the EPA docket in response to this notice and any others provided during external peer review. EPA will consider all comments submitted to the docket when revising the document post-peer review. This draft assessment is not final as described in EPA's information quality guidelines, and it does not represent, and should not be construed to represent Agency policy or views.

DATES: The 60-day public comment period begins December 18, 2024 and ends February 18, 2025. Comments must be received on or before February 18, 2025.

ADDRESSES: The IRIS Toxicological Review of Chloroform (Inhalation) will be available via the internet on the IRIS website at <https://www.epa.gov/iris> and in the public docket at <http://www.regulations.gov>, Docket ID No. EPA-HQ-ORD-2017-0497.

FOR FURTHER INFORMATION CONTACT:

For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; telephone: 202-566-1752; facsimile: 202-566-9744; or email: Docket_ORD@epa.gov.

For technical information on the IRIS Toxicological Review of Chloroform (Inhalation) contact Mr. Dahnish Shams; email: shams.dahnish@epa.gov. The IRIS Program will provide updates

through the IRIS website (<https://www.epa.gov/iris>) and via EPA's IRIS listserv. To register for the IRIS listserv, visit the IRIS website (<https://www.epa.gov/iris>) or <https://www.epa.gov/iris/forms/staying-connected-integrated-risk-information-system#connect>.

For information about the peer review, please visit the EPA SAB website: https://sab.epa.gov/ords/sab/r/sab_apex/sab/advisoryactivitydetail?p18_id=2651&clear=18&session=309037997993.

SUPPLEMENTARY INFORMATION:

I. *How to Submit Technical Comments to the Docket* at <https://www.regulations.gov>. Submit your comments, identified by Docket ID No. EPA-HQ-ORD-2017-0497 for the Chloroform IRIS Assessment, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.

- *Email:* Docket_ORD@epa.gov.

- *Fax:* 202-566-9744.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center (ORD Docket), Mail Code: 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202-566-1752.

For information on visiting the EPA Docket Center Public Reading Room, visit <https://www.epa.gov/dockets>. The telephone number for the Public Reading Room is 202-566-1744. The public can submit comments via www.regulations.gov or email.

Instructions: Direct your comments to docket number EPA-HQ-ORD-2017-0497 for IRIS Toxicological Review of Chloroform (Inhalation). Please ensure that your comments are submitted within the specified comment period. It is EPA's policy to include all comments it receives in the public docket within the specified comment period without change and to make the comments available online www.regulations.gov, including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information through

www.regulations.gov or email that you consider to be CBI or otherwise protected. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through www.regulations.gov,

your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at www.epa.gov/epahome/dockets.htm.

Docket: Documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health & Environmental Assessment.

[FR Doc. 2024-29865 Filed 12-17-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2024-0158; FRL-11254-01-OW]

RIN 2040-ZA43

Preliminary Effluent Guidelines Program Plan 16

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the U.S. Environmental Protection Agency's (EPA) Preliminary Effluent Guidelines Program Plan 16 (Preliminary Plan 16) and solicits public comment. The Clean Water Act (CWA) requires the EPA to biennially publish a plan for new and revised effluent limitations guidelines and pretreatment standards, after public review and comment. Preliminary Plan 16 discusses the EPA's 2022 and 2023 annual reviews of effluent guidelines and pretreatment standards, presents its

preliminary review of specific industrial categories, and provides an update on the analyses and tools that the EPA is continuing to enhance to further improve its annual review and biennial planning process.

DATES: Comments must be received on or before January 17, 2025.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OW-2024-0158, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.
- **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- **Hand Delivery or Courier:** EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.—4:30 p.m., Monday—Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this action. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments and additional information on the process for this action, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Doruntinë Rexhepi, Engineering and Analysis Division, Office of Water, 4303T, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566-2532; email address: rexhepi.doruntine@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2024-0158, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be

accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. General Information

A. Supporting Documents

A key document providing additional information is the *Preliminary Effluent Guidelines Program Plan 16* document. Supporting documents providing further details are also available for review.

B. How can I get copies of these documents and other related information?

1. **Docket.** The EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OW-2024-0158. The official public docket is the collection of materials that are available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004.

2. **Electronic Access.** You can access this **Federal Register** document electronically through the United States Government online source for Federal regulations at <https://www.regulations.gov>.

3. **Internet access.** Copies of the supporting documents are available at <https://www.epa.gov/eg/effluent-guidelines-plan>.

III. How Is This Document Organized

The outline of this document follows.

- A. Legal Authority.
- B. Request for Public Comments and Information.

A. Legal Authority

This notice is published under the authority of the CWA, 33 U.S.C. 1251, *et seq.*, and in particular sections 301(d), 304(b), 304(g), 304(m), 306, 307(b), and 308 of the Act, 33 U.S.C. 1311(d), 1314(b), 1314(g), 1314(m), 1316, 1317(b), and 1318.

B. Request for Public Comments and Information

The EPA invites comment on the entirety of Preliminary Plan 16. In

particular, the EPA invites comment on the following topics (see Preliminary Plan 16 for more information on these topics):

1. The order weighted average analysis including: the metrics used in the analysis to evaluate the industrial category rankings, the inclusion/exclusion of pollutant toxicity in annual review rankings, and results of the 2022 and 2023 annual rankings.

2. The findings of the preliminary category reviews, specifically the findings for Battery Manufacturing, Centralized Waste Treatment, and Oil and Gas Extraction Categories.

3. The preliminary category review schedule and tools described to support the EPA's review of effluent guidelines.

4. The capabilities, performance, and costs of treatment technologies for industrial wastewater to support the Agency's technology reviews.

5. The announcement made within Preliminary Plan 16 of the EPA's intent to prepare a generic ICR to support effluent guidelines planning and rulemakings.

6. The announcement made within Preliminary Plan 16 of an online form on the CWA methods website to request new analytical methods for wastewater and surface waters.

7. The announcements made within Preliminary Plan 16 regarding new studies.

Bruno Pigott,

Principal Deputy Assistant Administrator.

[FR Doc. 2024-29860 Filed 12-17-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2024-0092; FRL-12319-01-OCSPP]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of the products listed in this notice will be permitted after the registrations have been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before June 16, 2025.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2024-0092, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-2707; email address: green.christopher@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a

wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](https://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/comments.html>.

II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel certain pesticide products registered under FIFRA section 3 (7 U.S.C. 136a) or 24(c) (7 U.S.C. 136v(c)). The registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredients
10163-195	10163	Botran Technical	Dicloran (031301/99-30-9)—(95%).
69117-2	69117	Greyhound Insecticide	Abamectin (122804/71751-41-2)—(2%).

The registrant of 10163-195, has requested to sell and distribute existing stocks for 18-months after the effective date of cancellation.

Table 2 of this unit includes the name and address of record for the registrants of the products in Table 1 of this unit, in sequence by EPA company number.

This number corresponds to the first part of the EPA registration number of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
10163	Gowan Company, LLC, 370 S Main St., Yuma, AZ 85366.
69117	ArborSystems, Inc. D/B/A ArborSystems, Agent Name: RegWest Company, LLC, 9017 18th Street, Greeley, CO 80634–4756.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA (7 U.S.C. 136d(f)(1)(B)) requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) (7 U.S.C. 136d(f)(1)(C)) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II have not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the product has been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with the pesticide product 69117–2, upon cancellation of the product 69117–2

identified in Table 1 of Unit II, EPA anticipates allowing the registrant to sell and distribute existing stocks of this product for 1 year after publication of the Cancellation Order in the **Federal Register**.

Thereafter, the registrant will be prohibited from selling or distributing the pesticide 69117–2, identified in Table 1 of Unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal. Persons other than the registrant will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product.

For 10163–195

The registrant of 10163–195, has requested to sell and distribute existing stocks for 18-months after publication of the Cancellation Order in the **Federal Register**. Persons other than the registrant will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 11, 2024.

Daniel Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2024–29828 Filed 12–17–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2024–0057; FRL–11683–11–OCSPP]

Certain New Chemicals; Receipt and Status Information for November 2024

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, to make information publicly

available and to publish information in the **Federal Register** pertaining to submissions under TSCA Section 5, including notice of receipt of a Premanufacture notice (PMN), Significant New Use Notice (SNUN) or Microbial Commercial Activity Notice (MCAN), including an amended notice or test information; an exemption application (Biotech exemption); an application for a test marketing exemption (TME), both pending and/or concluded; a notice of commencement (NOC) of manufacture (including import) for new chemical substances; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review. This document covers the period from 11/01/2024 to 11/30/2024.

DATES: Comments identified by the specific case number provided in this document must be received on or before January 17, 2025.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2024–0057, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Jim Rahai, Project Management and Operations Division (MC 7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8593; email address: rahai.jim@epa.gov.

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

This document provides the receipt and status reports for the period from 11/01/2024 to 11/30/2024. The Agency is providing notice of receipt of PMNs, SNUNs, and MCANs (including amended notices and test information); an exemption application under 40 CFR part 725 (Biotech exemption); TMEs, both pending and/or concluded; NOCs to manufacture a new chemical substance; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review.

EPA is also providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices>. This information is updated on a weekly basis.

B. What is the Agency's authority for taking this action?

Under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, a chemical substance may be either an "existing" chemical substance or a "new" chemical substance. Any chemical substance that is not on EPA's TSCA Inventory of Chemical Substances (TSCA Inventory) is classified as a "new chemical substance," while a chemical substance that is listed on the TSCA Inventory is classified as an "existing chemical substance." (See TSCA section 3(11).) For more information about the TSCA Inventory please go to: <https://www.epa.gov/tsca-inventory>.

Any person who intends to manufacture (including import) a new chemical substance for a non-exempt commercial purpose, or to manufacture or process a chemical substance in a non-exempt manner for a use that EPA has determined is a significant new use, is required by TSCA section 5 to provide EPA with a PMN, MCAN, or SNUN, as appropriate, before initiating the activity. EPA will review the notice, make a risk determination on the chemical substance or significant new use, and take appropriate action as described in TSCA section 5(a)(3).

TSCA section 5(h)(1) authorizes EPA to allow persons, upon application and under appropriate restrictions, to manufacture or process a new chemical substance, or a chemical substance

subject to a significant new use rule (SNUR) issued under TSCA section 5(a)(2), for "test marketing" purposes, upon a showing that the manufacture, processing, distribution in commerce, use, and disposal of the chemical will not present an unreasonable risk of injury to health or the environment. This is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: <https://www.epa.gov/chemicals-under-tsca>.

Under TSCA sections 5 and 8 and EPA regulations, EPA is required to publish in the **Federal Register** certain information, including notice of receipt of a PMN/SNUN/MCAN (including amended notices and test information); an exemption application under 40 CFR part 725 (biotech exemption); an application for a TME, both pending and concluded; NOCs to manufacture a new chemical substance; and a periodic status report on the new chemical substances that are currently under EPA review or have recently concluded review.

C. Does this action apply to me?

This action provides information that is directed to the public in general.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

E. What should I consider as I prepare my comments for EPA?

1. *Submitting confidential business information (CBI).* Do not submit this information to EPA through [regulations.gov](https://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. Status Reports

In the past, EPA has published individual notices reflecting the status of TSCA section 5 filings received, pending or concluded. In 1995, the Agency modified its approach and streamlined the information published in the **Federal Register** after providing notice of such changes to the public and an opportunity to comment (see the **Federal Register** of May 12, 1995 (60 FR 25798) (FRL-4942-7)). Since the passage of the Lautenberg amendments to TSCA in 2016, public interest in information on the status of section 5 cases under EPA review, and particularly the final determination of such cases, has increased. In an effort to be responsive to the regulated community, the users of this information, and the general public, to comply with the requirements of TSCA, to conserve EPA resources and to streamline the process and make it more timely, EPA is providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices>. This information is updated on a weekly basis.

III. Receipt Reports

For the PMN/SNUN/MCANs that have passed an initial screening by EPA during this period, Table I provides the following information (to the extent that such information is not subject to a CBI claim) on the notices screened by EPA during this period: The EPA case number assigned to the notice that indicates whether the submission is an initial submission, or an amendment, a notation of which version was received, the date the notice was received by EPA, the submitting manufacturer (*i.e.*, domestic producer or importer), the potential uses identified by the manufacturer in the notice, and the chemical substance identity.

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that this information in the table is generic information because the specific information provided by the submitter was claimed as CBI. Submissions which are initial submissions will not have a letter following the case number. Submissions

which are amendments to previous submissions will have a case number followed by the letter “A” (e.g. P-18-1234A). The version column designates submissions in sequence as “1”, “2”,

“3”, etc. Note that in some cases, an initial submission is not numbered as version 1; this is because earlier version(s) were rejected as incomplete or invalid submissions. Note also that

future versions of the following tables may adjust slightly as the Agency works to automate population of the data in the tables.

TABLE I—PMN/SNUN/MCANS APPROVED* FROM 11/01/2024 TO 11/30/2024

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
J-25-0001	1	11/13/2024	CBI	(G) Ethanol production	(G) Biofuel producing <i>Saccharomyces cerevisiae</i> modified, genetically stable.
P-21-0007A	3	11/06/2024	CBI	(G) Catalyst	(G) Reaction products of Aluminosilicates, Me, Me group-terminated and (alkyl)cycloalkylene dialkylzirconium.
P-21-0008A	3	11/06/2024	CBI	(G) Catalyst	(G) Reaction products of Aluminosilicates, Me, Me group-terminated and cycloalkylene dialkyl tetrahydro indenyl zirconium.
P-22-0158A	5	11/19/2024	Aqdot	(G) Additive used in consumer, commercial, and industrial applications.	(S) 1H,4H,14H,17H-2,16:3,15-Dimethano-5H,6H,7H,8H,9H,10H,11H,12H,13H,18H,19H,20H,21H,22H,23H,24H,25H,26H-2,3,4a,5a,6a,7a,8a,9a,10a,11a,12a,13a,15,16,17a,18a,19a,20a,21a,22a,23a,24a,25a,26a-tetracosazabispentaleno[1''',6''':5'',6'',7''']cycloocta[1'',2'',3'':3',4']pentaleno[1',6':5,6,7]cycloocta[1,2,3-gh:1',2',3'-g'h']cycloocta[1,2,3-cd:5,6,7-c'd']dipentalene-1,4,6,8,10,12,14,17,19,21,23,25-dodecone, dodecahydro-, stereoisomer;2,18:3,17-Dimethano-2,3,4a,5a,6a,7a,8a,9a,10a,11a,12a,13a,14a,15a,17,18,19a,20a,21a,22a,23a,24a,25a,26a,27a,28a,29a,30a-octacosaza bispentaleno[1''''',6''''':5''',6''',7''',8''']cycloocta[1''',2''',3''':3''',4''']pentaleno[1''',6''':5'',6'',7''']cycloocta[1'',2'',3'':3',4']pentaleno[1',6':5,6,7]cycloocta[1,2,3-cd:1',2',3'-gh]pentalene-1,4,6,8,10,12,14,16,19,21,23,25,27,29-tetradecane, tetradecahydro-, stereoisomer;2,20:3,19-Dimethano-2,3,4a,5a,6a,7a,8a,9a,10a,11a,12a,13a,14a,15a,16a,17a,19,20,21a,22a,23a,24a,25a,26a,27a,28a,29a,30a,31a,32a,33a,34a-dotriacontazabispentaleno[1''''',6''''':5''',6''',7''',8''']cycloocta[1''',2''',3''':3''',4''']pentaleno[1''',6''':5'',6'',7''']cycloocta[1'',2'',3'':3',4']pentaleno[1',6':5,6,7]cycloocta[1,2,3-gh:1',2',3'-g'h']cycloocta[1,2,3-cd:5,6,7-c'd']dipentalene-1,4,6,8,10,12,14,16,18,21,23,25,27,29,31,33-hexadecane, hexadecahydro-, stereoisomer.
P-23-0141A	2	11/21/2024	Hach Company	(G) Buffer solution for free chlorine determination.	(S) 2-Butenedioic acid (2Z)-, potassium salt (1:?).
P-24-0046A	2	11/20/2024	The Euclid Chemical Company.	(S) Grinding aid used in cement manufacture.	(G) Alkanol, alkoxyalkyl imino, salt.
P-24-0047A	2	11/20/2024	The Euclid Chemical Company.	(S) Grinding aid used in cement manufacture.	(G) Alkanol, nitrilo, salt.
P-24-0116A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Phenol, 4,4-(1-alkylidene) bis-, polymer with 2-(chloromethyl) oxirane, 4-alkylphenyl ether, reaction products with alkylpolyamine and 2-(alkylamino)alkanol, hydrolyzed, alkanesulfonates (salts).
P-24-0117A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Alkanolic acid, compds. with hydrolyzed bisphenol-epichlorohydrin polymer 4-alkylphenyl ether- alkylpolyamine and 2-(alkylamino)alkanol reaction products.
P-24-0118A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Alkanolic acid, compds. with [(aminoalkyl)imino] bis[alkanol]-bisphenol-epichlorohydrin polymer 4-alkylphenyl ether—2-(alkylamino)alkanol reaction products.
P-24-0119A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Amidosulfonic acid, compds. With [(aminoalkyl)imino] bis[alkanol]-bisphenol-epichlorohydrin polymer 4-alkylphenyl ether—2-(alkylamino)alkanol reaction products.

TABLE I—PMN/SNUN/MCANS APPROVED* FROM 11/01/2024 TO 11/30/2024—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P-24-0120A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Alkanoic acid, compds. with hydrolyzed bisphenol-monoalkylamine-epichlorohydrin polymer 4-alkylphenyl ether- alkylpolyamine and 2-(alkylamino)alkanol reaction products.
P-24-0121A	4	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Phenol, 4,4-(1-alkylidene) bis-, polymer with 2-(chloromethyl) oxirane and monoalkanamine, 4-alkylphenyl ether, reaction products with alkylpolyamine and 2-(alkylamino)alkanol, hydrolyzed, alkanesulfonates (salts).
P-25-0005A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Cashew, nutshell liq., polymer with [(aminoalkyl)imino] bis[alkanol], bisphenol and epichlorohydrin, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0006A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Phenol, 4,4-(1-alkylidene) bis-, polymer with [(aminoalkyl)imino] bis[alkanol] and 2-(chloromethyl) oxirane, 3-alkyloxy-2-hydroxypropyl ethers, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0007A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Phenol, 4,4-(1-alkylidene) bis-, polymer with [(aminoalkyl)imino] bis[alkanol] and 2-(chloromethyl) oxirane, 4-alkylphenyl ethers, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0008A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Benzenediol, polymer with [(aminoalkyl)imino] bis[alkanol], 2-(chloromethyl)oxirane and 4,4-(1-alkylidene) bis[phenol], 4-alkylphenyl ethers, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0009A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Cashew, nutshell liq., polymer with [(aminoalkyl)imino] bis[alkanol], bisphenol, epichlorohydrin and benzenediol, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0010A	2	11/20/2024	CBI	(G) For use in coatings for metal parts.	(G) Benzenediol, polymer with [(aminoalkyl)imino] bis[alkanol], 2-(chloromethyl)oxirane and 4,4-(1-alkylidene) bis[phenol], 3-alkyloxy-2-hydroxypropyl ethers, reaction products with dialkanolamine, alkyl carboxylates (salts) alkanesulfonates (salts).
P-25-0011A	3	11/01/2024	CBI	G (Surface Modifier)	(G) Phosphonic acid, P- [polyfluoro- oxygen-substituted-poly(trifluoromethyl)-heteroatom-substituted-alkan-1-yl]-.
P-25-0011A	4	11/20/2024	CBI	(G) Surface Modifier	(G) Phosphonic acid, P- [polyfluoro- oxygen-substituted-poly(trifluoromethyl)-heteroatom-substituted-alkan-1-yl]-.
P-25-0015	1	11/12/2024	CBI	(G) Additive in paving applications.	(G) Modified tall oil fatty acid polyamine condensate.
P-25-0016	1	11/15/2024	CBI	(G) Photoacid generator use at customer sites.	(G) Tri haloaromatic iodonium dicyclo salt with polyhaloalkyl carbomonocycle hetero acid.
P-25-0017	2	11/26/2024	US Polymers Accurez, LLC.	(S) Binder for Thermoplastic Coatings; Binder for Ink/Adhesive.	(G) Reaction product of aromatic acid with trifunctional polyol and pelargonic acid.
P-25-0020	1	11/21/2024	CBI	(G) Contained use for microlithography for electronic device manufacturing.	(G) Sulfonium, triphenyl-, salt with heterosubstituteddifluorosubstitutedalkyl substitutedalkyl trihalosubstitutedcarbomonocycle carboxylate (1:1).
P-25-0021	1	11/22/2024	CBI	(G) Contained use for microlithography for electronic device manufacturing.	(G) Sulfonium, tri (halosubstituted henyl)-, salt with heterosubstituteddifluorosubstitutedalkyl substitutedalkyl trihalosubstitutedcarbomonocycle carboxylate (1:1).
SN-23-0024A	2	11/21/2024	CBI	(G) Component in batteries.	(S) Phosphoric acid, iron (2+) lithium salt (1:1:1).
SN-25-0002	1	11/20/2024	CBI	(G) Additive used in plastic panels.	(S) Cesium tungsten oxide.
SN-25-0003	1	11/25/2024	CBI	(S) Cathode Active Material in Batteries.	(S) Phosphoric acid, iron (2+) lithium salt (1:1:1).

In Table II. of this unit, EPA provides the following information (to the extent that such information is not subject to a CBI claim) on the TMEs and/or Biotech Exemptions received by EPA during this period: The EPA case

number assigned to the TME and/or Biotech Exemption, the submission document type (initial or amended), the version number, the date the TME and/or Biotech Exemption was received by EPA, the submitting manufacturer (*i.e.*,

domestic producer or importer), the potential uses identified by the manufacturer in the TME and/or Biotech Exemption, and the chemical substance identity.

TABLE II—TMES AND BIOTECH EXEMPTIONS RECEIVED FROM 11/01/2024 TO 11/30/2024

Case No.	Submission type	Version	Received date	Manufacturer	Use	Chemical substance
T-24-0001A	Test Marketing Exemption Application (TMEA) Test Marketing Exemption Application (TMEA).	4	11/18/2024	Zschimmer & Schwarz	(S) Raw material in ester manufacturing, to be fully consumed.	(G) Isomerized alkane derivs.

In Table III of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs that have passed an initial screening by EPA during this period: The EPA case number assigned

to the NOC including whether the submission was an initial or amended submission, the date the NOC was received by EPA, the date of commencement provided by the submitter in the NOC, a notation of the

type of amendment (*e.g.*, amendment to generic name, specific name, technical contact information, etc.) and chemical substance identity.

TABLE III—NOCs APPROVED* FROM 11/01/2024 TO 11/30/2024

Case No.	Received date	Commencement date	If amendment, type of amendment	Chemical substance
J-20-0013	11/08/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-20-0014	11/13/2024	12/21/2023	N	(G) Strains of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-20-0015	11/13/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-20-0016	11/13/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-20-0017	11/13/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-20-0018	11/13/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce enzymes.
J-21-0019	11/13/2024	12/21/2023	N	(G) Strain of <i>Escherichia coli</i> modified with genetically stable, plasmid-borne DNA to produce plasmid-borne DNA.
P-13-0143	11/15/2024	03/10/2013	N	(G) Polyalkylene acid, alkanol amine derivative.
P-15-0680A	11/19/2024	05/14/2018	N	(S) 2-propenoic acid, butylester, polymer with 1,3-cyclohexan edimethanamine, reaction products with Bu glycidyl ether.
P-18-0226A	11/01/2024	03/04/2024	N	(G) Trialkylammonioethyl fatty-alkylate, alkyl sulfate.
P-20-0156	11/11/2024	10/16/2024	N	(G) Substituted, triaryl-, Tri cycloalkane alkyl disubstituted.
P-21-0055A	11/25/2024	07/07/2022	Amended generic chemical name ..	(G) Fatty acids, reaction products with dialkenyltriamine-aromatic dicarboxylic acid polymer and polycyclic acids.
P-21-0066	11/12/2024	10/23/2024	N	(G) 1,2-Alkanediol, 3-aryloxy, mono phosphate ester.
P-22-0154	11/19/2024	11/15/2024	N	(S) 2-tridecenoic acid, 2-acetyl-4-methyl-, ethyl ester.
P-22-0175A	11/26/2024	05/22/2024	Relinquished chemical identity confidentiality claim.	(S) Silsesquioxanes, Me vinyl, hydroxy and methoxy and [(trimethylsilyl)oxy]- terminated.
P-23-0069	11/01/2024	10/21/2024	N	(S) Oils, <i>Pisum sativum</i> , polymers with 1, 6-diisocyanatohexane, 1,5 diisocyanato pentane, glycerol, and maltodextrin.
P-23-0101	11/19/2024	10/31/2024	N	(G) Glycerides from fermentation of genetically modified microorganism, epoxidized.
P-23-0103	11/19/2024	10/31/2024	N	(G) Glycerides from fermentation of genetically modified microorganism, epoxidized, reaction products with ethanol.
P-23-0152	11/11/2024	10/17/2024	N	(G) 1-Alkanethiol, 3-(trialkoxysilyl)- hydrolysis products with silica, oxidized.
P-23-0174	11/15/2024	11/07/2024	N	(G) Mixed metal oxide.
P-23-0188	11/25/2024	11/15/2024	N	(G) Alkenoic acid, 3-methyl-, 1,1-dimethyl-2-propen-1-yl ester.
P-24-0088	11/04/2024	10/07/2024	N	(G) Mixed metal oxide.

In Table IV of this unit, EPA provides the following information (to the extent such information is not subject to a CBI claim) on the test information that has

been received during this time period: The EPA case number assigned to the test information; the date the test information was received by EPA, the

type of test information submitted, and chemical substance identity.

TABLE IV—TEST INFORMATION RECEIVED FROM 11/01/2024 TO 11/30/2024

Case No.	Received date	Type of test information	Chemical substance
P-16-0543	11/19/2024	Exposure Monitoring Report	(G) Halogenophosphoric acid metal salt.
P-22-0056	11/09/2024	<i>In Vitro</i> Percutaneous Absorption of Tin in a Sealant Formulation Through Human Skin; <i>In Vitro</i> Percutaneous Absorption of Radiolabeled TIB KAT 223 in Sealant Formulation Through Human Split-Thickness Skin; Supplementary risk assessment for industrial handling of TIB KAT 223 and consumer use of sealants formulated with TIB KAT 223; initial review engineering report; CEM Inhalation and Dermal Exposure Estimates.	(S) Tin, dioctylbis (2,4-pentanedionato-. kappa. O2,. kappa. O4)-.

If you are interested in information that is not included in these tables, you may contact EPA's technical information contact or general information contact as described under **FOR FURTHER INFORMATION CONTACT** to access additional non-CBI information that may be available.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2024.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2024-29934 Filed 12-17-24; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2023-0601; FRL-11581-07-OCSPP]

High-Priority Substance Designations Under the Toxic Substances Control Act (TSCA) and Initiation of Risk Evaluation on High-Priority Substances; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Under the Toxic Substances Control Act (TSCA) and related implementing regulations, EPA is designating five chemicals as High-Priority Substances for risk evaluation. This document provides the identity of five chemical substances for final designation as High-Priority Substances for risk evaluation, EPA's rationale for final designation as High-Priority Substances, and instructions on how to access the chemical-specific information, analysis, and basis EPA used to support final designations for the chemical substances. A designation of a substance as a High-Priority Substance is not a finding of unreasonable risk. Rather, the designation of these chemical substances as high priority constitutes the initiation of evaluation of associated risk.

DATES: The designations of High-Priority Substances for risk evaluation in this notice are effective December 18, 2024.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2023-0601, is available online at <https://www.regulations.gov>. In addition, the docket ID numbers for the individual chemical substances designated in Unit IV. are as follows: Acetaldehyde (EPA-HQ-OPPT-2018-0497); Acrylonitrile (EPA-HQ-OPPT-2018-0449);

Benzenamine (EPA-HQ-OPPT-2018-0474); Vinyl Chloride (EPA-HQ-OPPT-2018-0448); and 4,4'-Methylene bis (2-chloroaniline) (MBOCA) (EPA-HQ-OPPT-2018-0464). Additional information about dockets generally, along with instructions for visiting the docket in-person, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information: Sarah Au, Data Gathering, Management and Policy Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-0398; email address: au.sarah@epa.gov.

For general information: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to entities that currently or may manufacture (including import) a chemical substance regulated under TSCA (e.g., entities identified under North American Industrial Classification System (NAICS) codes 325 and 324110). The action may also be of interest to chemical processors, distributors in commerce, and users, non-governmental organizations in the environmental and public health sectors, state and local government agencies, Tribes, and members of the public. Since other entities may also be interested, EPA has not attempted to describe all the specific entities and corresponding NAICS codes for entities that may be interested in or affected by this action.

B. What action is the Agency taking?

EPA is finalizing the designation of five chemical substances as High-Priority Substances for risk evaluation pursuant to section 6(b) of TSCA, 15 U.S.C. 2605(b). This document includes a high-level summary of comments received during the two 90-day comment periods during which the public submitted comments on EPA's initiation of prioritization (Ref. 1) and the proposed designations of those five chemicals as High-Priority Substances for risk evaluation (Ref. 2), as well as a high-level summary of Agency responses to those comments received during both 90-day public comment periods. The comments and EPA's responses are discussed in more depth

in the response to comments document (Ref. 3). EPA also considered comments received during and following the prioritization public webinar that occurred in February 2024, during which EPA explained the prioritization process and provided an overview of information that may be used to inform the considerations that ultimately support a High- or Low-Priority Substance designation, such as information on conditions of use and health effects resulting from exposure to the chemicals of interest.

C. Why is the Agency taking this action?

TSCA section 6(b) and implementing regulations at 40 CFR part 702, subpart A require EPA to carry out a prioritization process for chemical substances that may be designated as high priority for risk evaluation. EPA generally expects to complete five risk evaluations per year over the next several years, and TSCA section 6(b)(3)(C) requires EPA to designate at least one High-Priority Substance upon completion of each risk evaluation for a High-Priority Substance. Pursuant to TSCA section 6(b)(2)(B), EPA is finalizing the designation of the five chemical substances as High-Priority Substances for risk evaluation identified as candidates for High-Priority Substance designation when EPA initiated the prioritization process on December 18, 2023 (Ref. 1). As required under TSCA section 6(b)(3)(C), EPA is specifying the designation of: MBOCA to replace the final risk evaluation for 1,1-dichloroethane; acetaldehyde to replace the final risk evaluation for 1,3-butadiene; acrylonitrile to replace the final risk evaluation for dicyclohexyl phthalate; benzenamine to replace the final risk evaluation for formaldehyde; and vinyl chloride to replace the final risk evaluation for tris(2-chloroethyl) phosphate.

D. What is the Agency's authority for taking this action?

This document is issued pursuant to TSCA section 6(b)(1) and 6(b)(3)(C).

E. What are the estimated incremental impacts of this action?

This document identifies the five chemical substances for which EPA is initiating the risk evaluation process and the five chemical substances that have already or will have risk evaluations completed which they will replace. This document does not establish any requirements on persons or entities outside of the Agency. No incremental impacts are therefore anticipated, and consequently EPA did

not estimate potential incremental impacts for this action.

II. Background

TSCA section 6(b)(1) requires EPA to prioritize chemical substances for risk evaluation. In accordance with TSCA section 6(b) and 40 CFR 702.7, on December 18, 2023 (Ref. 1) EPA initiated the prioritization process for five chemical substances identified as candidates for High-Priority Substance designation. On July 25, 2024, EPA proposed to designate the same five chemical substances as High-Priority Substances for risk evaluation (Ref. 2). That notice included a summary of the approach used by EPA to support the proposed designations, links to the proposed designation document for each of the chemical substances, and instructions on how to access the chemical-specific information, analysis, and basis EPA used to make the proposed designation for each chemical substance.

Under TSCA section 6(b)(1)(B) and implementing regulations (40 CFR 702.3), a High-Priority Substance is defined as “a chemical substance that EPA concludes, without consideration of costs or other non-risk factors, may present an unreasonable risk of injury to health or the environment because of a potential hazard and a potential route of exposure under the conditions of use, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by EPA.”

A designation of a substance as a High-Priority Substance is not a finding of unreasonable risk. Rather, when prioritization is complete, for those chemicals designated as High-Priority Substances, the Agency will have evidence on hazards and exposures that supports a finding that the substances may present an unreasonable risk of injury to health or the environment under the conditions of use. Final designation of a High-Priority Substance initiates the risk evaluation process (40 CFR 702.17), which culminates in a finding of whether the chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use.

As described in the notice proposing to designate the five chemical substances as High-Priority Substances for risk evaluation (Ref. 2), “EPA will generally use reasonably available information to screen the candidate chemical substance[s] against the following criteria and considerations:

- The chemical substance’s hazard and exposure potential;

- The chemical substance’s persistence and bioaccumulation;
- Potentially exposed or susceptible subpopulations;
- Storage of the chemical substance near significant sources of drinking water;
- The chemical substance’s conditions of use or significant changes in conditions of use;
- The chemical substance’s production volume or significant changes in production volume; and
- Other risk-based criteria that EPA determines to be relevant to the designation of the chemical substance’s priority” (40 CFR 702.9(a)).

When selecting candidates for prioritization, the Agency also generally intends to consider (1) Agency priorities (with consideration of the priorities of other Federal agencies), (2) Quantity and quality of information (to ensure that information necessary to prioritize the substance is reasonably available), and (3) Overall workload (the Agency will be mindful of the complexity associated with the assessment of the chemical substance to ensure timely completion of prioritization and risk evaluation of each substance) (Ref. 5).

A more detailed discussion of the information, analysis, and basis used to support the proposed High-Priority Substance designation can be found in Unit IV.A of the July 25, 2024, notice (Ref. 2).

As described in 40 CFR 702.9(b), in conducting the screening review during the prioritization process, EPA considered sources of reasonably available information relevant to the review criteria as outlined in the statute (TSCA section 6(b)(1)(A)) and implementing regulations (40 CFR 702.9(a)) and consistent with the scientific standards of TSCA section 26(h), including, as appropriate, sources for hazard and exposure data listed in Appendices A and B of the “TSCA Work Plan Chemicals: Methods Document” (February 2012), and did not consider costs or other non-risk factors in making a proposed High-Priority Substance designation (see TSCA Section 6(b) and 40 CFR 702.9).

After considering additional information collected from the proposed designation process, described in Unit III., EPA is finalizing the High-Priority Substance designations of the same five chemical substances proposed for High-Priority Substance designations, consistent with the scientific standards of TSCA section 26(h) and (i). EPA did not consider costs or other non-risk factors in making the final priority designations. Instructions on how to access the chemical-specific

information, analysis, and basis used by EPA to support the final designation for each chemical substance can be found in Unit IV. A general statement of the condition(s) of use that were the primary basis for each designation is contained in Unit IV. Pursuant to TSCA section 6(b)(3)(A) and 40 CFR 702.17, the designation of these chemical substances as High-Priority Substances constitutes the initiation of the risk evaluations on the substances.

III. Information and Comments Received

A. Overview of Public Comments

EPA provided a 90-day comment period for the public to submit comments on the list of candidate High-Priority Substances immediately following the initiation of prioritization (Ref. 1) and provided a second 90-day comment period for the public to submit comments on the documents supporting the proposed designations of High-Priority Substances for risk evaluation (Ref. 2). The two comment periods are required by TSCA section 6(b)(1)(C) and implementing regulations (40 CFR 702.7(d) and 702.9(g)).

Under TSCA section 6(b)(1)(C)(i), EPA must “request interested persons to submit relevant information on a chemical substance that EPA has initiated the prioritization process on, before proposing a priority designation for the chemical substance, and provide 90 days for such information to be provided” (Ref. 1). At initiation of the prioritization process, EPA published a **Federal Register** notice identifying five chemical substances and provided a general explanation for why the Agency chose to initiate prioritization on those chemical substances. During this comment period, the public was invited to submit relevant information on the chemical substances undergoing prioritization, including, but not limited to, any information that may inform the screening review conducted pursuant to 40 CFR 702.9(a). The information received was considered when developing the proposed designations for the High-Priority Substances. The required 90-day comment period was extended for an additional 30 days to receive chemical-specific comments and information for MBOCA (docket ID No. EPA-HQ-OPPT-2018-0464). The second 90-day comment period following the proposed High-Priority Substance designations of the same five chemical substances identified as candidates for High-Priority Substance designation. Under TSCA section 6(b)(1)(C)(ii), EPA must “publish each proposed designation of a chemical

substance as a High- or Low-Priority Substance, along with an identification of the information, analysis, and basis used to make the proposed designations, and provide 90 days for public comment on each such proposed designation” (Ref. 2). The **Federal Register** notice proposing the designations of these substances as High-Priority for risk evaluation identified how to access the chemical-specific information, analysis, and basis used to support the proposed designations and announced the availability of a proposed designation document for each of the chemical substances undergoing prioritization. Interested persons were invited to submit comments, including additional information relevant to the chemical substances that were proposed as high priority for risk evaluations.

To the extent that comments from the first comment period provided information on additional conditions of use for the candidate High-Priority Substances, those conditions of use were discussed in the proposed designation documents for each chemical substance. Other information received specific to High-Priority Substances (e.g., relevant studies and assessments) was considered when making the final priority designations and will be considered as reasonably available information in the subsequent risk evaluation for each High-Priority Substance.

Following a public webinar on February 20, 2024, EPA also received comments on the prioritization process and data considered up until that date for the five chemical substances for which EPA initiated prioritization in December 2023. The comments received were considered when developing the proposed and final designations for the High-Priority Substances.

EPA created one general docket to receive comments regarding the prioritization process (docket ID No. EPA-HQ-OPPT-2023-0601) and additional dockets to receive chemical-specific information (as identified under **ADDRESSES**). During the first public comment period, EPA also opened the pre-prioritization docket (docket ID No. EPA-HQ-OPPT-2023-0606) to welcome potentially relevant information and comments on the candidate chemical substances that were not selected for prioritization.

EPA received 96,011 comment submissions to inform prioritization; several of these comments were mass mailing campaigns with identical submissions. There were also many comments that could not be posted publicly due to inappropriate language, copyright violations, and empty

submissions. Upon review, EPA received 977 unique submissions across both public comment periods. Some commenters included comments for multiple chemical substances in one submission and submitted the same comment to multiple dockets while other commenters chose to submit different sets of comments to each chemical-specific docket. EPA received submissions from individuals, Tribes, potentially affected businesses or trade associations, environmental and public health advocacy groups, academia, and other organizations. Comments addressed the overall prioritization process (e.g., the collection and consideration of relevant information, basis for designation, etc.), the review process (e.g., the use of data and approaches for screening review), information specific to the candidate chemical substances (e.g., relevant studies, previous assessments, and conditions of use information), as well as topics beyond the scope of this prioritization action or not related to the prioritization process in general (e.g., scheduling future chemicals for prioritization, risk evaluation, and risk management). EPA also received a few comments which were not related to TSCA. All comments received are identified by their respective docket ID number and are available at <https://www.regulations.gov>.

EPA responded to comments related to the High-Priority Substance designations in two general categories: (1) General comments, including overarching and cross-cutting policy and process comments, received for the candidate High-Priority Substance designations; and (2) Chemical-specific comments received on each proposed High-Priority Substance designation (Ref. 3). A high-level summary of the comments received related to the prioritization process and Agency responses follows in this unit. The comments and the Agency’s responses are discussed in more depth in the response to comments document (Ref. 3), a copy of which is included in docket ID No. EPA-HQ-OPPT-2023-0601.

B. Comments on Candidate High-Priority Designations

EPA received 748 unique comments during the first public comment period between December 18, 2023, and March 18, 2024, and 229 unique comments during the second comment period from July 25, 2024, to October 23, 2024, resulting in a total of 977 unique comment submissions. An additional two comment submissions were received for MBOCA during the 30-day

extension of the first public comment period for Docket ID number: EPA-HQ-OPPT-2018-0464.

EPA received several mass-mailing campaigns, totaling over 13,000 signatures. All mass-mailing campaigns expressed their support for the prioritization process and encouraged EPA to prioritize one or all of the chemicals. Specifically, many of the mass mailing campaigns encouraged EPA to designate vinyl chloride as a High-Priority Substance under TSCA. In addition to the mass-mailing campaigns and 17 commenters who attended the prioritization public webinars in February 2024, EPA received over 100 comments expressing support for EPA’s prioritization actions.

Commenters expressed their concern regarding human health hazards and exposure potential of all five of the High-Priority Substances and asked that EPA consider specific potential health outcomes and exposure scenarios. Several commenters urged EPA to identify relevant potentially exposed or susceptible subpopulations (PESS), including infants, children, pregnant women, workers, the elderly, and people living in proximity to sources of contamination, as well as consider environmental justice concerns in the prioritization process. In addition, several commenters, including some of the mass-mailing campaigns, urged the Agency to consider all potential exposures and risks, including those from accidents, spills, and leaks, specifically potential exposure resulting from transportation incidents such as derailments and collisions, which may pose significant risk to fence line communities.

Over 600 commenters asked EPA to ban vinyl chloride and emphasized the availability of hazard and exposure data demonstrating harm posed by vinyl chloride releases. Many commenters also cited the February 3, 2023, train derailment that resulted in the release of and potential exposure to vinyl chloride by residents in East Palestine, Ohio.

Each data submission and potentially relevant data source was screened using systematic review approaches for applicability and considered for the final designation of these chemical substances as High-Priority Substances and will be considered as reasonably available information.

The Agency appreciates all comments and information submitted by the public for this action. For additional information regarding specific topics and EPA’s responses to these comments, please see the Agency’s full response to comments received (Ref. 3).

IV. Designation as High-Priority Substances for Risk Evaluation

Based on the information provided in the proposed designation documents, as referenced in the document that appeared in the **Federal Register** of July 25, 2024 (Ref. 2), and public comments received, including information pertaining to individual chemical substances, EPA is designating the same five chemicals as High-Priority Substances for risk evaluation under TSCA. Pursuant to 40 CFR 702.11, which states: “For High-Priority Substances, EPA generally expects to indicate which condition(s) of use were the primary basis for such designations.” For all five High-Priority Substances the conditions of use which formed the primary basis for the designation were included in the proposed designation documents. The final High-Priority Substance designations are as follows:

- Acetaldehyde, CASRN 75–07–0, Docket ID number: EPA–HQ–OPPT–2018–0497;
- Acrylonitrile, CASRN 107–13–1, Docket ID number: EPA–HQ–OPPT–2018–0449;
- Benzenamine, CASRN 62–53–3, Docket ID number: EPA–HQ–OPPT–2018–0474;
- Vinyl chloride, CASRN 75–01–4, Docket ID number: EPA–HQ–OPPT–2018–0448; and
- 4,4'-Methylene bis(2-chloroaniline) (MBOCA), CASRN 101–14–4, Docket ID number: EPA–HQ–OPPT–2018–0464.

The final designations are based on the conclusion that each chemical substance satisfies the definition of High-Priority Substance in TSCA section 6(b)(1)(B) and 40 CFR 702.3. EPA developed a document for each substance to identify the information, analysis and basis used to support the proposed designations as a High-Priority Substance for risk evaluation. These documents are available in the docket of each of the chemical substances. Also included in each document is an explanation of the approach used by EPA to conduct the review. Each document includes an overview of the requirements in TSCA section 6(b)(1)(A) and a regulatory section addressing the review criteria and considerations (40 CFR 702.9).

These designated High-Priority Substances will fulfill the statutory requirement to designate at least one high-priority substance upon completion of each risk evaluation for a High-Priority Substance, under TSCA section 6(b)(3)(C). Pursuant to TSCA section 6(b)(3)(A) and 40 CFR 702.17, the designation of these chemical

substances as High-Priority Substances constitutes the initiation of the risk evaluations on the substances.

A designation of a chemical substance as a High-Priority Substance is not a finding of unreasonable risk; rather, a final designation as a High-Priority Substance initiates the risk evaluation for the chemical substance. This is a three-year process that will culminate in a finding of whether or not the chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use. The chemical-specific designation documents containing the information, analysis and basis used to support the proposed designations are located in the docket for each chemical substance. As previously discussed, to the extent that comments provided information on additional conditions of use for the candidate High-Priority Substances for risk evaluation, those conditions of use were noted in the proposed designation documents for each chemical substance and may be reflected in the draft scope of the risk evaluation for each chemical substance, which will include the conceptual model and analysis plan for carrying out the evaluation. As such, EPA will not amend the proposed designation documents. Instead, additional submitted potentially relevant information specific to High-Priority Substances (e.g., relevant studies and assessments) will be considered in subsequent phases of risk evaluation, including draft scope documents and draft risk evaluation documents, both of which will be subject to public comment opportunities.

V. References

The following is a listing of the documents that are specifically referenced in this document. The docket for this action includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket. For assistance in locating these referenced documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Initiation of Prioritization Under the Toxic Substances Control Act (TSCA). Notice. **Federal Register**. 88 FR 87423, December 18, 2023 (FRL–11581–01–OCSPP).
2. EPA. Proposed High-Priority Substance Designations Under the Toxic Substances Control Act (TSCA). **Federal Register**. 89 FR 60420, July 25, 2024 (FRL–11581–03–OCSPP).
3. EPA. EPA Response to Public Comments Received on the “Initiation of Prioritization Under the Toxic

Substances Control Act” and “Proposed High-Priority Substance Designations Under the Toxic Substances Control Act.” December 18, 2024.

4. EPA. “A Working Approach for Identifying Potential Candidate Chemicals for Prioritization.” (https://www.epa.gov/sites/production/files/201809/documents/preprioritization_white_paper_9272018.pdf). September 27, 2018.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–29830 Filed 12–17–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2023–0601; FRL–11581–06–OCSPP]

Initiation of Prioritization Under the Toxic Substances Control Act (TSCA); Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Under the Toxic Substances Control Act (TSCA) and related implementing regulations, EPA is initiating the prioritization process for five chemical substances as candidates for designation as High-Priority Substances for risk evaluation. This action provides the identity of the chemical substances being initiated for prioritization, a general explanation of why the Agency chose these chemical substances, and information on the data sources EPA plans to use to support the designation. EPA is providing a 90-day comment period, during which interested persons may submit relevant information on these chemical substances.

DATES: Comments must be received on or before March 18, 2025.

ADDRESSES: Submit your comments, identified by docket identification (ID) number, through <https://www.regulations.gov>. Follow the online instructions for submitting comments. For comments not related to a specific chemical, including general comments on Unit IV.A., use docket ID number EPA–HQ–OPPT–2023–0601; submit information on the candidates for which EPA is initiating the prioritization process to the applicable chemical-specific docket ID number identified in Unit III.B.; submit information on the potential candidates for which EPA is not currently initiating the prioritization

process to the docket ID number identified in Unit IV.B. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information: Sarah Au, Data Gathering, Management, and Policy Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-0398; email address: au.sarah@epa.gov.

For general information: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Executive Summary****A. Does this action apply to me?**

This action is directed to the public in general and may be of interest to entities that currently or may manufacture (including import) a chemical substance regulated under TSCA (e.g., entities identified under North American Industrial Classification System (NAICS) codes 325 and 324110). The action may also be of interest to chemical processors, distributors in commerce, users, non-profit organizations in the environmental and public health sectors, state and local government agencies, Tribes, and members of the public. Because other entities may also be interested, the Agency has not attempted to describe all the specific entities and corresponding NAICS codes for entities that may be interested in or affected by this action.

B. What action is the Agency taking?

EPA is initiating the prioritization process under TSCA, 15 U.S.C. 2601 *et seq.*, for five chemical substances as candidates for designation as High-Priority Substances for risk evaluation. This document includes the identity of the chemical substances entering the prioritization process before designation and a general explanation of why the Agency chose to initiate prioritization on these chemical substances. In addition, EPA is providing a 90-day comment period during which interested persons may submit relevant information on these chemical

substances. Relevant information might include, but is not limited to, any information that may inform the prioritization screening review conducted pursuant to 40 CFR 702.9(a).

C. Why is the Agency taking this action?

TSCA section 6(b) requires that EPA initiate the prioritization process for chemical substances that may be designated as high priority or low priority for risk evaluation. Because EPA generally expects to complete five risk evaluations per year over the next several years, EPA is initiating the prioritization process for five chemical substances per TSCA section 6(b)(3)(C), which requires EPA to designate at least one High-Priority Substance upon completion of each risk evaluation for a High-Priority Substance. In the **Federal Register** on December 18, 2023 (88 FR 87423) (FRL-11581-01-OCSP), EPA initiated prioritization for five chemical substances that have undergone consideration as High-Priority Substances pursuant to TSCA section 6(b)(2)(B). By initiating prioritization another five chemical substances pursuant to TSCA section 6(b)(2)(B), EPA intends to maintain a sustainable pipeline of existing chemical risk evaluations under TSCA section 6(b). The request for interested persons to submit relevant information on a chemical substance for which EPA has initiated the prioritization process is required by TSCA section 6(b)(1)(C)(i).

D. What is the Agency's authority for taking this action?

This document is issued pursuant to the authority in TSCA section 6(b)(1) and (3)(C).

E. What are the estimated incremental impacts of this action?

This document does not establish requirements on persons or entities outside of the Agency. No incremental impacts are therefore anticipated, and consequently EPA did not estimate potential incremental impacts for this action.

F. What should I consider as I prepare my comments for EPA?**1. Submitting CBI**

Do not submit CBI to EPA through <https://www.regulations.gov> or email. If you wish to include CBI in your comment, please follow the applicable instructions at <https://www.epa.gov/dockets/commenting-epa-dockets#rules> and clearly mark the part or all the information you claim to be CBI. In addition to one complete version of the comment including information claimed as CBI, a copy of the comment that does

not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2 and/or 40 CFR part 703, as applicable.

2. Tips for Preparing Your Comments

When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets.html>.

II. Background

TSCA section 6(b)(1) requires EPA to prioritize chemical substances for risk evaluation and to establish a process for prioritizing chemical substances. Under TSCA section 6(b) and as described in 40 CFR 702.7, EPA is initiating the prioritization process for five chemical substances as candidates for High-Priority Substances for risk evaluation.

Under TSCA section 6(b)(1)(B) and its implementing regulations (40 CFR 702.3), a High-Priority Substance is defined as a chemical substance that EPA determines, without consideration of costs or other non-risk factors, may present an unreasonable risk of injury to health or the environment because of a potential hazard and a potential route of exposure under the conditions of use, including an unreasonable risk to potentially exposed or susceptible subpopulations identified as relevant by EPA.

Initiation of prioritization for chemical substances as High-Priority Substance candidates is not a finding of risk. Rather, when prioritization is complete, for those chemicals designated as High-Priority Substances, EPA will have evidence that this substance may present an unreasonable risk of injury to health or the environment because of a potential hazard and a potential route of exposure under the conditions of use. Final designation of a High-Priority Substance initiates the risk evaluation process (40 CFR 702.17), which culminates in a finding of whether the chemical substance presents an unreasonable risk under the conditions of use.

This document is intended to fulfill the TSCA section 6(b)(1)(C)(i) requirement that the Administrator request interested persons to submit relevant information on chemical substances for which the Administrator has initiated the prioritization process. As described in 40 CFR 702.7, this document initiates the prioritization process and provides 90 days during which interested persons may submit relevant information.

As described in 40 CFR 702.9(b), in conducting the screening review during the prioritization process, EPA will consider sources of information relevant to the screening review criteria as outlined in the statute (TSCA section 6(b)(1)(A)) and implementing regulations (40 CFR 702.9(a)) and consistent with the scientific standards of TSCA section 26(h), including, as appropriate, sources for hazard and exposure data listed in Appendices A and B of the TSCA Work Plan Chemicals: Methods Document (February 2012).

Consistent with the approach described in 40 CFR 702.7, and the “A Working Approach for Identifying Potential Candidate Chemicals for Prioritization” document (September 27, 2018), available at https://www.epa.gov/sites/default/files/2018-09/documents/preprioritization_white_paper_9272018.pdf, EPA consulted with other federal agencies and intends to continue to collaborate with them to identify information that is useful throughout the prioritization process.

III. High Priority Candidate Chemical Substances for Which EPA Is Initiating Prioritization

A. How did EPA select these candidates for prioritization for potential designation as High-Priority Substances for risk evaluation?

In general, EPA’s working approach to select candidates for designation as High-Priority Substances for risk evaluation is outlined in the document, titled “A Working Approach for Identifying Potential Candidate Chemicals for Prioritization,” released to the public on September 27, 2018, available at https://www.epa.gov/sites/default/files/2018-09/documents/preprioritization_white_paper_9272018.pdf. To identify candidates for designation as High-Priority Substances, EPA primarily reviewed the “TSCA Work Plan for Chemical Assessments: 2014 Update (2014 TSCA Work Plan),” available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemical-assessments-2014-update>. TSCA requires EPA to preferentially consider chemicals on the 2014 TSCA Work Plan that are persistent and bioaccumulative and those that are known human carcinogens and highly toxic, based on scores and criteria documented in the Work Plan, as these chemicals were selected for inclusion on the Work Plan due to their potential risk to human health and the environment. Aside from this statutory requirement, TSCA gives EPA discretion in how the Agency

ultimately selects a chemical substance for prioritization. EPA strives to designate as High-Priority Substances those chemicals with the greatest hazard and exposure potential first, consistent with the policy objectives codified in 40 CFR 702.5(a) in the **Federal Register** on July 20, 2017 (82 FR 33753) (FRL–9964–24)).

The number of chemical substances remaining on the 2014 TSCA Work Plan with persistence and bioaccumulation scores of 3 has been significantly reduced over time as EPA has expedited rulemaking under TSCA section 6(h) for five persistent, bioaccumulative, and toxic (PBT) chemical substances and as the Agency has conducted risk evaluations and promulgated risk management for rules for other chemical substances from the 2014 TSCA Work Plan. TSCA section 6(b)(2)(B) further requires that at least 50 percent of all ongoing risk evaluations be drawn from the 2014 TSCA Work Plan for Chemical Assessments. Given EPA’s statutory deadlines and the timing of prioritization actions needed to offset the completion of risk evaluations for chemical substances designated as High-Priority Substances in 2019, EPA heavily weighed data availability in deciding which chemical substances to include in this action. Chemical substances remaining on the 2014 TSCA Work Plan that have persistence and bioaccumulation scores of 3 have significant data gaps, were submitted as potential manufacturer-requested risk evaluation candidates or are categories for which EPA is in the process of determining specific chemical structures that may be considered for inclusion in those categories.

EPA consulted with other EPA program offices and partner federal agencies to inform the Agency’s prioritization efforts. With these considerations, the chemicals for which prioritization is initiated in this action were selected based on a variety of factors and reflect Agency priorities. While data availability was a significant driver of the Agency’s selections, EPA also considered the complexity of evaluating broad chemical categories such as metal compounds. For EPA to build a sustainable TSCA prioritization, evaluation, and (when appropriate) risk management pipeline, chemicals ultimately designated as High-Priority Substances for risk evaluation should have a robust data landscape. In future rounds of prioritization, EPA intends to use its data gathering authorities earlier and commits to regular stakeholder engagement to ensure the Agency has the information needed to meet its statutory mandates.

Using data sources such as those described in the document titled, “A Working Approach for Identifying Potential Candidate Chemicals for Prioritization,” EPA considered various types of information and data from existing resources such as EPA’s National Center for Computational Toxicology’s Chemistry Dashboard (CompTox Chemicals Dashboard), available at <https://comptox.epa.gov/dashboard>. EPA also conducted initial searches of additional sources of public and gray literature (e.g., PubMed, Web of Science, other U.S. government and international websites).

EPA also considered existing information from public and non-public (i.e., confidential business information) sources maintained by authoritative sources, such as other EPA program offices, state and federal agencies, and various U.S. and international organizations (including but not limited to EPA’s Office of Water, EPA’s Office of Air and Radiation, EPA’s Office of Research and Development, California Environmental Protection Agency, National Institute for Occupational Safety and Health, Agency for Toxic Substances and Disease Registry, European Chemicals Agency, Health Canada, International Agency for Research on Cancer, and Organisation for Economic Co-operation and Development).

After identifying information from reasonably available sources, the information was screened across several data elements including physical and chemical properties, environmental fate and transport properties, hazard, exposure, and use information to determine the breadth of data availability for a chemical substance. Using experience gained from TSCA implementation activities to date, EPA considered previous and planned Agency activities related to a given chemical substance, including how to better leverage experience gained from previously conducted or ongoing risk evaluations. EPA also considered whether analyses from previous risk assessments could be used to better understand each chemical substance’s potential exposure and/or hazard characteristics.

In the absence of measured empirical data on chemicals being evaluated, EPA may use alternative means or new approach methods (NAMs) to obtain relevant data. NAMs can reduce vertebrate testing, consistent with TSCA section 4(h)(1)(A). EPA intends to use this approach to the extent practicable and scientifically justified.

EPA also considered information such as data submitted to EPA in 2020 under

the Chemical Data Reporting (CDR) rule under TSCA regarding reported uses and products to inform prioritization and risk evaluation. EPA considered the use information for these chemicals and screened them according to the types of industrial uses and types of products for which the chemicals were used as reported in the 2020 CDR. Information reported to the Toxics Release Inventory Program was also considered to identify reported uses and releases of chemical substances.

EPA intends to update and refine its initial review based on data sources identified by the public during the comment period (see EPA's request for data in Unit IV.) and, as permitted by TSCA section 14 and subject to EPA confidentiality regulations at 40 CFR part 2, subpart B and 40 CFR part 703, intends to make this information publicly available for the initiated chemicals when EPA publishes the proposed priority designation.

Between December 18, 2023, and October 31, 2024, EPA received information regarding candidate chemical substances being considered for prioritization actions during two periods. During September and October 2023, EPA hosted a series of pre-prioritization meetings with various stakeholders, Tribes, state and local governments, and other federal agencies to explain the prioritization process and provide an overview of information that may be used to inform the considerations that ultimately support a High- or Low-Priority Substance designation. A list of 15 candidate chemical substances being considered for future prioritization actions, including those undergoing initiation in this prioritization action, was presented to provide an opportunity for partners, stakeholders, and any interested persons to comment on the data and scientific literature available that may be used to help EPA determine which chemical substances may undergo prioritization in the near term. EPA also opened docket ID No. EPA-HQ-OPPT-2023-0606 for 90 days to receive any potentially relevant information on the 10 chemical substances communicated as candidates for prioritization but not selected for initiation on December 18, 2023, which included the chemical substances for which prioritization is being initiated with this action.

As a part of EPA's commitment to greater transparency and to maintain engagement with partners, stakeholders or any interested persons about upcoming prioritization actions, EPA hosted public webinars on September 30 and October 1, 2024, that explained the prioritization process, provided an

overview of information that may be used to inform the considerations that ultimately support a High- or Low-Priority Substance designation, and shared an expanded list of 27 candidate chemical substances being considered for prioritization actions. This expanded list included the 10 chemical substances previously communicated in 2023 as being potential candidates for prioritization but not yet selected for initiation. Following the public webinars, EPA opened docket ID No. EPA-HQ-OPPT-2023-0606 for 30 days to receive any potentially relevant information on the 27 chemical substances communicated as being candidates for prioritization. EPA also engaged with Tribes, state and local governments, and other federal agencies and presented the same information that was provided during the public webinars.

EPA considered all comments and information received during the various meetings and webinars, as well as those submitted to docket ID no. EPA-HQ-OPPT-2023-0606 on all candidate chemical substances considered for prioritization actions communicated between September 2023 and October 2024 to identify the five chemical substances being initiated for prioritization. During the first 90-day public comment period accompanying the initiation action that began in December 2023, EPA received comments pertaining to six chemical substances communicated as potential candidates for prioritization during the pre-prioritization presentations in September and October 2023 and September and October 2024: 4-tert-octylphenol, N-(1,3-Dimethylbutyl)-N'-phenyl-p-phenylenediamine (6PPD), benzene, ethylbenzene, naphthalene, and styrene.

One commentator (EPA-HQ-OPPT-2018-0448-0027) wrote in general support of the consideration of benzene, ethylbenzene, naphthalene, and styrene for upcoming prioritization actions and the consideration of submitted information on natural disasters and environmental impacts on potential exposure.

Some commentators (EPA-HQ-OPPT-2023-0606-0005; EPA-HQ-OPPT-2023-0606-0006; EPA-HQ-OPPT-2023-0606-0007) included information on 6PPD and/or 6PPD-quinone (a degradation product of 6PPD) for consideration in upcoming prioritization actions and in support of the petition submitted under TSCA section 21 requesting the promulgation of risk management regulations under TSCA section 6(a) to prohibit the manufacturing, processing, use and

distribution of 6PPD for and in tires to eliminate unreasonable risk to the environment.

Another commenter (EPA-HQ-OPPT-2023-0606-0005) requested that docket ID. No. EPA-HQ-OPPT-2023-0606 remain open to allow for continuous submission of potentially relevant information regarding the characterization of 6PPD risk. EPA intends to re-open docket ID No. EPA-HQ-OPPT-2023-0606 during specific timeframes during pre-prioritization to allow for submission of information using regulations.gov.

As described in Unit IV.B., EPA is also re-opening docket ID No. EPA-HQ-OPPT-2023-0606 to solicit comments and information on 22 chemical substances that are candidates for future prioritization actions. Regarding the TSCA section 21 petition from Earthjustice on behalf of the Yurok Tribe, the Port Gamble S'Klallam Tribe, and the Puyallup Tribe of Indians, EPA issued an Advance Notice of Proposed Rulemaking in the **Federal Register** on November 18, 2024 (89 FR 91299) (FRL-11682-01-OCSPP) for 6PPD and 6PPD-quinone under TSCA section 6(a), and is committed to finalizing a TSCA section 8(d) rulemaking by the end of 2024 that would require persons who manufacture (including import) 6PPD to submit lists or copies of unpublished health and safety studies to EPA.

One commentator (EPA-HQ-OPPT-2023-0606-0003) stated that the information presented in the 2014 TSCA Work Plan was incorrect for 4-tert-octylphenol and that EPA should not include 4-tert-octylphenol on the fourth Candidate Chemical List under SDWA. Under TSCA, EPA is required to consider chemical substances identified in the 2014 TSCA Work Plan and does not plan to revise the Work Plan as part of this action. Additional information received regarding the potential hazard, potential exposure, and bioaccumulation and persistence of 4-tert-octylphenol may be considered during prioritization.

For more information on the comments and EPA's responses regarding the candidate chemical substances, see Section 1.7 and 7.1 of the "EPA Response to Public Comments Received on the "Initiation of Prioritization Under the Toxic Substances Control Act" and "Proposed High-Priority Substance Designations Under the Toxic Substances Control Act" document published in docket ID no. EPA-HQ-OPPT-2023-0601 and EPA-HQ-OPPT-2023-0606.

B. What chemicals are being initiated?

EPA is initiating the prioritization process for the following five chemicals as candidates for designation as High-Priority Substances:

1. 4-Tert-Octylphenol, CASRN 140–66–9, Docket ID No.: EPA–HQ–OPPT–2018–0496

This chemical was listed in the 2014 TSCA Work Plan with a hazard score of 3; an exposure score of 3; and a persistence and bioaccumulation score of 2. Exposure to 4-tert-octylphenol (4-(1,1,3,3-tetramethylbutyl)-phenol may result in a range of human health effects such as kidney inflammation and impaired fertility (*i.e.*, lowered sperm count). Data related to human carcinogenicity have not been identified. Data regarding the use of this chemical was reported to EPA in the 2020 CDR. EPA also receives information annually on this chemical through the Toxics Release Inventory (TRI). Information is available from assessments conducted by international organizations, and other countries.

2. Benzene, CASRN 71–43–2, Docket ID No.: EPA–HQ–OPPT–2018–0475

This chemical was listed in the 2014 TSCA Work Plan with a hazard score of 3; an exposure score of 3; and a persistence and bioaccumulation score of 1. Data regarding the use of this chemical was reported to EPA in the 2020 CDR. Benzene is a known human carcinogen. Exposure to benzene may also result in a range of health effects such as immune function (*e.g.*, decreased immune lymphocyte count) and developmental abnormalities (*i.e.*, fetal malformations). EPA also receives information annually on this chemical through the TRI. Information is available from assessments conducted by other federal agencies, the state of California, international organizations, and other countries.

3. Ethylbenzene, CAS RN 100–41–4, Docket ID No.: EPA–HQ–OPPT–2018–0487

This chemical was listed in the 2014 TSCA Work Plan with a hazard score of 3; an exposure score of 3; and a persistence and bioaccumulation score of 1. Ethylbenzene is a probable human carcinogen. Exposure to ethylbenzene may also result in a range of health effects such as changes to liver and kidney tissue, hearing loss, and developmental abnormalities (*i.e.*, fetal malformations). Data regarding the use of this chemical was reported to EPA in the 2020 CDR. EPA also receives information annually on this chemical through the TRI. Information is

available from assessments conducted by other federal agencies, the state of California, international organizations, and other countries.

4. Naphthalene, CASRN 91–20–3, Docket ID No.: EPA–HQ–OPPT–2018–0454

This chemical was listed in the 2014 TSCA Work Plan with a hazard score of 3; an exposure score of 3; and a persistence and bioaccumulation score of 2. Naphthalene is a probable human carcinogen. Exposure to naphthalene may also result in a range of health effects such as destruction of red blood cells resulting in lower blood oxygen, damage to eyesight, and changes to liver, lung, and nasal tissue. Data regarding the use of this chemical was reported to EPA in the 2020 CDR. EPA also receives information annually on this chemical through the TRI. Information is available from assessments conducted by other federal agencies, the state of California, international organizations, and other countries.

5. Styrene, CASRN 100–42–5, Docket ID No.: EPA–HQ–OPPT–2018–0461

This chemical was listed in the 2014 TSCA Work Plan with a hazard score of 3; an exposure score of 3; and a persistence and bioaccumulation score of 1. Styrene is a probable human carcinogen. Exposure to styrene may also result in a range of health effects such as hearing loss, memory loss, fetal death, and tissue changes in the lungs and nasal passages. Data regarding the use of this chemical was reported to EPA in the 2020 CDR. EPA also receives information annually on this chemical through the TRI. Information is available from assessments conducted by other federal agencies, the state of California, international organizations, and other countries.

IV. Relevant Information

A. What additional information is EPA seeking for the five candidate chemical substances for which EPA is initiating prioritization?

Through this initiation of prioritization for chemical substances, EPA is providing a 90-day comment period as required by the statute (TSCA section 6(b)(1)(C)(i)) and implementing regulations (40 CFR 702.7(d)) and requesting that interested persons voluntarily submit relevant information. Relevant information might include, but is not limited to, information that may inform the screening review conducted pursuant to 40 CFR 702.9(a), consistent with the scientific standard of TSCA

section 26(h), about the following criteria and considerations:

- The chemical substance's hazard and exposure potential;
- The chemical substance's persistence and bioaccumulation;
- Potentially exposed or susceptible subpopulations which the submitter believes are relevant to the prioritization;
- Whether there is any storage of the chemical substance near significant sources of drinking water, including the storage facility location and the nearby drinking water source(s);
- The chemical substance's conditions of use or significant changes in conditions of use, including information regarding trade names;
- The chemical substance's production volume or significant changes in production volume; and
- Any other information relevant to the potential risks of the chemical substance that might be relevant to the designation of the chemical substance's priority for risk evaluation.

If the information is publicly available, citations are sufficient (including, but not limited to: Title, author, date of publication, publication source), and the submission does not need to include copies of the information.

B. What information is the Agency seeking for the 22 additional chemical substances that EPA considered, but did not select, for the current round of prioritization?

During the pre-prioritization process, EPA hosted public webinars and met with federal partners, industry, environmental organizations, labor organizations, state and local governments, and Tribes to discuss the prioritization process and presented a list of 27 chemical substances EPA was considering for prioritization. EPA took feedback from these discussions into consideration when selecting the five chemicals for prioritization listed in Unit III.B. Interested persons may submit relevant information on the chemical substances listed in this unit that are not currently undergoing prioritization by using docket ID number EPA–HQ–OPPT–2023–0606.

EPA has not yet determined which specific chemical structures are being considered for the chemical substances designated as a category in the 2014 TSCA Work Plan (*i.e.*, do not have CASRN listed). Therefore, EPA welcomes comments and information on specific chemical structures that may be relevant for addressing the various prioritization criteria and considerations on the chemical categories listed in this

unit. Information submitted on the substances within a category should be reported for each individual chemical structure, to the extent possible (*i.e.*, known or reasonably ascertainable). If the chemical identity of some of the individual chemical structures are not known or reasonably ascertainable by the commenter, the information associated with those chemical substances may be reported as a group of chemical structures (*i.e.*, isomeric mixture) or as the chemical category:

- 1-Hexadecanol, CASRN 36653–82–4;
- 2-Ethylhexyl 2,3,4,5-tetrabromobenzoate (TBB), CASRN 183658–27–7;
- Bis(2-Ethylhexyl)-3,4,5,6-Tetrabromophthalate (TBPH), CASRN 26040–51–7;
- Bisphenol A, CASRN 80–05–7;
- Creosote, CASRN 8001–58–9;
- Di-n-octyl phthalate (DnOP), CASRN 117–84–0;
- N-Nitroso-diphenylamine, CASRN 86–30–6;
- *P,P'*-Oxybis(benzenesulfonylhydrazide), CASRN 80–51–3;
- Tribromomethane, CASRN 75–25–2;
- Triglycidyl isocyanurate, CASRN 2451–62–9;
- M-Xylene, CASRN 108–38–3;
- O-Xylene, CASRN 95–47–6;
- P-Xylene, CASRN 106–42–3;
- Antimony and Antimony Compounds, Category;
- Arsenic and Arsenic Compounds, Category;
- Cobalt and Cobalt Compounds, Category;
- Lead and Lead Compounds, Category;
- Long-chain chlorinated paraffins (C18–20), Category;
- Medium-chain chlorinated paraffins (C14–17), Category;
- Bisphenol S, CASRN 80–09–1;
- Hydrogen Fluoride, CASRN 7664–39–3;
- *N*-(1,3-Dimethylbutyl)-*N'*-phenyl-*p*-phenylenediamine (6PPD), CASRN 793–24–8.

C. How will confidential business information be protected?

A person seeking to protect from disclosure as “confidential business information” any information that person submits under TSCA must assert and substantiate a claim for protection from disclosure concurrent with submission of the information in accordance with the requirements of TSCA section 14 and 40 CFR 703, with limited exceptions provided in the statute. TSCA section 14(b) limits

confidentiality protections for health and safety studies and information from such studies, however, and while EPA considers confidential business information when conducting its review under 40 CFR 702.9(a), the Agency encourages submitters to minimize claims for protection from disclosure wherever possible to maximize transparency in EPA’s screening review. More information on asserting and submitting confidential business information claims under TSCA can be found at 40 CFR 703 and <https://www.epa.gov/tscabi>.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–29829 Filed 12–17–24; 8:45 am]

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FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT: 89 FR 89012.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Thursday, November 14, 2024 at 11:00 a.m., Hybrid Meeting: 1050 First Street NE, Washington, DC (12th Floor) and virtual.

CHANGE IN THE MEETING: The November 14, 2024 Open Meeting was canceled.

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Laura E. Sinram,

Secretary and Clerk of the Commission.

[FR Doc. 2024–30107 Filed 12–16–24; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

[Docket No. OP–1863]

Regulation Q; Regulatory Capital Rule: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice.

SUMMARY: The Board is providing notice of the 2024 aggregate global indicator amounts, as required under the Board’s rule regarding risk-based capital surcharges for global systemically important bank holding companies.

DATES: December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Anna Lee Hewko, Associate Director, (202) 250–1577, Brian Chernoff, Manager, (202) 731–8914, Alexander Jiron, Senior Financial Institution Policy Analyst II, (202) 450–7350, or Aakash Jani, Senior Financial Institution Policy Analyst I, (202) 941–8305, Division of Supervision and Regulation; or Jay Schwarz, Deputy Associate General Counsel, (202) 452–2970, Mark Buresh, Senior Special Counsel, (202) 499–0261, Jonah Kind, Senior Counsel, (202) 309–5287, or David Imhoff, Senior Attorney (202) 834–3222, Legal Division. Board of Governors of the Federal Reserve System, 20th and C NW, Washington, DC 20551. For the hearing impaired and users of Telecommunications Device for the Deaf (TDD) and TTY–TRS, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: The Board’s framework for determining risk-based capital surcharges for global systemically important bank holding companies (GSIB surcharge rule) establishes a methodology to identify global systemically important bank holding companies (GSIBs) in the United States based on indicators that are correlated with systemic importance.¹ Under the GSIB surcharge rule, a firm must calculate its GSIB score using a specific formula (method 1). Method 1 uses five equally weighted categories that are correlated with systemic importance—size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity—and subdivided into twelve systemic indicators.

A firm divides its own measure of each systemic indicator by an aggregate global indicator amount. A firm’s method 1 score is the sum of its weighted systemic indicator scores expressed in basis points. A firm that calculates a method 1 score of 130 basis points or more is identified as a GSIB under the GSIB surcharge rule. The GSIB surcharge for a firm is the higher of the GSIB surcharge determined under method 1 and a second method, method 2, which is calculated based on measures of size, interconnectedness, cross-jurisdictional activity, complexity, and the firm’s reliance on short-term wholesale funding.²

The aggregate global indicator amounts used in the score calculation

¹ See 12 CFR 217.402, 217.404.

² Method 2 uses similar inputs to those used in method 1 but replaces the substitutability category with a measure of a firm’s use of short-term wholesale funding. In addition, method 2 is calibrated differently from method 1. See 12 CFR 217.405.

under method 1 are based on data collected by the Basel Committee on Banking Supervision (BCBS). The BCBS amounts are determined based on the sum of the systemic indicator amounts as reported by the 75 largest U.S. and foreign banking organizations as measured by the BCBS, and any other banking organization that the BCBS includes in its sample total for that year. The BCBS publicly releases these

amounts, denominated in euros, each year.³ Pursuant to the GSIB surcharge rule, the Board publishes the aggregate global indicator amounts each year as denominated in U.S. dollars using the euro-dollar exchange rate provided by the BCBS.⁴ Specifically, to determine the 2024 aggregate global indicator amounts, the Board uses the year-end 2023 euro-denominated indicator amounts published by the BCBS and

multiplies each of the euro-denominated indicator amounts by 1.105, the euro to U.S. dollar spot exchange rate on December 31, 2023.⁵

The aggregate global indicator amounts expressed in U.S. dollars for purposes of the 2024 method 1 score calculation under § 217.404(b)(1)(i)(B) of the GSIB surcharge rule are:

AGGREGATE GLOBAL INDICATOR AMOUNTS IN U.S. DOLLARS (USD) FOR 2024

Category	Systemic indicator	Aggregate global indicator amount (in USD)
Size	Total exposures	\$115,205,051,188,518
Interconnectedness	Intra-financial system assets	11,253,226,663,114
	Intra-financial system liabilities	11,388,383,441,235
	Securities outstanding	19,247,590,871,111
Substitutability	Payments activity	3,527,103,136,881,927
	Assets under custody	219,479,268,261,988
	Underwritten transactions in debt and equity markets	7,962,804,019,185
Complexity	Notional amount of over-the-counter (OTC) derivatives	733,514,990,056,729
	Trading and available-for-sale (AFS) securities	4,278,831,961,372
	Level 3 assets	803,127,442,989
Cross-jurisdictional activity	Cross-jurisdictional claims	28,416,427,492,687
	Cross-jurisdictional liabilities	23,524,643,383,930

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of Supervision and Regulation under delegated authority.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2024–29981 Filed 12–17–24; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

AGENCY: Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

ACTION: Notice of five AHRQ subcommittee meetings.

SUMMARY: The subcommittees listed below are part of AHRQ's Health Services Research Initial Review Group (IRG) Committee. Grant applications are

to be reviewed and discussed at these meetings. Each subcommittee meeting will be closed to the public.

DATES: See below for dates of meetings:

1. *Healthcare Safety and Quality Improvement Research (HSQR).*

Date: February 5–6, 2025.

2. *Healthcare Effectiveness and Outcomes Research (HEOR).*

Date: February 5–6, 2025.

3. *Health System and Value Research (HSVR).*

Date: February 13–14, 2025.

4. *Healthcare Research Training (HCRT).*

Date: February 27–28, 2025.

5. *Healthcare Information Technology Research (HITR).*

Date: February 27–28, 2025.

ADDRESSES: Agency for Healthcare Research and Quality (Virtual Review), 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: (to obtain a roster of members, agenda or minutes of the non-confidential portions of the meetings.) Jenny Griffith, Committee Management Officer, Division of Policy, Coordination and Analysis, Office of Extramural Research Education and Priority Populations, Agency for Healthcare Research and Quality (AHRQ), 5600 Fishers Lane,

Rockville, Maryland 20857, telephone (301) 427–1557.

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, 5 U.S.C. 1009(a)(2), AHRQ announces meetings of the above-listed scientific peer review groups, which are subcommittees of AHRQ's Health Services Research Initial Review Group Committee. The subcommittee meetings will be closed to the public in accordance with the provisions set forth in 5 U.S.C. 1009(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Agenda items for these meetings are subject to change as priorities dictate.

Dated: December 12, 2024.

Marquita Cullom,

Associate Director.

[FR Doc. 2024–29969 Filed 12–17–24; 8:45 am]

BILLING CODE 4160–90–P

³ The data used by the Board are available on the BCBS website at <https://www.bis.org/bcbs/gsib/denominators.htm>.

⁴ 12 CFR 217.404(b)(1)(i)(B); see also 80 FR 49082, 49086–87 (August 14, 2015). In addition, the Board

maintains the GSIB Framework Denominators on its website, available at <https://www.federalreserve.gov/supervisionreg/basel/denominators.htm>.

⁵ Foreign exchange rates provided by the BCBS. Available at https://www.bis.org/bcbs/gsib/reporting_instructions.htm.

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Notice of Closed Meeting**

Pursuant to 5 U.S.C. 1009(d), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–OH–25–003, Occupational Safety and Health Training Project Grants (TPG).

Date: March 4, 2025.

Time: 12:00 p.m.–5:00 p.m., EST.

Place: Video-Assisted Meeting.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Marilyn Ridenour, B.S.N., M.P.H., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1095 Willowdale Road, Morgantown, West Virginia 26505. Telephone: (304) 285–5879; Email: MRidenour@cdc.gov.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–30022 Filed 12–17–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Notice of Closed Meeting**

Pursuant to 5 U.S.C. 1009(d), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—PAR 18–812, NIOSH Member Conflict Review.

Date: February 6, 2025.

Time: 1 p.m.–3 p.m., EST.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Michael Goldcamp, Ph.D., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1095 Willowdale Road, Morgantown, West Virginia 26505. Telephone: (304) 285–5951; Email: MGoldcamp@cdc.gov.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–30021 Filed 12–17–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. FDA–2024–N–2844]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reclassification Petitions for Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by January 17, 2025.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. The OMB control number for this information collection is 0910–0138. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–3794, PRAStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Reclassification Petitions for Medical Devices

OMB Control Number 0910–0138—Extension

This information collection helps support implementation of statutory provisions found in sections 513(e) and (f), 514(b), 515(b), and 520(l) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360c(e) and (f), 21 U.S.C. 360d(b), 21 U.S.C. 360e(b), and 21 U.S.C. 360j(l)) pertaining to the reclassification of medical devices.

Specifically, the FD&C Act establishes three tiers of regulatory control for medical devices, by establishing three classes of medical devices, and requiring that all devices be classified into one of these three classes. The classification of a device depends upon the degree of regulatory control necessary to provide a reasonable assurance of the safety and effectiveness of the device. The three tiers of regulatory control are: (1) Class I—general controls, subject to sections 501 adulteration, 502 misbranding, 510 registration, 516 banned devices, 518 notification and other remedies, 519 records and reports, and 520 general provisions of the FD&C Act; (2) Class II—performance standards; and (3) Class III—premarket approval.

Implementing regulations in 21 CFR part 860, subpart C (parts 860.120 through 860.136) provide that any person may petition for reclassification of a device from any class to any other class and prescribe requisite format and content elements for reclassification petitions submitted to the Agency. We also provide information on our website at <https://www.fda.gov/about-fda/cdrh-transparency/reclassification> regarding medical device reclassification, which may serve as a helpful resource to respondents.

FDA is responsible for reviewing petitions for reclassification and determining whether the subject device will be reclassified. In some instances, FDA also submits such petitions to one of its medical device advisory panels for review and recommendations. FDA's

decision regarding the reclassification of a device is based primarily upon the information contained in the petition. Respondents to the information collection are private sector, for-profit businesses. We have not identified reclassification petitions as a type of submission we are currently prepared to accept electronically. Submission instructions, including addresses, are provided in § 860.123(b).

In the **Federal Register** of July 9, 2024 (89 FR 56390), FDA published a 60-day notice requesting public comment on the proposed collection of information. One comment was received, but it was not related to this information collection.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR part; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
§ 860.123; supporting data for reclassification petitions	12	1	12	497	5,964

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Reclassification petitions must be submitted as set forth in the applicable regulations, which provide for the submission of an original and two copies (§ 860.123(b)(4)). Each petition must include supporting data to show why reclassification of the device type will provide reasonable assurance of the safety and effectiveness of the device type. The principal data in such a petition will typically be reports of clinical trials.

Our estimated burden for the information collection reflects an increase of 6 responses and a corresponding increase of 2,982 hours. We attribute this adjustment to an increase in the number of submissions we received over the last few years.

Dated: December 11, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024–29955 Filed 12–17–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–4974]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Advanced Manufacturing Technologies Designation Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA).

DATES: Submit written comments (including recommendations) on the collection of information by January 17, 2025.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or

by using the search function. The OMB control number for this information collection is 0910–0139. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Advanced Manufacturing Technologies Designation Program

OMB Control Number 0910–0139—Revision

This information collection supports the establishment of an FDA Advanced Manufacturing Technologies (AMT) Designation Program, as provided for in section 506L of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 356l). Intending to enhance the development of and combat the shortage of critical medical products, the AMT Designation Program encourages early adoption of new technological advances in manufacturing processes by the pharmaceutical industry or other drug/

biologic developers. FDA regulations in 21 CFR parts 210 and 211 govern current good manufacturing practice in the manufacturing, processing, packing, or holding of drugs and finished pharmaceuticals (including medical gases and active pharmaceutical ingredients), respectively. Applicable information collection and attendant burden are currently discussed, accounted for, and approved in OMB control number 0910–0139.

We are revising the information collection to include the AMT Designation Program within the scope of activity, as authorized by section 506L of the FD&C Act, and account for attendant burden. Requests for AMT designation are reviewed by FDA to evaluate whether the data and information submitted meets the criteria established in section 506L of the FD&C Act. If a request for AMT designation is granted, then future new drug application (NDA), abbreviated new drug application (ANDA), or biologics

license application (BLA) applicants may use or reference the designated AMT, noting specific application of the designated AMT to specific product development and inclusion in NDA, ANDA, or BLA submissions describing development and manufacturing processes. Also required by section 506L of the FD&C Act, we engaged with our stakeholders in a public meeting on June 8, 2023 (April 24, 2023, 88 FR 24807), to discuss innovative manufacturing technologies for drug and biological products and included a discussion of the AMT Designation Program. For more information regarding AMT, we invite readers to visit our website at <https://www.fda.gov/emergency-preparedness-and-response/mcm-issues/advanced-manufacturing>, which includes regular updates on Agency implementation of its AMT Designation Program.

Finally, section 506L of the FD&C Act also provides for the issuance of guidance. In the **Federal Register** of

December 13, 2023 (88 FR 86333), we issued the draft guidance document entitled “Advanced Manufacturing Technologies Designation Program,” to communicate the goals, scope, and framework of the new program. We invited public comment under both our good guidance practices regulation in 21 CFR 10.115, and applicable PRA regulations in 5 CFR part 1320 and received a few comments. The comments included some requests for procedural clarification but focused mostly on requests for clarification of technical specifications and technologies that might qualify for AMT designation. Although we have updated the guidance document to address a number of public comments, we continue to implement the program and refine Agency processes.

FDA estimates the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

Section 506L(c) FD&C Act	Number of respondents	Number of responses per respondents	Total annual responses	Average burden per response	Total hours
Submitting AMT designation requests; FDA Guidance for Industry, section III.B	20	1	20	10	200

¹ There are no capital or operating and maintenance costs associated with the information collection.

Based on our experience with similar information collection activities that involve requests for FDA determinations, along with related preliminary and followup communications, we assume 10 hours is needed to complete the activities provided for in section 506L of the FD&C Act and discussed in the referenced guidance document. Although we have received fewer than 10 requests for AMT designation thus far, we are hopeful that 20 respondents will submit requests for AMT designation under the program.

Dated: December 11, 2024.
P. Ritu Nalubola,
Associate Commissioner for Policy.
[FR Doc. 2024–29954 Filed 12–17–24; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Food and Drug Administration
[Docket Nos. FDA–2024–E–0195; FDA–2024–E–0196; FDA–2024–E–0197; FDA–2024–E–0198]
Determination of Regulatory Review Period for Purposes of Patent Extension; SOHONOS
AGENCY: Food and Drug Administration, HHS.
ACTION: Notice.
SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for SOHONOS and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.
DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are

incorrect may submit either electronic or written comments and ask for a redetermination by February 18, 2025. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 16, 2025. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.
ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 18, 2025. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.
Electronic Submissions
Submit electronic comments in the following way:
• *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically,

including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket Nos. FDA-2024-E-0195, FDA-2024-E-0196, FDA-2024-E-0197, and FDA-2024-E-0198 for "Determination of Regulatory Review Period for Purposes of Patent Extension; SOHONOS." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in

its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

FOR FURTHER INFORMATION CONTACT:

Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6200, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval

phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, SOHONOS (palovarotene) indicated for reduction in the volume of new heterotopic ossification in adults and children aged 8 years and older for females and 10 years and older for males with fibrodysplasia ossificans progressiva. Subsequent to this approval, the USPTO received patent term restoration applications for SOHONOS (U.S. Patent Nos. 9,314,439 and 10,292,954 filed by Ipsen Biopharmaceuticals, Inc. (agent of Thomas Jefferson University), and U.S. Patent Nos. 10,864,194 and 11,622,959, filed by Ipsen Biopharmaceuticals, Inc. (agent of Clementia Pharmaceuticals Inc.)), and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated February 16, 2024, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of SOHONOS represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for SOHONOS is 7,526 days. Of this time, 6,657 days occurred during the testing phase of the regulatory review period, while 869 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* January 9, 2003. The applicant claims April 27, 2014, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 9, 2003, which was 30 days after FDA receipt of an earlier IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* March 31, 2021. FDA has verified the applicant's claim that the new drug application (NDA) for SOHONOS (NDA 215559) was initially submitted on March 31, 2021.

3. *The date the application was approved:* August 16, 2023. FDA has verified the applicant's claim that NDA 215559 was approved on August 16, 2023.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 69 days, 1,209 days or 1,773 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 11, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024–29964 Filed 12–17–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0119]

Fiscal Year 2025 Generic Drug Science and Research Initiatives Workshop; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the following public workshop entitled “FY 2025 Generic Drug Science and Research Initiatives Workshop.” The purpose of the public workshop is to provide an overview of the status of science and research initiatives for generic drugs and an opportunity for public input on these initiatives. FDA is seeking this input from a variety of interested parties—industry, academia, patient advocates, professional societies, and other interested parties—as it fulfills its commitment under the Generic Drug User Fee Amendments of 2022 (GDUFA III) to develop an annual list of science and research initiatives specific to generic drugs. FDA will take the information it obtains from the public workshop into account in developing its fiscal year (FY) 2026 Generic Drug User Fee Amendments (GDUFA) science and research initiatives.

DATES: The public workshop will be held on June 3 and 4, 2025. Either electronic or written comments on this public workshop must be submitted by July 7, 2025. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held in person and will be accessible virtually. Registrants will have an opportunity to indicate their interest in attending the public workshop in person. If there are restrictions imposed by applicable health guidelines for in-person gatherings, or seating capacity limitations, registrants interested in attending the public workshop in person will be contacted. The public workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503, sections B and C), Silver Spring, MD 20993–0002. Entrance for the public workshop participants (non-FDA employees) is through Building 1 where routine security check procedures will be

performed. For parking and security information, please refer to <https://www.fda.gov/about-fda/visitor-information>.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 7, 2025. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2023–N–0119 for “FY 2025 Generic Drug Science and Research Initiatives Workshop; Public Workshop; Request for Comments.” Received comments,

those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Sam Raney, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4732, Silver Spring, MD 20993, 240–402–7967, Sameersingh.Raney@fda.hhs.gov; or Robert Lionberger, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4722, Silver Spring, MD 20993, 240–402–7957, Robert.Lionberger@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In July 2012, Congress passed the Generic Drug User Fee Amendments of 2012 (GDUFA I) (Pub. L. 112–144). GDUFA I was designed to enhance public access to safe, high-quality generic drugs and to modernize the generic drug program. To support this goal, FDA agreed in the Generic Drug User Fee Act Program Performance Goals and Procedures (GDUFA I commitment letter) to work with industry and interested parties on identifying science and research initiatives specific to generic drugs for each fiscal year covered by GDUFA I.

In August 2017, GDUFA was reauthorized until September 2022 through the Generic Drug User Fee Amendments of 2017 (GDUFA II) (Public Law 115–52), and in September 2022, GDUFA was reauthorized until September 2027 through GDUFA III (Pub. L. 117–180, 136 Stat. 2155). In the GDUFA Reauthorization Performance Goals and Program Enhancements Fiscal Years 2023–2027 (GDUFA III commitment letter),¹ FDA agreed to conduct annual public workshops to solicit input from industry and interested parties for inclusion in an annual list of GDUFA III regulatory science initiatives. This public workshop scheduled for June 3 and 4, 2025, seeks to fulfill this agreement.

II. Topics for Discussion at the Public Workshop

The purpose of this public workshop is to obtain input from industry and other interested parties on identifying generic drug science and research initiatives for FY 2026. FDA is interested in receiving input about regulatory science initiatives for the ongoing years of the GDUFA III science and research program, and particularly for FY 2026.

Topics discussed during the workshop will focus on research that is needed to address scientific knowledge gaps and associated challenges impacting the development and regulatory assessment of generic products, including complex generics. As examples, topics discussed will likely focus on identifying what research is needed to clarify technical details related to implementing bioequivalence approaches recommended in FDA guidances for generic products with complex active ingredients and associated challenges (e.g., related to immunogenicity), or for

¹ The GDUFA III commitment letter is available at <https://www.fda.gov/media/153631/download>.

those that are complex products (e.g., drug-device combination products), or for other generic products where research could address scientific uncertainties and, thereby, facilitate a more efficient approval pathway (e.g., a waiver of in vivo bioequivalence studies for solid oral dosage forms that currently do not have proper alternative methods to support such waivers). Additional topics that can enhance public access to high-quality, safe, and effective generic products may also be discussed. Specific presentations and discussions at this workshop will be announced at a later date and may differ from the topics above. Input about the topics above will help the Agency identify and expand its scientific focus for the next fiscal year.

FDA will consider all comments made at this workshop or received through the docket (see **ADDRESSES**) as it develops its FY 2026 science and research initiatives. Information concerning the science and research initiatives for generic drugs can be found on the Science & Research website at <https://www.fda.gov/drugs/generic-drugs/science-research>.

III. Participating in the Public Workshop

Registration: Persons interested in attending this public workshop must register online at https://fda.zoomgov.com/webinar/register/WN_wxxGxb5HSgKMAa2Q_sJLEw#/registration. Registration may be performed at any time before or during the workshop. Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone number.

Registration is free and based on space availability, with priority given to early registrants. Early registration is recommended because seating is limited; therefore, FDA may limit the number of participants from each organization. Registrants will receive confirmation when they have been accepted.

If you need special accommodations due to a disability, please contact FDA via email at GDUFARegulatoryScience@fda.hhs.gov no later than 11:59 p.m. Eastern Time on May 20, 2025.

Requests for Oral Presentations: During online registration you may indicate if you wish to present your public comments and which topic(s) you wish to address. Requests to provide public comments via a prerecorded presentation or a live presentation, including in-person or virtual presentations, should be submitted via email to GDUFARegulatoryScience@fda.hhs.gov

by 11:59 p.m. Eastern Time on April 3, 2025. FDA will do its best to accommodate requests to make public comments that are within the scope of this public workshop; *i.e.*, those that identify what research is needed to address specific challenges for generic product development or regulatory assessment. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations, and request time for a joint presentation, or submit requests for designated representatives to participate in the workshop. Based on the public comment presentation requests received by April 3, 2025, at 11:59 p.m. Eastern Time, FDA will determine the amount of time allotted to each presenter and the approximate time each oral presentation is to begin; FDA will select and notify participants by April 30, 2025. If selected for presentation, any presentation materials must be emailed to GDUFARegulatoryScience@fda.hhs.gov no later than May 20, 2025, 11:59 p.m. Eastern Time. No commercial or promotional material will be permitted to be presented or distributed at the public workshop.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast. Please register online (as described above) to attend the workshop remotely (virtually). Registrants will receive a hyperlink that provides access to the webcast on both days. Although FDA verified the website addresses in this document, please note that websites are subject to change over time.

Transcripts: Please be advised that as soon as a video recording and audio transcript of the public workshop are available, they will be accessible at <https://www.regulations.gov> or via the Science & Research FDA website accessible at <https://www.fda.gov/drugs/generic-drugs/science-research>. They may also be available for viewing at the Dockets Management Staff (see **ADDRESSES**).

Dated: December 12, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024–29962 Filed 12–17–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2022–E–0681; FDA–2022–E–0682; FDA–2022–E–0683]

Determination of Regulatory Review Period for Purposes of Patent Extension; BYLVAY

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for BYLVAY and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by February 18, 2025. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 16, 2025. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 18, 2025. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any

confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket Nos. FDA–2022–E–0681, FDA–2022–E–0682, and FDA–2022–E–0683 for “Determination of Regulatory Review Period for Purposes of Patent Extension; BYLVAY.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management

Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6200, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product’s regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the

actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA’s determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, BYLVAY (odevixibat) indicated for the treatment of pruritis in patients 3 months of age and older with progressive familial intrahepatic cholestasis. Subsequent to this approval, the USPTO received patent term restoration applications for BYLVAY (U.S. Patent Nos. 9,694,018, 10,011,633, and 10,093,697) from Albireo Pharma, Inc. (agent for Albireo AB) and the USPTO requested FDA’s assistance in determining the patents’ eligibility for patent term restoration. In a letter dated January 18, 2024, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of BYLVAY represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product’s regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for BYLVAY is 1,868 days. Of this time, 1,625 days occurred during the testing phase of the regulatory review period, while 243 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* June 10, 2016. FDA has verified the applicant’s claim that the date the investigational new drug application became effective was on June 10, 2016.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* November 20, 2020. FDA has verified the applicant’s claim that the new drug application (NDA) for BYLVAY (NDA 215498) was initially submitted on November 20, 2020.

3. *The date the application was approved:* July 20, 2021. FDA has verified the applicant’s claim that NDA 215498 was approved on July 20, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations

of the actual period for patent extension. In its applications for patent extension, this applicant seeks 630 days, 679 days, or 861 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 11, 2024.

P. Ritu Nalubola,

Associate Commissioner for Policy.

[FR Doc. 2024–29966 Filed 12–17–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel: Mechanism for Time-Sensitive Research Opportunities in Environmental Health Sciences (R21).

Date: January 15, 2025.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709.

Meeting Format: Virtual Meeting.

Contact Person: Murali Ganesan, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training (DERT), National Institute of Environmental Health Sciences, National Institutes of Health, Keystone Building, Room 3097, Research Triangle Park, NC 27713, Phone: 984-287-4674, Email: murali.ganesan@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: December 12, 2024.

Bruce A. George,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-29836 Filed 12-17-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Early-Stage Dissemination and Implementation Research in Communication Disorders.

Date: January 16, 2025.

Time: 12:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Meeting Format: Virtual Meeting.

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451-6339, kellya2@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Inner Ear Imaging RFA Review.

Date: January 30, 2025.

Time: 1:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Meeting Format: Virtual Meeting.

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301-402-3587, rayk@nidcd.nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Institutional Research Training Opportunities Review.

Date: January 31, 2025.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Meeting Format: Virtual Meeting.

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451-6339, kellya2@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Grant (P50) Review.

Date: February 6, 2025.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Meeting Format: Virtual Meeting.

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301-402-3587, rayk@nidcd.nih.gov.

Name of Committee: National Institute on Deafness and Other Communication

Disorders Special Emphasis Panel; Chemosensory Fellowship Review Meeting.

Date: February 11, 2025.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Meeting Format: Virtual Meeting.

Contact Person: Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496-8683, sonia.nanescu@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Fellowship Review.

Date: February 21, 2025.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Address: Hilton Garden Inn Seaworld Orlando, FL.

Meeting Format: Virtual Meeting.

Contact Person: Martin Basch, Ph.D., Scientific Review Officer, NIH/NIDCD, Scientific Review Branch, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496-9693, martin.basch@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 12, 2024.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-29910 Filed 12-17-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; HEAL Initiative: Translating Research to Practice to End the Overdose Crisis.

Date: January 23–24, 2025.

Time: 10:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Address: National Institute of Health
National Institute on Drug Abuse, 301 North
Stonestreet Avenue, Bethesda, MD 20892.

Meeting Format: Virtual Meeting.

Contact Person: Sheila Pirooznia, Ph.D.,
Scientific Review Officer, Scientific Review
Branch, Division of Extramural Review,
National Institute on Drug Abuse, NIH, 301
North Stonestreet Avenue, MSC 6021,
Bethesda, MD 20892, (301) 496–9350,
sheila.pirooznia@nih.gov.

Name of Committee: National Institute on
Drug Abuse Special Emphasis Panel; NIDA
REI: Research at Minority Serving
Institutions on Neurocognitive Mechanisms
Underlying the Impact of Structural Racism
on the Substance Use Trajectory.

Date: February 3, 2025.

Time: 3:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant
applications.

Address: National Institute of Health
National Institute on Drug Abuse, 301 North
Stonestreet Avenue, Bethesda, MD 20892.

Meeting Format: Virtual Meeting.

Contact Person: Shareen Amina Iqbal,
Ph.D., Scientific Review Officer, Scientific
Review Branch, Division of Extramural
Research, National Institute on Drug Abuse,
NIH, 301 North Stonestreet Avenue, MSC
6021, Bethesda, MD 20892, (301) 443–4577,
shareen.iqbal@nih.gov.

Name of Committee: National Institute on
Drug Abuse Special Emphasis Panel;
Developing Digital Therapeutics for
Substance Use Disorders.

Date: February 5, 2025.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant
applications.

Address: National Institute of Health
National Institute on Drug Abuse, 301 North
Stonestreet Avenue, Bethesda, MD 20892.

Meeting Format: Virtual Meeting.

Contact Person: Shareen Amina Iqbal,
Ph.D., Scientific Review Officer, Scientific
Review Branch, Division of Extramural
Research, National Institute on Drug Abuse,
NIH, 301 North Stonestreet Avenue, MSC
6021, Bethesda, MD 20892, (301) 443–4577,
shareen.iqbal@nih.gov.

(Catalogue of Federal Domestic Assistance
Program Nos. 93.277, Drug Abuse Scientist
Development Award for Clinicians, Scientist
Development Awards, and Research Scientist
Awards; 93.278, Drug Abuse National
Research Service Awards for Research
Training; 93.279, Drug Abuse and Addiction
Research Programs, National Institutes of
Health, HHS)

Dated: December 12, 2024.

Lauren A. Fleck,

*Program Analyst, Office of Federal Advisory
Committee Policy.*

[FR Doc. 2024–29831 Filed 12–17–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

The National Institutes of Health Public Access Policy

AGENCY: National Institutes of Health,
HHS.

ACTION: Notice.

SUMMARY: The 2024 National Institutes
of Health (NIH) Public Access Policy
implements additional steps to
accelerate free public access to scholarly
publications resulting from the research
that NIH supports, building upon NIH's
long history of providing public access
to research results.

FOR FURTHER INFORMATION CONTACT:

Hilary Leeds, J.D., Senior Policy Analyst
for Public Access, Office of Science
Policy, at (301) 496–9838 or
SciencePolicy@od.nih.gov.

SUPPLEMENTARY INFORMATION:

Background

Increasing access to publications
resulting from the National Institutes of
Health (NIH) funding offers many
benefits to the scientific community and
the public who funded the underlying
research. When patients, families, and
healthcare providers can access
published findings resulting from NIH
funding, they are able to better
understand and address the most
critical health concerns facing their
communities. It also allows researchers,
students, and members of the public in
all communities to have equitable
access to such content. This access can
accelerate future research, lead to
collaboration, and allow interested
readers and patients to follow the latest
advances more closely. Importantly,
these goals reflect NIH's commitment to
the responsible stewardship of the
Nation's investment in biomedical
research by improving transparency and
accessibility of taxpayer-funded
research, an essential component of
fostering trust in research. NIH is
issuing this updated Public Access
Policy to further advance these goals by
accelerating free public access to
research results.

NIH has a long history of providing
access to research products resulting
from its funded research. The NIH
Public Access Policy [https://
sharing.nih.gov/public-access-policy/
public-access-policy-overview](https://sharing.nih.gov/public-access-policy/public-access-policy-overview) in effect
since 2008, requires that NIH-supported
researchers submit their final peer-
reviewed manuscripts to the National
Library of Medicine's PubMed Central®
digital archive of full-text biomedical

and life sciences journal literature upon
acceptance for publication, to be made
freely available to the public after an
allowable embargo period of not more
than 12 months after the official date of
publication. The 2008 Policy
implements Public Law 110–161
[https://www.congress.gov/110/statute/
STATUTE-121/STATUTE-121-
Pg1844.pdf](https://www.congress.gov/110/statute/STATUTE-121/STATUTE-121-Pg1844.pdf), which was made a
legislative mandate for FY 2009 and
beyond by Public Law 111–8 [https://
www.govinfo.gov/content/pkg/PLAW-
111publ8/pdf/PLAW-111publ8.pdf](https://www.govinfo.gov/content/pkg/PLAW-111publ8/pdf/PLAW-111publ8.pdf). The
Policy has, to date, resulted in more
than 1.5 million articles reporting on
NIH-supported research being freely
available to the public in PubMed
Central.

On August 25, 2022, the White House
Office of Science and Technology Policy
(OSTP) released updated policy
guidance (2022 OSTP Memorandum
[https://www.whitehouse.gov/wp-
content/uploads/2022/08/08-2022-
OSTP-Public-Access-Memo.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/08/08-2022-OSTP-Public-Access-Memo.pdf)) to all
federal agencies with research and
development expenditures to further
promote equity, advance trust in
science, and continue to advance
American scientific leadership.
Following the 2022 OSTP
Memorandum, NIH released its Plan to
Enhance Public Access to the Results of
NIH-Supported Research [https://
grants.nih.gov/grants/guide/notice-files/
NOT-OD-23-091.html](https://grants.nih.gov/grants/guide/notice-files/NOT-OD-23-091.html) in February 2023
(hereafter, the NIH Public Access Plan)
and its Draft Public Access Policy
[https://www.federalregister.gov/
documents/2024/06/18/2024-13373/
request-for-information-on-the-national-
institutes-of-health-draft-public-access-
policy](https://www.federalregister.gov/documents/2024/06/18/2024-13373/request-for-information-on-the-national-institutes-of-health-draft-public-access-policy) in June 2024 (NIH Draft Public
Access Policy). The NIH Public Access
Plan and Draft Public Access Policy
provided a roadmap for how NIH
proposed to accelerate access to
scholarly publications, consistent with
the government-wide expectation to
remove the 12-month embargo period
before public availability. This 2024
NIH Public Access Policy is consistent
with the expectations of the 2022 OSTP
Memorandum regarding scholarly
publications and is informed by all
public feedback, including comments
submitted in response to the NIH Draft
Public Access Policy.

Overview of Public Comments

A total of 144 written public
comments [https://osp.od.nih.gov/wp-
content/uploads/2024/10/Compiled-
Public-Comments-on-RFI-on-the-NIH-
Draft-Public-Access-Policy-508C.pdf](https://osp.od.nih.gov/wp-content/uploads/2024/10/Compiled-Public-Comments-on-RFI-on-the-NIH-Draft-Public-Access-Policy-508C.pdf)
were received in response to the NIH
Draft Public Access Policy. Written
comments were received from a variety

of constituencies, including those from universities, professional associations, nonprofit organizations, and publishers. In addition, NIH hosted a public listening session <https://osp.od.nih.gov/events/virtual-listening-session-on-the-nih-public-access-plan/> on the NIH Public Access Plan in April 2023, and in November 2023, NIH sponsored a workshop <https://www.nationalacademies.org/our-work/enhancing-public-access-to-the-results-of-research-supported-by-the-department-of-health-and-human-services-a-workshop> held by the National Academies of Sciences, Engineering and Medicine (NASEM) on Enhancing Public Access to the Results of Research Supported by the U.S. Department of Health and Human Services (HHS). Commenters and attendees included academic institutional officials, researchers at various career stages, patient advocates, publishers, and officials from professional associations, many of whom also publish academic journals.

NIH reviewed and considered all feedback to inform and develop the 2024 NIH Public Access Policy. Upon the listed effective date, the new Policy replaces the 2008 NIH Public Access Policy.

Discussion of Public Comments

A discussion of the public comments on the NIH Draft Public Access Policy, organized by general topic or theme, is provided below. Each section outlines the 2008 NIH Public Access Policy's approach on each issue, proposals in the NIH Draft Public Access Policy, public comments on the NIH Draft Public Access Policy, and the approach in the 2024 NIH Public Access Policy (also referred to as the Policy).

Definitions of Article, Manuscript, and Final Published Article

2008 NIH Public Access Policy: The 2008 NIH Public Access Policy did not have a general term or definition to describe the versions produced in the various stages of writing and publishing. Frequently Asked Questions (FAQs) associated with the 2008 NIH Public Access Policy expanded on some useful terms, such as Final Peer-Reviewed Manuscript and Final Published Article.

NIH Draft Public Access Policy: The NIH Draft Public Access Policy included a definition of Article to describe, in general, the versions from the creation of the draft through the Final Published Article. It also included definitions of Manuscript, Final Published Article, Journal, and Official Date of Publication (described further in its own section).

Public Comments: Although some comments supported the Draft Public Access Policy definitions of Article and Manuscript, other comments suggested that these terms were used inconsistently. There were many suggestions to define terms more clearly. Some suggestions included using other sources for definitions, such as the NISO Journal Article Version recommendations and the National Science Foundation's Public Access Plan's terms. Some comments suggested other replacement definitions. Some comments suggested that articles should not be considered Final Published Articles until the compilation of a volume or issue.

2024 NIH Public Access Policy: To communicate clearly and transparently, the Policy includes the definitions of two precise terms: Author Accepted Manuscript and Final Published Article. Each term is uniquely and consistently used throughout the Policy. In the Policy, the term Final Published Article represents the journal's authoritative copy, even prior to the compilation of a volume or issue or the assignment of associated metadata.

Because PubMed Central accepts submissions of the article from both the author (Author Accepted Manuscript) and journal (Final Published Article), the term "article" is still generally used here in this preamble to the Policy to refer to both Author Accepted Manuscripts and the Final Published Articles that are submitted to PubMed Central. However, it has been removed from the Policy itself. In addition, the Guidance on Government Use License and Rights includes the term Submitted Manuscript, as this Guidance discusses the process of submitting articles to be considered for publication in journals.

Definition of Official Date of Publication

2008 NIH Public Access Policy: When determining the timing of public release of a manuscript, NIH based the official date of publication on the later of the electronic or print publication date.

NIH Draft Public Access Policy: The NIH Draft Public Access Policy defined Official Date of Publication as "the date on which the article is first made available in final, edited form, whether in print or electronic (*i.e.*, online) format."

Public Comments: It was unclear to some if the NIH Draft Public Access Policy applied to an article upon its acceptance in a journal or upon its publication. Some comments suggested that the Official Date of Publication should refer to the point when an article has been issued pagination or an online

article number if that journal does not issue pagination.

2024 NIH Public Access Policy: The 2024 NIH Public Access Policy applies to Author Accepted Manuscripts. When determining the release of an Author Accepted Manuscript for public availability, the definition of Official Date of Publication is applicable. NIH has revised the definition of Official Date of Publication to be "the date on which the Final Published Article is first made available in final, edited form, whether in print or electronic (*i.e.*, online) format." This clarifies how NIH determines when an Author Accepted Manuscript should be made publicly available, which is not dependent on the compilation of a volume or issue or the assignment of associated metadata, as reflected in the revised definition of Final Published Article.

In addition, the definition of the Official Date of Publication is consistent with expectations under the NIH Policy for Data Management and Sharing (DMS Policy <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-21-013.html>). Aligning definitions across the NIH DMS Policy and the updated NIH Public Access Policy provides consistency and clarity to those researchers who are subject to both policies. These modifications and clarifications are aligned with current practice in scholarly communications.

Scope of the Public Access Policy

2008 NIH Public Access Policy: The 2008 NIH Public Access Policy's scope included the concept of "direct" funding by NIH. The scope of the 2008 NIH Public Access Policy was not limited to articles reporting research findings. Rather, the 2008 Policy's requirements applied to any peer-reviewed article that arose from direct NIH funding and was accepted for publication in a journal on or after April 7, 2008. For example, a peer-reviewed article that arose from NIH funding that described an infrastructure project may have been subject to the 2008 Policy, even if not reporting research findings.

NIH Draft Public Access Policy: The NIH Draft Public Access Policy adopted the 2008 NIH Public Access Policy's scope. Accordingly, the NIH Draft Public Access Policy applied to any Manuscript accepted for publication in a journal that results from funding by NIH in whole or in part. The applicability of the NIH Draft Public Access Policy depended upon whether the Manuscript was the result of NIH funding in whole or in part and was not dependent on whether non-NIH funds contributed to developing or writing the Manuscript itself. In addition, the NIH

Draft Public Access Policy's applicability was based on the Manuscript's acceptance date, regardless of when the award from which the article resulted was funded.

Finally, the NIH Draft Public Access Policy, like the 2008 NIH Public Access Policy, did not limit its scope to Manuscripts reporting only on research (it included, for example, a peer-reviewed article that resulted from NIH funding and described an infrastructure project).

Public Comments: Some comments requested clarification of the scope or suggested that the scope of the Policy be limited to original research articles. In addition, some comments suggested that the Policy should apply to the Version of Record rather than the Manuscript. Comments suggested that the Version of Record is more reliable as it contains post-publication corrections, for example. Some also suggested that the Policy should only apply to grants with a minimal funding threshold. Others suggested that NIH create a fund to help pay for publication costs for articles related to ongoing and closed awards.

Some comments asked for additional clarification on what is encompassed in the term "Supplemental Material" and if non-peer-reviewed written products, such as reviews, perspectives, commentaries, and editorials, were within scope of the Policy.

2024 NIH Public Access Policy: The Policy maintains the scope of the NIH Draft Public Access Policy. Specifically, the Policy applies to final, peer-reviewed articles (*i.e.*, Author Accepted Manuscripts) accepted for publication in a journal on or after the Effective Date (December 31, 2025) that result from NIH funding in whole or in part. Supplemental Material are widely understood to be material included with the publication that support the publication (*e.g.*, detailed methods, additional figures).

Importantly, NIH has a long history of ensuring the accuracy and integrity of the scholarly communication record maintained in its biomedical literature services over time by including post-publication updates made through correction, retraction, and/or an expression of concern. NIH creates links in PubMed Central between citations for original articles and citations for post-publication updates based on information published by the journal. All updated or retracted articles in PubMed Central are clearly identified as such by a prominent banner and watermark. PubMed Central also links to the Final Published Article on the journal website whenever possible.

Duration of Public Access Policy Applicability

2008 NIH Public Access Policy: Neither the 2008 NIH Public Access Policy nor the law that made the 2008 Policy a requirement for FY 2009 and beyond <https://www.govinfo.gov/content/pkg/PLAW-111publ8/pdf/PLAW-111publ8.pdf> specifies an end date to the 2008 Policy's applicability. This approach is consistent with publishing timelines, in which publication often happens after the end of an award.

NIH Draft Public Access Policy: NIH did not propose an end date for applicability to Manuscripts resulting from awards.

Public Comments: Some comments asked for clarification and guidance on how publication costs may be supported after closeout of an award. Some suggested that NIH find a way to allow awardees to use NIH funds to pay publication costs for articles subject to the Policy after closeout.

2024 NIH Public Access Policy: The law that made the 2008 Policy a requirement for FY 2009 and beyond does not have an end date for the Policy's applicability. The 2024 NIH Public Access Policy, when effective, replaces the 2008 NIH Public Access Policy, which already applies to final, peer-reviewed accepted articles resulting from NIH funding for ongoing and closed awards. Therefore, the requirement of continued applicability is not new, and, consistent with the law and the 2008 NIH Public Access Policy, the 2024 NIH Public Access Policy does not include an end date for applicability of the Policy to Author Accepted Manuscripts within scope. Costs are discussed below in a separate section.

Policy Effective Date

2008 NIH Public Access Policy: The 2008 NIH Public Access Policy became effective for manuscripts accepted for publication on or after April 7, 2008, and which arose from direct funding from an award active in FY 2008 or beyond, a contract signed on or after April 7, 2008, or from intramural research or an NIH employee.

NIH Draft Public Access Policy: The NIH Draft Public Access Policy was proposed to become effective for Manuscripts accepted for publication on or after October 1, 2025.

Public Comments: Several comments expressed preference for an Effective Date on the latest date such policies should be effective as outlined in the 2022 OSTP Memorandum, December 31, 2025. These comments suggested that the additional time would allow for

better planning, communication, and additional opportunities for training for Policy compliance. It was suggested that this would also allow more time to renegotiate submission agreements between journal publishers and the National Library of Medicine. Other comments supported an Effective Date of October 1, 2025.

Some comments suggested that the Policy should apply only to articles resulting from awards made after the Effective Date.

Comments requested clear communications around how the Policy would be initially implemented. Specific comments sought clarification on whether the Policy would apply retroactively and whether it would apply to draft or peer-reviewed articles that were not yet published as of the Policy's Effective Date. Additionally, some comments asked NIH to publish a clear implementation plan and provide opportunity for public comment on the implementation plan.

2024 NIH Public Access Policy: The Policy adopts an Effective Date of December 31, 2025. This approach is responsive to public comments and allows for additional time for affected groups and institutions to plan and prepare for the implementation of the Policy, while still being consistent with the 2022 OSTP Memorandum.

The Policy applies to Author Accepted Manuscripts accepted on or after December 31, 2025, regardless of when the award was made that resulted in the Author Accepted Manuscript. This approach avoids a situation where the 2008 NIH Public Access Policy is in effect at the same time as the 2024 Policy. Such a situation could have led to administrative burden in tracking which policies apply to publications produced under different awards and confusion for readers, with some articles being made public without an embargo while other newly published articles would have an embargo applied.

NIH recognizes that some implementation questions might arise around the Effective Date. NIH anticipates that such issues are time-limited, and NIH is committed to working with the research community to prepare for implementation of the updated Policy.

Rights in Author Accepted Manuscripts, Including Creating Derivative Works

2008 NIH Public Access Policy: The FAQs for the 2008 NIH Public Access Policy described how and when rights in articles accrue and what rights may be transferred. NIH provided sample language an author or institution may have added to a copyright agreement

with a journal. In addition, authors depositing Manuscripts in PubMed Central must agree to the NIH Manuscript Submission (NIHMS) Statement that, in part, allows the Manuscript to be appropriately tagged and made available on PubMed Central. This ensures that all PubMed Central articles are available in machine-readable formats that support accessibility <https://www.ncbi.nlm.nih.gov/pmc/about/accessibility/> and facilitate text mining <https://pmc.ncbi.nlm.nih.gov/tools/amdataset/#use>.

NIH Draft Public Access Policy: NIH focused on achieving the NIH Draft Public Access Policy's goals regarding rights for Manuscripts through minimally burdensome pathways. First, the NIH Draft Public Access Policy clarified that, upon the acceptance of funding, government use rights are granted to NIH. NIH proposed incorporating a statement granting NIH the right to make Manuscripts publicly available in PubMed Central upon the Official Date of Publication into Notices of Award and applicable contracts. This would help clarify that NIH's rights would be automatically established at the acceptance of funding, without requiring funded recipients to take additional steps.

Secondly, the NIH Draft Public Access Policy proposed that authors depositing Manuscripts in PubMed Central would provide a license to NIH that mirrored the Government Use License as part of a revised Manuscript Submission Statement, granting NIH the rights to 1) make Manuscripts publicly available in PubMed Central upon the Official Date of Publication and 2) create derivative works in order to make Manuscripts available in machine-readable formats to support accessibility and facilitate text mining, consistent with current practice.

Beyond these measures, NIH did not propose requiring authors to apply a particular license to their Manuscripts.

In the Draft Guidance on Government Use License and Rights, NIH encouraged authors to clearly communicate NIH's rights through a statement in the Manuscript itself. In this Guidance, NIH proposed sample language for authors to place in their Manuscripts if desired.

Public Comments: NIH received many comments on rights. Many comments were broadly supportive of the draft language of the license that would be provided to NIH upon acceptance of award, while many others were broadly opposed. Some comments supported including NIH's rights in award conditions as being fully consistent with the government use rights. Others

questioned the legal bases for NIH's proposal and suggested it could restrict an author's ability to determine how their works will be reused. Others requested clarification around the scope of NIH's rights, such as whether the license could prevent authors from depositing their articles in institutional repositories.

Regarding the proposed language for the standard license when depositing Manuscripts in PubMed Central, comments were similarly split between support and opposition. Some suggested that the standard language added consistency and minimized confusion for those who are depositing, while others suggested that the language did not help authors understand their rights. Some were also confused as to how this language differed from the suggested language that was provided for authors to include in the article.

Comments were divided on the inclusion of the proposed license to allow for creating derivative works. Many supported the proposed language and indicated that it helped ensure accessibility, make critical information more widely available, and allow for machine readability. Many further suggested edits to the license and use statements that would grant rights to the full public reuse of the Manuscripts, with appropriate attribution. Those in opposition asserted that the proposal was not in alignment with the Government Use License and could undermine existing copyright agreements and the safeguards that publishers provide. Some also stated that the ability to create derivative works could undermine the integrity of the scientific record. Others suggested that if NIH were to include the ability to create derivative works in the license, there should be additional clarifications around specific use cases and limitations, providing adequate attribution to authors, and a way to enforce only appropriate uses.

2024 NIH Public Access Policy: The Policy includes relevant language about NIH's rights to make Author Accepted Manuscripts available in PubMed Central without embargo upon the Official Date of Publication. NIH reiterates that this does not mean that NIH has rights to the Final Published Article, as defined in the Policy, but only to the Author Accepted Manuscript, as defined in the Policy.

The Policy also requires that those depositing Author Accepted Manuscripts in PubMed Central agree to a revised Manuscript Submission Statement reiterating NIH's right to post such Author Accepted Manuscripts without embargo upon the Official Date

of Publication. The language for this statement, as included in the Guidance on Government Use License and Rights, has been modified from the Draft Public Access Policy to remove the phrase "create derivative works." Because NIH had not intended the language to convey what comments suggested regarding the potential to compromise scientific integrity, NIH has removed the phrase. NIH will, however, continue using features, existing or to-be-developed, that ensure accessibility and usability. NIH also reserves the right to, in the future, reasonably interpret statutory and/or regulatory language to permit uses of content that are consistent with copyright law, that provide value to users, and that are considered to be in line with practices of the time.

Regarding comments that proposed NIH should provide the public with full reuse rights through explicit language about reuse of the work for any purpose with attribution, NIH notes that such language is akin to authors providing NIH with a particular license. As stated in the NIH Draft Public Access Policy, NIH does not believe that a particular license is needed to achieve the Policy's goals.

Finally, NIH clarifies that the Policy does not prevent authors from depositing their Author Accepted Manuscripts into institutional repositories, as long as Author Accepted Manuscripts are also deposited in PubMed Central per the Policy.

Publication Costs

2008 NIH Public Access Policy: According to the 2008 NIH Public Access Policy FAQs, "Publication costs, including author fees, may be charged to NIH grants and contracts on three conditions: (1) such costs incurred are actual, allowable, and reasonable to advance the objectives of the award; (2) costs are charged consistently regardless of the source of support; (3) all other applicable rules on allowability of costs are met." Importantly, even if such costs were not incurred during a specific period of performance of an award, an award may still be charged for publication costs before its closeout.

NIH Draft Public Access Policy: In the NIH Draft Public Access Policy, NIH clarified that compliance with the Draft Policy is free. NIH proposed maintaining a free pathway for compliance through depositing the Manuscript in PubMed Central.

The NIH Draft Public Access Policy noted that if authors were asked to pay a third-party fee for the submission of Manuscripts to PubMed Central, the NIH Draft Public Access Policy would not permit this fee to be paid from NIH

funds because it is not a legitimate publication expense. The NIH Draft Public Access Policy indicated reasonable costs associated with publication that were allowable may be requested in the budget for the project as direct or indirect costs.

The Draft Guidance on Publication Costs contained examples of unallowable costs, based on cost principles and the NIH Grants Policy Statement (GPS). Regarding the ability to pay publication costs after an award has ended, the Draft Guidance stated that NIH cannot pay publication costs after closeout of an award (as affirmed in revisions to 2 CFR 200.461 <https://www.federalregister.gov/documents/2024/04/22/2024-07496/guidance-for-federal-financial-assistance#sectno-reference-200.461>). Points to Consider for Authors and Institutions in Assessing Reasonable Costs were included in the Draft Guidance on Publication Costs.

Public Comments: NIH received many comments on costs. There were comments that supported the free pathway to compliance, while other comments suggested that framing it as such undermines the efforts of publishers and could disrupt revenue streams. Some of these comments suggested that the Policy could impact publication quality, cause shifts in journal models (e.g., subscription- or article processing charge (APC)-based), or broadly increase APCs. Some suggested that smaller publishers, such as those supported by professional societies, will be particularly impacted by the Policy. Comments also expressed uncertainty about whether compliance with the Policy would require authors to pay journals to make their articles available immediately upon publication.

Comments both supported and opposed the information in the Draft Guidance on Publication Costs. Those supporting NIH's approach suggested that the Guidance would allow for the best use of funds and increase access to scientific research overall. Others proposed that NIH also cover fees related to other aspects of publishing, such as the peer review process and copyediting, as well as fees associated with novel ways of making the results of NIH funding publicly available.

Many requested clarification on allowable costs and provided some specific suggestions and comments about circumstances that could warrant the use of NIH funds. Some suggested that NIH should add factors about why authors might choose to pay a fee to the Points to Consider for Authors and Institutions in Assessing Reasonable

Costs (in the Draft Guidance on Publication Costs).

Other comments proposed that NIH pay for publication costs after closeout of the award and that this approach should be consistent across federal agencies. Comments also suggested that NIH should provide additional resources and guidance to underserved populations, such as researchers from historically excluded backgrounds, early-stage investigators, and researchers from lower-resourced institutions.

2024 NIH Public Access Policy: First, NIH reiterates that compliance with the Policy does not require the payment of an open access fee to a journal.

NIH also reiterates that the free pathway to compliance can be achieved by depositing the Author Accepted Manuscript into PubMed Central for public availability upon the Official Date of Publication without embargo.

NIH recognizes and understands that publishing itself is not free. NIH has developed Guidance on Publication Costs to guide institutions and authors when budgeting for and paying allowable and reasonable publication costs. The available compliance pathways of both the free deposition of the Author Accepted Manuscript to PubMed Central and also the journal deposition of the Final Published Article to PubMed Central support equity in publishing opportunity and, in particular, author choice. Importantly, through this Policy, NIH does not prevent authors from publishing findings resulting from NIH funding in journals that do not make their content immediately, publicly available, as long as the Author Accepted Manuscript is deposited in PubMed Central for public availability upon the Official Date of Publication. In this way, NIH promotes author choice in journal selection.

Regarding APCs and potential impacts, NIH recognizes that it is unclear how and to what extent publishing costs will be affected by NIH's and the government-wide policies that ensure taxpayer access to the results of the research they funded without embargo. NIH will continue to consider appropriate methods to monitor costs for potential impacts on relevant communities once the Policy has been implemented and any downstream effects are more readily apparent.

The Guidance on Publication Costs outlines key factors for allowability and Points to Consider for Authors and Institutions in Assessing Reasonable Costs. NIH has clarified some areas of the Draft Guidance on Publication Costs in response to comments received.

The GPS does not limit allowable costs only to articles that are subject to the Policy. NIH acknowledges that the public dissemination of results from NIH funding does not occur only through peer-reviewed publications. Models for sharing research findings are evolving and allowable costs may be requested for publicly disseminating works reporting on the results of NIH funding that are not subject to the NIH Public Access Policy. NIH notes, however, that the unallowable costs listed in the Guidance on Publication Costs continue to apply, and works must be made publicly available to qualify for costs.

NIH also makes clear that institutions, through their policies, may choose how to allot benefits under agreements with publishers and use NIH funds for publishing in ways that are otherwise allowable and ensure direct and indirect costs are charged consistently, regardless of the source of funds.

NIH notes that the use of institutional resources, such as library services, to aid in Policy compliance is not only permitted but encouraged.

NIH cannot allow costs to be paid from an award after its closeout or from a contract after it is expired. However, costs for publication may be charged after the period of performance and prior to closeout (*i.e.*, during the 120-day liquidation period). These costs must only be for the originally approved activities and must not be associated with any new work performed outside of the period of performance.

Finally, NIH has added some additional considerations to the Points to Consider for Authors and Institutions in Assessing Reasonable Costs that address concerns that the points were only outlining reasons not to pay a fee. NIH promotes consideration of all relevant factors when authors and institutions are deciding whether costs are reasonable in particular circumstances.

Compliance and Enforcement

2008 NIH Public Access Policy: The 2008 NIH Public Access Policy noted that the awardee institution is responsible for complying with the terms and conditions of the award. Compliance could be achieved through submission of the article by the author or journal to PubMed Central. NIH could take one or more enforcement actions depending on the severity and duration of the noncompliance, in accordance with applicable statutes, regulations, and policies.

NIH Draft Public Access Policy: The NIH Draft Public Access Policy adopted the same pathways to compliance as the

2008 NIH Public Access Policy. It also reinforced the requirement to properly communicate and acknowledge federal funding in articles. Importantly, the NIH Draft Public Access Policy stated that noncompliance with the requirement to properly communicate and acknowledge federal funding is itself a violation of the terms and conditions of award and also could result in noncompliance with the NIH Public Access Policy. It noted that non-competing continuation grant awards are subject to a delay in award processing and that noncompliance may affect future funding for the institution.

Public Comments: Some comments asked whether submission to PubMed Central would be the responsibility of the journal or the author and how compliance with the Policy would be monitored. Others asked for clarification around the flexibility of depositing Manuscripts immediately upon acceptance in PubMed Central, given processing times and other unforeseeable delays.

2024 NIH Public Access Policy: Compliance with the Policy is the responsibility of the institution, but, as noted in the Policy, compliance may be achieved through the pathway of the journal's submission of the Final Published Article to PubMed Central. NIH intends to continue monitoring compliance through existing processes. The 2024 NIH Public Access Policy outlines additional information on compliance and enforcement for awards, contracts, Other Transaction agreements, and NIH employees.

Regarding processing times, as noted in the NIH Draft Public Access Policy, implementation accounts for processing time that may be needed before public availability in PubMed Central. When Author Accepted Manuscripts are deposited into PubMed Central, an NIH Manuscript Submission Identifier (NIHMSID) may be used temporarily until the submission process is complete and a PubMed Central Identifier (PMCID) is assigned.

Accessibility and Understandability

2008 NIH Public Access Policy: NIH currently makes content in PubMed Central available in accessible and machine-readable formats. In addition, NIH has multiple ways to make research results available to the public, including through press releases and the Public Health Relevance Statement and the Outcomes section in RePORTER.

NIH Draft Public Access Policy: The Draft Policy noted that, as supporting technologies continue to develop, NIH would consider additional approaches

to increase understanding of NIH-funded scientific research.

Public Comments: Some comments suggested that the Draft Public Access Policy would increase accessibility of NIH research. Others noted that plain language summaries could enhance understandability.

2024 NIH Public Access Policy: Accessibility of PubMed Central content is paramount, and NIH will continue to make content accessible for those using assistive technologies. PubMed Central continues to improve the user experience and make its content more perceivable, operable, understandable, and robust, guided in part by feedback from those who use assistive technologies. NIH appreciates comments noting that, to make discoveries truly accessible to the public, information should be disseminated in ways that are meaningful and digestible. NIH is regularly looking for ways to promote the sharing of the results of its funded research, whether through press releases, websites, summary information on awards in RePORTER, or other means.

NIH Public Access Policy

Purpose

Increasing access to publications resulting from National Institutes of Health (NIH) funding offers many benefits to the scientific community and the public who funded the underlying research. When patients, families, and healthcare providers can access published findings resulting from NIH funding, they are able to better understand and address the most critical health concerns facing their communities. It also allows researchers, students, and members of the public in all communities to have equitable access to such content. This access can accelerate future research, lead to collaboration, and allow interested readers and patients to follow the latest advances more closely. Importantly, these goals also reflect NIH's commitment to the responsible stewardship of the Nation's investment in biomedical research by improving transparency and accessibility of taxpayer-funded research, an essential component of fostering trust in research.

To achieve these goals, the NIH Public Access Policy requires Author Accepted Manuscripts accepted for publication in a journal, on or after December 31, 2025, to be submitted to PubMed Central upon acceptance for publication, for public availability without embargo upon the Official Date of Publication.

Definitions

Author Accepted Manuscript: The author's final version that has been accepted for journal publication and includes all revisions resulting from the peer review process, including all associated tables, graphics, and supplemental material.

Final Published Article: The journal's authoritative copy, including journal or publisher copyediting and stylistic edits, and formatting changes, even prior to the compilation of a volume or issue or the assignment of associated metadata.

Journal: A periodical publication that is either (1) included in the "journal" section of the National Library of Medicine (NLM) Catalog <https://www.ncbi.nlm.nih.gov/nlmcatalog/journals> or (2) meets all of the following criteria:

- Requirements for ISSN assignment;
- Content is issued over time under a common title;
- Is a collection of articles by different authors; and
- Is intended to be published indefinitely.

Official Date of Publication: The date on which the Final Published Article is first made available in final, edited form, whether in print or electronic (*i.e.*, online) format.

Scope and Effective Date

The NIH Public Access Policy applies to any Author Accepted Manuscript accepted for publication in a journal, on or after December 31, 2025, that is the result of funding by NIH in whole or in part through:

- A grant or cooperative agreement, including training grants,
- A contract,
- An Other Transaction,
- NIH intramural research, or
- The official work of an NIH employee.

The NIH Public Access Policy applies regardless of whether the NIH-funded principal investigator or project director is an author and regardless of whether non-NIH funds contributed to developing or writing the Author Accepted Manuscript. Upon the Effective Date, this Policy replaces the 2008 NIH Public Access Policy.

Requirements

The NIH Public Access Policy requires:

- Submission of an electronic version of the Author Accepted Manuscript to PubMed Central upon its acceptance for publication for public availability without embargo upon the Official Date of Publication;

- An acknowledgment in the Author Accepted Manuscript and Final Published Article that satisfies the requirements in the NIH Grants Policy Statement (GPS) regarding communicating and acknowledging federal funding (GPS 4.2.1 https://grants.nih.gov/grants/policy/nihgps/HTML5/section_4/4.2.1_acknowledgement_of_federal_funding.htm and GPS 8.2.1 https://grants.nih.gov/grants/policy/nihgps/HTML5/section_8/8.2.1_rights_in_data_publication_and_copywriting.htm), as well as analogous requirements for acknowledging federal funding as incorporated into the terms of Other Transaction agreements and applicable contracts; and

- When an Author Accepted Manuscript is submitted to NIH,¹ agreeing to a standard license that mirrors that of the Government Use License at 2 CFR 200.315 <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR8feb98c2e3e5ad2/section-200.315>, or its successor regulation, explicitly granting NIH the right to make the Author Accepted Manuscript publicly available through PubMed Central without embargo upon the Official Date of Publication.

Government Use License and Rights

- By accepting NIH funding, the recipient grants to NIH, as the funding agency, a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes and to authorize others to do so, which includes making Author Accepted Manuscripts publicly available in PubMed Central upon the Official Date of Publication. A statement that conveys this point is incorporated into Notices of Award, the terms of Other Transaction agreements, and applicable contracts.

- NIH encourages authors to include a statement that indicates the Author Accepted Manuscript is subject to the NIH Public Access Policy and that this means that NIH, as the funding agency, has the right to make the Author Accepted Manuscript publicly available in PubMed Central upon the Official Date of Publication. NIH provides sample language in the Guidance on Government Use License and Rights that authors may choose to include in Author Accepted Manuscripts. Such a statement ensures transparency and ensures awareness that NIH has the right to make the Author Accepted Manuscript available in PubMed Central

without embargo upon the Official Date of Publication.

- Authors are not expected to provide rights to NIH to the Final Published Article, and the rights that accrue to NIH upon the acceptance of funding are to the Author Accepted Manuscript. However, as noted in the section on Compliance and Enforcement, NIH will accept submission of the Final Published Article to PubMed Central from journals or publishers with formal agreements with NLM as compliant with the Policy when it may be made publicly available without embargo upon the Official Date of Publication.

NIH Funding of Publication Costs

Reasonable costs associated with publication that are allowable costs of the project budget may be requested as direct or indirect costs, as specified in the GPS 7.9 https://grants.nih.gov/grants/policy/nihgps/html5/section_7/7.9_allowability_of_costs_activities.htm and as incorporated into the terms of Other Transaction agreements and applicable contracts (see the Guidance on Publication Costs for more information). Submission of Author Accepted Manuscripts to PubMed Central remains free for authors under the NIH Public Access Policy. If, during the course of the publication process, an author is asked to pay a fee for submission of the Author Accepted Manuscript to PubMed Central, such costs are not allowable.

Compliance and Enforcement

Regarding submission to PubMed Central, compliance with the Policy may be achieved through either:

- Submission of the electronic version of the Author Accepted Manuscript to PubMed Central upon its acceptance for publication, for public availability without embargo upon the Official Date of Publication, or
- Submission of the Final Published Article to PubMed Central from journals or publishers with formal agreements with NLM, upon the Official Date of Publication, for public availability without embargo.

Additional details on compliance and enforcement can be found below:

- *Grants*: Noncompliance with the NIH Public Access Policy may be considered by NIH regarding future funding decisions for the recipient institution (e.g., as authorized in the NIH GPS 8.5, Specific Award Conditions and Remedies for Noncompliance (Specific Award Conditions and Enforcement Actions https://grants.nih.gov/grants/policy/nihgps/HTML5/section_8/8.5_special_award_conditions_and_remedies_for_

[noncompliance_special_award_conditions_and_enforcement_actions_.htm](#))). Non-competing continuation grant awards are subject to a delay in award processing for noncompliance with the NIH Public Access Policy.

- *Contracts*: Compliance with and enforcement of the Policy will be consistent with the contract and the Federal Acquisition Regulations, as applicable.

- *Other Transaction Agreements*: Compliance with and enforcement of the Policy will be consistent with applicable NIH policies and the terms of the agreement.

- *Intramural Research and the Official Work of NIH Employees*: Compliance with and enforcement of the Policy will be consistent with applicable NIH policies and procedures.

Communicating and acknowledging federal funding enables a clear, public-facing indication of NIH funding in Author Accepted Manuscripts and Final Published Articles. Failure to include required acknowledgments may result in noncompliance with the NIH Public Access Policy, in addition to resulting in noncompliance with terms and conditions of funding regarding communicating and acknowledging federal funding.

Guidance on Government Use License and Rights

Purpose

Federal agencies have, by law, certain rights to products resulting from federal funding. For works (e.g., Author Accepted Manuscripts) under the Government Use License (2 CFR 200.315 <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR8feb98c2e3e5ad2/section-200.315>), or its successor regulation, the National Institutes of Health (NIH) “reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes and to authorize others to do so.” These rights also apply as incorporated into the terms of Other Transaction agreements and applicable contracts (e.g., the rights in data clause within the contract).

This Guidance assists authors in navigating compliance with the NIH Public Access Policy with minimal burden. NIH also encourages authors to be clear with journals and publishers to ensure journals and publishers understand that NIH has a right to make Author Accepted Manuscripts publicly available upon the Official Date of Publication.

¹ This happens typically through the NIH Manuscript Submission (NIHMS) System.

Public Access Policy Requirements Related to Rights

Upon accepting NIH funding, recipients grant to NIH the right to make Author Accepted Manuscripts resulting from the funding publicly available in PubMed Central upon the Official Date of Publication, and this is affirmed via a statement in Notices of Award, in the terms of Other Transaction agreements, and in applicable contracts.

Authors submitting Author Accepted Manuscripts to PubMed Central must agree to a submission statement as part of the standard PubMed Central manuscript submission process. Under the NIH Public Access Policy, authors submitting an Author Accepted Manuscript to PubMed Central must provide NIH with a standard license that mirrors the Government Use License. This language, included as part of this submission statement to PubMed Central, states:

I hereby grant to NIH, a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use this work for Federal purposes and to authorize others to do so. This grant of rights includes the right to make the final, peer-reviewed manuscript publicly available in PubMed Central upon the Official Date of Publication.

The language in this statement may evolve, but it includes a grant of rights to NIH to make the Author Accepted Manuscript publicly available in PubMed Central without an embargo, upon the Official Date of Publication.

Guidance for Communicating Rights in Author Accepted Manuscripts

NIH highly encourages authors to be transparent during the journal submission process by indicating to the journal or publisher that the Author Accepted Manuscript, should the Submitted Manuscript² be accepted, is subject to the NIH Public Access Policy, and that this means that NIH, as the funding agency, has the right to make the Author Accepted Manuscript publicly available in PubMed Central upon the Official Date of Publication. NIH does not require that authors demonstrate to NIH what was communicated to publishers.

NIH suggests that authors include the points above as a statement in the Submitted Manuscript. Such a statement may accompany the required funding acknowledgment. NIH provides the following sample language that may be included in the Submitted Manuscript and then, should it be

accepted, the Author Accepted Manuscript:

This manuscript is the result of funding in whole or in part by the National Institutes of Health (NIH). It is subject to the NIH Public Access Policy. Through acceptance of this federal funding, NIH has been given a right to make this manuscript publicly available in PubMed Central upon the Official Date of Publication, as defined by NIH.

Guidance on Publication Costs

Purpose

The National Institutes of Health (NIH) reiterates that compliance with the Public Access Policy is free. However, NIH recognizes that some peer-reviewed publishing routes may result in publication costs, including, but not limited to, article processing charges (APCs). Publication costs are allowable when they comport with the existing NIH cost principles (Grants Policy Statement (GPS) 7.2 https://grants.nih.gov/grants/policy/nihgps/HTML5/section_7/7.2_the_cost_principles.htm and GPS 7.9.1 https://grants.nih.gov/grants/policy/nihgps/html5/section_7/7.9_allowability_of_costs_activities.htm#Selected (Publication and Printing Costs). Cost principles clarify when costs should be allocated as direct versus indirect costs, and they clarify charges and fees that are allowable under the outlined conditions.

This Guidance clarifies publication costs that are not allowable based on existing cost principles. It also outlines Points to Consider for Authors and Institutions in Assessing Reasonable Costs. This Guidance is intended to help funded authors and institutions understand what costs are allowable and reasonable under the NIH Public Access Policy. The NIH GPS also permits allowable and reasonable costs to be used to make public other works resulting from NIH funding that are not subject to the NIH Public Access Policy. This Guidance includes a brief section describing these kinds of works. The factors for what make costs unallowable are broadly applicable, regardless of whether the publication or other work is subject to the NIH Public Access Policy.

Public Access Policy Requirements Related to Costs

All costs must comport with 2 CFR 200 subpart E <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-E>, or its successor regulation, as implemented in NIH GPS 7.2 and GPS 7.9 https://grants.nih.gov/grants/policy/nihgps/HTML5/section_7/7.9_allowability_of_costs_activities.htm. These principles also apply as analogous requirements in the terms of

Other Transaction agreements. For applicable contracts, all publication costs must comport with 2 CFR 200 subpart E, or its successor regulation, and the terms and conditions of the contract.

The NIH Public Access Policy clarifies that reasonable costs that are allowable may be requested in the budget for the project as direct or indirect costs, as specified in the NIH GPS and as incorporated into the terms of Other Transaction agreements and applicable contracts. Importantly, the NIH Public Access Policy also states that submission of Author Accepted Manuscripts to PubMed Central remains free for authors. Journal or publisher fees that arise during the course of the publication process for the sole purpose of submitting the Author Accepted Manuscript to PubMed Central are not allowable costs. Compliance with the Policy does not require the payment of an open access fee to a journal.

Other Unallowable Costs

In addition to not allowing the payment of fees to submit Author Accepted Manuscripts to PubMed Central, examples of other unallowable costs are listed below in the context of the corresponding rules that can be found in the NIH GPS. This list may be updated as needed.

- Costs for services (e.g., peer review) for which there is no resulting, publicly available product are unallowable because costs must be chargeable or assignable in accordance with the relative benefits received (GPS 7.2).
- Costs for which the institution already pays a fee that would cover all publication costs (e.g., an agreement the institution has with a publisher whereby all authors from that institution may publish for free in exchange for subscription services) are unallowable because costs may not be double charged or inconsistently charged as both direct and indirect costs (GPS 7.4 https://grants.nih.gov/grants/policy/nihgps/HTML5/section_7/7.4_reimbursement_of_facilities_and_administrative_costs.htm). Note that institutions have discretion in apportioning publication costs among agreements and NIH funds, as long as when NIH funds are used, such costs are otherwise allowable and consistently charged, regardless of the source of funds, per institutional policy.

- Costs for publishing services that are charged differentially because an Author Accepted Manuscript is subject to the NIH Public Access Policy or the work is the result of NIH funding are unallowable because charges must be levied impartially on all items

² The author's pre-accepted version of the manuscript that is submitted to a journal or publisher.

published by the journal, whether or not under a federal award (GPS 7.9.1).

- Costs for services incurred after closeout of the award, even for an Author Accepted Manuscript subject to the NIH Public Access Policy, are unallowable because the costs of publications must be incurred before closeout (GPS 7.9.1). Note that this means that costs for publication may be charged after the period of performance and prior to closeout (*i.e.*, during the 120-day liquidation period). However, these costs must only be for the originally approved activities and must not be associated with any new work performed outside of the period of performance.

Points To Consider for Authors and Institutions in Assessing Reasonable Costs

As stated in Section 7.2 of the NIH GPS, a cost may be considered reasonable if the nature of the goods or services acquired or applied and the associated dollar amount reflect the action that a prudent person would have taken under the circumstances prevailing when the decision to incur the cost was made. NIH promotes *reasonable* publication costs to ensure an equitable system for publishing opportunities. However, establishing a particular threshold for what is reasonable may lead to inequitable outcomes in specific circumstances, so NIH is instead providing these Points to Consider in assessing reasonable costs to guide authors and institutions. While NIH may modify this approach in the future, NIH encourages researchers and institutions to consider, when determining whether costs are reasonable:

- Amount of publication cost in relation to NIH award
- Other works researchers may wish to produce during an award period
- Professional and institutional priorities
- Sustainability in terms of the library budget, laboratory budget, and other relevant budgets, if such costs were to be consistently paid
- Relevance of the journal in communicating findings to advance science and/or improve health outcomes
- Suitability of the journal's target readership for the dissemination of the content

Other Public Works for Which Allowable Costs May Be Requested

This Guidance is primarily to help funded authors and institutions understand what costs are allowable under the NIH Public Access Policy.

NIH acknowledges that the public dissemination of results from NIH funding does not occur only through peer-reviewed publications. Models for sharing research findings are evolving and allowable costs may be requested for publicly disseminating works reporting on the results of NIH funding that are not subject to the NIH Public Access Policy.

As a reminder, the unallowable costs listed above continue to apply, and works must be made publicly available to qualify for costs.

Reputable Journals and Responsible Conduct of Research

In addition, NIH reiterates its Statement on Article Publication Resulting from NIH Funded Research <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-18-011.html>, a 2017 NIH Guide Notice that encourages authors to publish papers resulting from NIH-funded research in reputable journals. Fees paid to journals that have characteristics described in the Statement may be considered unreasonable.

Finally, NIH also reiterates the importance of maintaining integrity in science in its Guidance on the requirement for Instruction in the Responsible Conduct of Research <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-22-055.html>, which includes responsible authorship and publication.

Dated: December 12, 2024.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2024-29929 Filed 12-17-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract

proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS-NIH-CDC-SBIR PHS 2025-1 Discovery and Development of Oral Small-molecule Direct-acting Antivirals Targeting Viruses of Pandemic Potential (Topic 146).

Date: January 15, 2025.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52A, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Shilpakala Ketha, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52A, Rockville, MD 20892, (301) 761-6821, shilpa.ketha@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 12, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-29838 Filed 12-17-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer at (240) 276-0361.

Project: Substance Abuse Prevention and Treatment Block Grant Synar Report Format, FFY 2024-2026—(OMB No. 0930-0222)—Extension

Section 1926 of the Public Health Service Act [42 U.S.C. 300x-26] stipulates that Substance Use Prevention, Treatment, and Recovery Services Block Grant (SUPTRS) funding agreements for alcohol and drug abuse programs for fiscal year 1994 and

subsequent fiscal years require states to have in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 21. This section further requires that states conduct annual, random, unannounced inspections to ensure compliance with the law; that the state submit annually a report describing the results of the inspections, the activities carried out by the state to enforce the required law, the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 21, and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought.

Before making an award to a state under the Block Grant, the Secretary must make a determination that the state has maintained compliance with the regulations. If a determination is made that the state is not in compliance, penalties shall be applied. There are three (3) penalty options for failure to comply with the Synar requirements: (1)

States may be fined a penalty up to 10 percent of the SUPTRS). (2) States may elect to submit a corrective action plan to the Assistant Secretary for Mental Health and Substance Use within 90 days of receipt of notice that they are not in compliance with the Synar regulations, which outlines strategies they will take to reduce the Retail Violation Rate to 20 percent or less. (3) States certify to the Secretary by May 1 of the fiscal year for which the funds are appropriated, consistent with subparagraph (B), that the State will commit additional State funds, in accordance with paragraph (1), to ensure that retailers do not sell tobacco products to individuals under 21 years of age; (Pub. L. 116–94 Statute, section 604 pg. 593). Respondents include the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Palau, Micronesia, and the Marshall Islands. Red Lake Indian Tribe is not subject to tobacco requirements.

Regulations that implement this legislation are at 45 CFR 96.130, are approved by OMB under control number 0930–0163, and require that each state submit an annual Synar report to the Secretary describing their progress in complying with section 1926 of the PHS Act. The Synar report, due December 31 following the fiscal year for which the state is reporting, describes the results of the inspections and the activities carried out by the state to enforce the required law; the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 21; and the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought. SAMHSA is requesting an extension of OMB approval of the current report format associated with section 1926 (42 U.S.C. 300x–26) to 2026. Extending OMB approval of the current report format will continue to facilitate consistent, credible, and efficient monitoring of Synar compliance across the states.

ANNUAL REPORTING BURDEN					
45 CFR citation	Number of respondents ¹	Responses per respondents	Total number of responses	Hours per response	Total hour burden
Annual Report (Section 1—States and Territories) 96.130(e)(1–3)	59	1	59	15	885
State Plan (Section II—States and Territories) 96.130(e)(4,5)96.130(g)	59	1	59	3	177
Total	59		118		1,062

¹ Red Lake Indian Tribe is not subject to tobacco requirements.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Alicia Broadus,
Public Health Advisor.
[FR Doc. 2024–29937 Filed 12–17–24; 8:45 am]
BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities

listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at <https://msc.fema.gov>.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at <https://>

www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or

pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Florida:					
Duval (FEMA Docket No.: B-2429).	City of Jacksonville (23-04-4924P).	The Honorable Donna Deegan, Mayor, City of Jacksonville, 117 West Duval Street, Suite 400, Jacksonville, FL 32202.	Development Services Department, 214 North Hogan Street, Room 2100, Jacksonville, FL 32202.	Jul. 31, 2024	120077
Lake (FEMA Docket No.: B-2451).	City of Leesburg (24-04-2358P).	The Honorable Jimmy Burry, 501 West Meadow Street, Leesburg, FL 34748.	Public Works Department, 220 South 14th Street, Leesburg, FL 34748.	Oct. 28, 2024	120136
Illinois:					
Lake (FEMA Docket No.: B-2394).	City of Waukegan (23-05-2407P).	The Honorable Ann B. Taylor, Mayor, City of Waukegan, 100 North Martin Luther King, Jr. Avenue, Waukegan, IL 60085.	City Hall, 100 North Martin Luther King, Jr. Avenue, Waukegan, IL 60085.	Feb. 21, 2024	170397
Lake (FEMA Docket No.: B-2394).	City of Zion (23-05-2407P).	The Honorable Billy McKinney, Mayor, City of Zion, 2828 Sheridan Road, Zion, IL 60099.	City Hall, 2828 Sheridan Road, Zion, IL 60099.	Feb. 21, 2024	170399
Lake (FEMA Docket No.: B-2394).	Village of Beach Park (23-05-2407P).	The Honorable John Hucker, Mayor, Village of Beach Park, 11270 West Wadsworth Road, Beach Park, IL 60099.	Village Hall, 11270 West Wadsworth Road, Beach Park, IL 60099.	Feb. 21, 2024	171022
Lake (FEMA Docket No.: B-2394).	Village of Grayslake (23-05-2407P).	The Honorable Rhett Taylor, Mayor, Village of Grayslake, 10 South Seymour Avenue, Grayslake, IL 60030.	Village Hall, 10 South Seymour Avenue, Grayslake, IL 60030.	Feb. 21, 2024	170363
Lake (FEMA Docket No.: B-2394).	Village of Old Mill Creek (23-05-2407P).	Tempel (Tim) Smith, President, Village of Old Mill Creek, P.O. Box 428, Old Mill Creek, IL 60083.	Village Hall, 19020 Old Grass Lake Road, Old Mill Creek, IL 60046.	Feb. 21, 2024	170385
Lake (FEMA Docket No.: B-2394).	Village of Third Lake (23-05-2407P).	Rodney Buckley, President, Village of Third Lake, 87 North Lake Avenue, Third Lake, IL 60030.	Village Hall, 87 North Lake Avenue, Third Lake, IL 60030.	Feb. 21, 2024	170392
Lake (FEMA Docket No.: B-2394).	Village of Winthrop Harbor (23-05-2407P).	The Honorable Mike Bruno, Mayor, Village of Winthrop Harbor, 830 Sheridan Road, Winthrop Harbor, IL 60096.	Village Hall, 830 Sheridan Road, Winthrop Harbor, IL 60096.	Feb. 21, 2024	170398
Lake (FEMA Docket No.: B-2394).	Unincorporated areas of Lake County (23-05-2407P).	Gary Gibson, Lake County Administrator, 18 North County Street, 9th Floor, Waukegan, IL 60085.	Lake County Central Permit Facility, 500 West Winchester Road, Unit 101, Libertyville, IL 60048.	Feb. 21, 2024	170357
Indiana:					
Shelby (FEMA Docket No.: B-2451).	City of Shelbyville (24-05-0650P).	The Honorable Scott Furgeson, Mayor, City of Shelbyville, 44 West Washington Street, Shelbyville, IN 46176.	Planning Commission, 44 West Washington Street, Shelbyville, IN 46176.	Nov. 4, 2024	180236
Shelby (FEMA Docket No.: B-2451).	Unincorporated areas of Shelby County (24-05-0650P).	Don Parker, President, Shelby County Commissioner, 25 West Polk Street, Room 206, Shelbyville, IN 46176.	Shelby County Planning Commission, 25 West Polk Street, Shelbyville, IN 46176.	Nov. 4, 2024	180235
Kansas: Johnson (FEMA Docket N/A).	City of Overland Park (23-07-0487P).	The Honorable Curt Skoog, Mayor, City of Overland Park, 8500 Santa Fe Drive, Overland Park, KS 66212.	City Hall, 8500 Santa Fe Drive, Overland Park, KS 66212.	Nov. 13, 2024	200174
Michigan: Van Buren (FEMA Docket No.: B-2451).	Township of Covert (23-05-2389P).	Daywi Cook, Supervisor, Township of Covert, 73943 East Lake Street, Covert, MI 49043.	Township Hall, 73943 East Lake Street, Covert, MI 49043.	Oct. 21, 2024	260259
New York:					
Erie (FEMA Docket No.: B-2451).	Town of Orchard Park (23-02-0681P).	Eugene Majchrzak, Supervisor, Town of Orchard Park, 4295 Sout Buffalo Street, Orchard Park, NY 14127.	Village Hall, 4295 Sout Buffalo Street, Orchard Park, NY 14127.	Nov. 21, 2024	360255

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
New Herkimer (FEMA Docket No.: B-2451).	Village of Dolgeville (23-02-0219P).	The Honorable Mary E. Puznowski, Mayor, Village of Dolgeville, 41 North Main Street, Dolgeville, NY 13329.	Village Hall, 41 North Main Street, Dolgeville, NY 13329.	Nov. 21, 2024	360301
Westchester (FEMA Docket No.: B-2429).	Village of Mamaroneck (22-02-0906P).	The Honorable Sharon Torres, Mayor, Village of Mamaroneck, 123 Mamaroneck Avenue, Mamaroneck, NY 10543.	Building Inspector's Office, 123 Mamaroneck Avenue, Mamaroneck, NY 10543.	Sep. 12, 2024	360916
Ohio:					
Butler (FEMA Docket No.: B-2451).	City of Fairfield (23-05-2358P).	The Honorable Mitch Rhodus, Mayor, City of Fairfield, 5350 Pleasant Avenue, Fairfield, OH 45014.	City Hall, 5350 Pleasant Avenue, Fairfield, OH 45014.	Oct. 31, 2024	390038
Butler (FEMA Docket No.: B-2451).	City of Hamilton (23-05-2358P).	The Honorable Pat Moeller, Mayor, City of Hamilton, 345 High Street, Suite 780, Hamilton, OH 45011.	Department of Community Development, Planning Division, 345 High Street, Suite 370, Hamilton, OH 45011.	Oct. 31, 2024	390039
Butler (FEMA Docket No.: B-2451).	Unincorporated areas of Butler County (23-05-2358P).	Cindy Carpenter, President, Butler County, Board of Commissioners, 315 High Street, 6th Floor, Hamilton, OH 45011.	Butler County Administrative Center Building and Zoning Department, 130 High Street, 1st Floor, Hamilton, OH 45011.	Oct. 31, 2024	390037
Texas:					
Brazos (FEMA Docket N/A).	City of Bryan (22-06-2507P).	The Honorable Bobby Gutierrez, Mayor, City of Bryan, P.O. Box 1000, Bryan, TX 77805.	City Hall, 300 South Texas Avenue, 300 South Texas Avenue, Bryan, TX 77803.	Feb. 2, 2024	480082
Brazos (FEMA Docket N/A).	Unincorporated areas of Brazos County (22-06-2507P).	The Honorable Duane Peters, Brazos County Judge, 200 South Texas Avenue, Suite 332, Bryan, TX 77803.	Brazos County Road and Bridge Department, 2617 Highway 21 West, Bryan, TX 77803.	Feb. 2, 2024	481195
La Salle (FEMA Docket No.: B-2451).	City of Cotulla (24-06-0886P).	The Honorable Javier Garcia, Mayor, City of Cotulla, 117 North Front Street, Cotulla, TX 78014.	City Hall, 117 North Front Street, Cotulla, TX 78014.	Oct. 18, 2024	480431
Wisconsin: Outagamie (FEMA Docket N/A).	Unincorporated areas of Outagamie County (23-05-2202P).	Jeff Nooyen, Chair, Outagamie County Board, 1754 Winesap Lane, Grand Chute, WI 54914.	Outagamie County Administration Building, 410 South Walnut Street, Appleton, WI, 54911.	Jun. 10, 2024	550302

[FR Doc. 2024-29975 Filed 12-17-24; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2024-0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at <https://msc.fema.gov>.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C.

4001 *et seq.*, and with 44 CFR part 65. The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each

community or online through the FEMA Map Service Center at <https://msc.fema.gov>. (Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,
Assistant Administrator (Acting) for Risk
Management, Federal Emergency
Management Agency, Department of
Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama:					
Madison (FEMA Docket No.: B-2467).	City of Huntsville (24-04-1487P).	The Honorable Thomas Battle, Jr., Mayor, City of Huntsville, 308 Fountain Circle Southwest, 8th Floor, Huntsville, AL 35804.	City Hall, 308 Fountain Circle Southwest, Huntsville, AL 35804.	Dec. 19, 2024	010153
Madison (FEMA Docket No.: B-2467).	Town of Owens Cross Roads (24-04-1487P).	The Honorable Tony K. Craig, Mayor, Town of Owens Cross Roads, 9032 U.S. Highway 431, Owens Cross Roads, AL 35763.	City Hall, 9032 U.S. Highway 431, Owens Cross Roads, AL 35763.	Dec. 19, 2024	010218
Madison (FEMA Docket No.: B-2467).	Unincorporated areas of Madison County (24-04-1487P).	Mac McCutcheon, Chair, Madison County Commission, 100 North Side Square, Suite 700, Huntsville, AL 35801.	Madison County Water Department, 266-C Shields Road, Huntsville, AL 35811.	Dec. 19, 2024	010151
Colorado:					
Boulder (FEMA Docket No.: B-2454).	City of Boulder (23-08-0614P).	The Honorable Aaron Brockett, Mayor, City of Boulder, 1777 Broadway, Boulder, CO 80302.	City Hall, 1777 Broadway, Boulder, CO 80302.	Nov. 18, 2024	080024
Douglas (FEMA Docket No.: B-2454).	Town of Castle Rock (23-08-0519P).	The Honorable Jason Gray, Mayor, Town of Castle Rock, 100 North Wilcox Street, Castle Rock, CO 80104.	Utilities Department, 175 Kellogg Court, Castle Rock, CO 80109.	Nov. 8, 2024	080050
Douglas (FEMA Docket No.: B-2454).	Town of Parker (23-08-0527P).	The Honorable Jeff Toborg, Mayor, Town of Parker, 20120 East Main Street, Parker, CO 80138.	Public Works and Engineering Department, 20120 East Main Street, Parker, CO 80138.	Nov. 8, 2024	080310
Delaware: Sussex (FEMA Docket No.: B-2454).	City of Rehoboth Beach (24-03-0249P).	The Honorable Stan Mills, Mayor, City of Rehoboth Beach, 229 Rehoboth Avenue, Rehoboth Beach, DE 19971.	Building and Licensing Department, 229 Rehoboth Avenue, Rehoboth Beach, DE 19971.	Nov. 12, 2024	105086
Florida:					
Bay (FEMA Docket No.: B-2454).	Unincorporated areas of Bay County (23-04-1974P).	Robert Majka, Bay County Manager, 840 West 11th Street, Panama City, FL 32401.	Bay County Government Center, 840 West 11th Street, Panama City, FL 32401.	Nov. 5, 2024	120004
Hillsborough (FEMA Docket No.: B-2460).	City of Plant City (23-04-5362P).	Bill McDaniel, Manager, City of Plant City, 302 West Reynolds Street, Plant City, FL 33564.	City Hall, 302 West Reynolds Street, Plant City, FL 33564.	Nov. 18, 2024	120113
Lee (FEMA Docket No.: B-2454).	Unincorporated areas of Lee County (23-04-5900P).	David Harner, Manager, Lee County, 2115 2nd Street, Fort Myers, FL 33901.	Lee County Building Department, 1500 Monroe Street, Fort Myers, FL 33901.	Oct. 30, 2024	125124
Monroe (FEMA Docket No.: B-2454).	Village of Islamorada (24-04-2987P).	The Honorable Joseph "Buddy" Pinder III, Mayor, Village of Islamorada, 86800 Overseas Highway, Islamorada, FL 33036.	Village Hall, 86800 Overseas Highway, Islamorada, FL 33036.	Nov. 8, 2024	120424
Orange (FEMA Docket No.: B-2454).	City of Orlando (24-04-1693P).	The Honorable Buddy Dyer, Mayor, City of Orlando, 400 South Orange Avenue, Orlando, FL 32801.	Public Works Department Engineering Division, 400 South Orange Avenue, 8th Floor, Orlando, FL 32801.	Nov. 12, 2024	120186
Palm Beach (FEMA Docket No.: B-2454).	Unincorporated areas of Palm Beach County (24-04-0141P).	Verdenia C. Baker, Palm Beach County Administrator, 301 North Olive Avenue, Suite 1101, West Palm Beach, FL 33401.	Palm Beach County Building Division, Planning Zoning and Building Department, 2300 North Jog Road, 1st Floor, Room 1E-17, West Palm Beach, FL 33411.	Nov. 12, 2024	120192
Palm Beach (FEMA Docket No.: B-2454).	Unincorporated areas of Palm Beach County (24-04-0346P).	Verdenia C. Baker, Palm Beach County Administrator, 301 North Olive Avenue, Suite 1101, West Palm Beach, FL 33401.	Palm Beach County Building Division, Planning Zoning and Building Department, 2300 North Jog Road, 1st Floor, Room 1E-17, West Palm Beach, FL 33411.	Nov. 12, 2024	120192
Volusia (FEMA Docket No.: B-2454).	City of DeBary (24-04-1649P).	The Honorable Karen Chasez, Mayor, City of DeBary, 16 Colomba Road, DeBary, FL 32713.	City Hall, 16 Colomba Road, DeBary, FL 32713.	Nov. 18, 2024	120672
North Carolina:					
Cumberland (FEMA Docket No.: B-2462).	Town of Hope Mills (24-04-0689P).	The Honorable Jessie Bellflowers, Mayor, Town of Hope Mills, 5770 Rockfish Road, Hope Mills, NC 28348.	Development and Planning Department, 5770 Rockfish Road, Hope Mills, NC 28348.	Nov. 20, 2024	370312
Cumberland (FEMA Docket No.: B-2462).	Unincorporated areas of Cumberland County (24-04-0689P).	Glenn Adams, Chair, Cumberland County Board of Commissioners, P.O. Box 1829, Fayetteville, NC 28301.	Cumberland County Engineering and Infrastructure Department, 130 Gillespie Street, Suite 214, Fayetteville, NC 28301.	Nov. 20, 2024	370076
Rowan (FEMA Docket No.: B-2460).	Unincorporated areas of Rowan County (23-04-5146P).	Greg Edds, Chair, Rowan County Board of Commissioners, 130 West Innes Street, Salisbury, NC 28144.	Rowan County Planning and Development Department, 402 North Main Street, #204, Salisbury, NC 28144.	Nov. 29, 2024	370351
Wake (FEMA Docket No.: B-2460).	Town of Holly Springs (23-04-3934P).	The Honorable Sean Mayefskie, Mayor, Town of Holly Springs, P.O. Box 8, Holly Springs, NC 27540.	Engineering Department, 128 South Main Street, Holly Springs, NC 27540.	Dec. 2, 2024	370403

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Pennsylvania:	Wake (FEMA Docket No.: B-2460).	Shinica Thomas, Chair, Wake County Board of Commissioners, P.O. Box 550, Raleigh, NC 27602.	Environmental Services Department, 337 South Salisbury Street, Raleigh, NC 27601.	Dec. 2, 2024	370368
	Luzerne (FEMA Docket No.: B-2454).	Ron Kobusky, President, Borough of Plymouth Council, 162 West Shawnee Avenue, Plymouth, PA 18651.	Borough Hall, 162 West Shawnee Avenue, Plymouth, PA 18651.	Nov. 12, 2024	420622
	Luzerne (FEMA Docket No.: B-2454).	The Honorable George C. Brown, Mayor, City of Wilkes-Barre, 40 East Market Street, 4th Floor, Wilkes-Barre, PA 18711.	Planning and Zoning Department, 40 East Market Street, 1st Floor, Wilkes-Barre, PA 18711.	Nov. 12, 2024	420631
	Luzerne (FEMA Docket No.: B-2454).	George L. Andrejko, Chair, Township of Hanover Board of Commissioners, 1267 Sans Souci Parkway, Hanover Township, PA 18706.	Township Hall, 1267 Sans Souci Parkway, Hanover Township, PA 18706.	Nov. 12, 2024	420608
	Luzerne (FEMA Docket No.: B-2454).	James Murphy, Chair, Township of Plymouth Board of Supervisors, 925 West Main Street, Plymouth, PA 18651.	Township Hall, 925 West Main Street, Plymouth, PA 18651.	Nov. 12, 2024	420623
Texas:	Bexar (FEMA Docket No.: B-2460).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Public Works Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	Nov. 12, 2024	480045
	Comanche (FEMA Docket No.: B-2460).	The Honorable Mary A. Boyd, Mayor, City of Comanche, 101 East Grand Avenue, Comanche, TX 76442.	City Hall, 101 East Grand Avenue, Comanche, TX 76442.	Nov. 8, 2024	480151
	Dallas (FEMA Docket No.: B-2460).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, 300 West Main Street, Grand Prairie, TX 75050.	Stormwater Department, 300 West Main Street, Grand Prairie, TX 75050.	Nov. 18, 2024	485472
	Dallas (FEMA Docket No.: B-2460).	The Honorable Rick Stopfer, Mayor, City of Irving, 825 West Irving Boulevard, Irving, TX 75060.	Capital Improvement Program, 825 West Irving Boulevard, Irving, TX 75060.	Nov. 18, 2024	480180
	Dallas (FEMA Docket No.: B-2460).	The Honorable Rick Stopfer, Mayor, City of Irving, 825 West Irving Boulevard, Irving, TX 75060.	Capital Improvement Program, 825 West Irving Boulevard, Irving, TX 75060.	Nov. 18, 2024	480180
	Denton (FEMA Docket No.: B-2454).	Scott Campbell, Manager, City of Corinth, 3300 Corinth Parkway, Corinth, TX 76208.	Engineering Department, 1200 North Corinth Street, Corinth, TX 76208.	Nov. 18, 2024	481143
	Denton (FEMA Docket No.: B-2454).	The Honorable Andy Eads, Denton County Judge, 1 Courthouse Drive, Suite 3100, Denton, TX 76208.	Denton County Development Services Department, 3900 Morse Street, Denton, TX 76208.	Nov. 18, 2024	480774
	Kaufman (FEMA Docket No.: B-2454).	The Honorable Jeff Jordan, Mayor, City of Kaufman, 209 South Washington Street, Kaufman, TX 75142.	City Hall, 209 South Washington Street, Kaufman, TX 75142.	Nov. 8, 2024	480407

[FR Doc. 2024-29974 Filed 12-17-24; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID: FEMA-2024-0036; OMB No. 1660-0112]

Agency Information Collection Activities: Proposed Collection; Comment Request; FEMA Preparedness Grants: Transit Security Grant Program (TSGP) and Intercity Bus Security Grant Program (IBSGP)**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.**ACTION:** 60-Day notice of revision and request for comments.**SUMMARY:** The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden,

invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Transit Security Grant Program (TSGP) and the Intercity Bus Security Grant Program (IBSGP), which are FEMA grant programs that focus on transportation infrastructure protection activities.

DATES: Comments must be submitted on or before February 18, 2025.**ADDRESSES:** To avoid duplicate submissions to the docket, please submit comments at www.regulations.gov under Docket ID FEMA-2024-0036. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal Rulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore,

submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Kevin Groves, Supervisory Program Analyst, FEMA, 202-330-3836, and kevin.groves@fema.dhs.gov. You may contact the Information Management Division for copies of the proposed collection of information at email address: FEMA-Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: The Transit Security Grant Program (TSGP) is a Federal Emergency Management Agency (FEMA) grant program that focuses on transportation infrastructure protection activities. The collection of information for TSGP is mandated by Section 1406, Title XIV of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (Pub. L. 110-53) (codified at 6 U.S.C. 1135), which directs the Secretary to establish a program for making grants to eligible public transportation agencies for

security improvements. Additionally, information is collected in accordance with Section 1406(c) of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (6 U.S.C. 1135(c)) which authorizes the Secretary to determine the requirements for grant recipients, including application requirements.

The Intercity Bus Security Grant Program (IBSGP) is a FEMA grant program that focuses on transportation infrastructure protection activities. The collection of information for IBSGP is mandated by Section 1532 of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (Pub. L. 110–53) (codified at 6 U.S.C. 1182), which directs the Secretary to establish a program for making grants to eligible public transportation agencies for security improvements. Additionally, information is collected in accordance with Section 1532(d) of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (6 U.S.C. 1182(d)) which authorizes the Secretary to determine the requirements for grant recipients, including application requirements. With this revision, FEMA adds the instruments for the IBSGP to this collection for easier management and transparency.

Collection of Information

Title: FEMA Preparedness Grants: Transit Security Grant Program (TSGP) and Intercity Bus Security Grant Program (IBSGP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0112.

FEMA Forms: TSGP Five Year Security Capital and Operational Sustainment Plan, FEMA Form FF–207–FY–21–101; TSGP Investment Justification Background Document, FEMA Form FF–207–FY–21–102; TSGP Investment Justification, FEMA Form FF–207–FY–21–103; TSGP Public Transit Risk Assessment Methodology (PT–RAM) Gap Analysis, FEMA Form FF–207–FY–21–104; TSGP PT–RAM Implementation Plan, FEMA Form FF–207–FY–21–105; TSGP PT–RAM, FEMA Form FF–207–FY–21–106; ISBGP Investment Justification Form, FEMA Form FF–207–FY–23–102; IBSGP Detailed Budget Worksheet, FEMA Form FF–207–FY–23–103; and IBSGP Vulnerability Assessment and Security Plan, FEMA Form FF–207–FY–23–104.

Abstract: The TSGP and IBSGP are important components of the Department's effort to enhance the security of the Nation's critical infrastructure. The programs provide funds to owners and operators of transit

systems (TSGP) and private bus operators (IBSGP) to protect critical surface transportation infrastructure and the traveling public from acts of terrorism, major disasters, and other emergencies.

Affected Public: Business or other for-profit entities, State and local governments.

Estimated Number of Respondents: 906.

Estimated Number of Responses: 906.

Estimated Total Annual Burden Hours: 15,940.

Estimated Total Annual Respondent Cost: \$1,537,792.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$1,163,120.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2024–29891 Filed 12–17–24; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2482]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before March 18, 2025.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA–B–2482, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and

Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are

used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information

regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Trinity County, California and Incorporated Areas Project: 21-09-0021S Preliminary Date: September 27, 2024	
Unincorporated Areas of Trinity County	Trinity County Community Development Department, 530 Main Street, Weaverville, CA 96093.
City and County of Honolulu, Hawaii Project: 20-09-0042S Preliminary Date: July 31, 2024	
City and County of Honolulu	Department of Planning and Permitting, 650 South King Street, 7th Floor, Honolulu, HI 96813.

[FR Doc. 2024-29973 Filed 12-17-24; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2024-0002; Internal Agency Docket No. FEMA-B-2483]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood

Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before March 18, 2025.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2483, to Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacibit, Chief, Engineering Services Branch, Federal Insurance and

Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are

used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information

regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison. (Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Montgomery County, Maryland and Incorporated Areas Project: 12-03-0415S Preliminary Date: July 31, 2023	
City of Gaithersburg	Public Works Department, 800 Rabbitt Road, Gaithersburg, MD 20878.
City of Rockville	City Hall, 111 Maryland Avenue, Rockville, MD 20850.
City of Takoma Park	Takoma Park Department of Public Works, 31 Oswego Avenue, Silver Spring, MD 20910.
Town of Barnesville	Town Hall, 18001 Barnesville Road, Barnesville, MD 20838.
Town of Brookeville	Town Office, 5 High Street, Brookeville, MD 20833.
Town of Chevy Chase View	Montgomery County Department of Permitting Services, 2425 Reedie Drive, 7th Floor, Wheaton, MD 20902.
Town of Garrett Park	Town Office, 4600 Waverly Avenue, 3rd Floor, Garrett Park, MD 20896.
Town of Glen Echo	Town Hall, 6106 Harvard Avenue, Glen Echo, MD 20812.
Town of Poolesville	Town Hall, 19721 Beall Street, Poolesville, MD 20837.
Town of Somerset	Somerset Town Hall, 4510 Cumberland Avenue, Chevy Chase, MD 20815.
Unincorporated Areas of Montgomery County	Montgomery County Department of Permitting Services, 2425 Reedie Drive, 7th Floor, Wheaton, MD 20902.
Village of Martin's Additions	Martin's Additions Village Office, 7013 Brookville Road, Suite B, 2nd Floor, Chevy Chase, MD 20815.

[FR Doc. 2024-29972 Filed 12-17-24; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7080-N-59]

30-Day Notice of Proposed Information Collection: Public Housing—Contracting With Resident-Owned Businesses; OMB Control No.: 2577-0161

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 17, 2025.

ADDRESSES: Interested persons are invited to submit comments regarding

this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; telephone 202–402–3577 (this is not a toll-free number) or email: PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email: Colette.Pollard@hud.gov, telephone (202) 402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is

seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 18, 2024 at 89 FR 76500.

A. Overview of Information Collection

Title of Information Collection: Public Housing—Contracting with Resident-Owned Businesses.

OMB Control Number: 2577–0161.

Type of Request: Extension of previously approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: PHAs that entered into contracts with resident-owned businesses prior to December 26, 2014, must comply with the requirements/procedures set forth in, 24 CFR 85.36(h), and 24 CFR 85.36(i). Contracts with resident-owned businesses entered into after December 26, 2014, must comply with 24 CFR part 963, 2 CFR 200.325, and 2 CFR 200.326 and other such contract terms that may be applicable to the procurement under the Department’s regulations. These requirements include:

- Certified copies of any State, county, or municipal licenses that may be required of the business to engage in the type of business activity for which it was formed. Where applicable, the PHA must obtain a certified copy of its corporate charter or other organizational document that verifies that the business was properly formed in accordance with State law;
- Certification that shows the business is owned by residents,

disclosure documents that indicate all owners of the business and each owner’s percentage of the business along with sufficient evidence sufficient that demonstrates to the satisfaction of the PHA that the business has the ability to perform successfully under the terms and conditions of the proposed contract;

- Certification as to the number of contracts awarded, and the dollar amount of each contract award received, under the alternative procurement process; and

- Contract award documents, proof of bonding documents, independent cost estimates and comparable price analyses.

Members of affected public: Public Housing Agencies, and Applicable Resident Entrepreneurs *Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* Estimated number of respondents: 75. The calculation for burden hours is as follows: Calculation for number of respondents: 75 (estimated number of PHAs contracting with resident owned businesses) × 24 (number of hours for procurement process) = 1,800 total hours. The Department estimates that out of a total of 3,763 PHAs only 2 percent or 75 PHAs contract with resident owned business. This number is less than the previous request due to several PHAs choosing to leave the program, but the Department anticipates there may have been more business or contracting opportunities particularly during the pandemic.

Information collection	Number of respondents	Average number of reponses per respondent	Total annual responses	Burden hours per response	Total hours	Hourly cost	Total annual cost
OMB Control No. 2577–0161	75	1	75	24	1,800	\$30.95	\$55,710

The national average of PHA staff salary used is \$64,590 per year obtained from <https://www.ziprecruiter.com/Salaries/Public-Housing-Authority-Salary>, or \$30.95 per hour as computed using the 2,087-Hour Divisor. The calculation for costs is as follows: 75 PHAs × 24 hours = 1,800 hours × \$30.95 = \$55,710.

Status of the Proposed Information Collection: Meeting HUD Regulation requirements.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of

information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated

collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C.

Colette Pollard,

*Department Reports Management Officer,
Office of Policy Development and Research,
Chief Data Officer.*

[FR Doc. 2024–29905 Filed 12–17–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[PO4820000251]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Bureau of Land Management Resource Advisory Council Application

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew with revisions a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before January 17, 2025.

ADDRESSES: Written comments and recommendations for the proposed information collection revision should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Carrie Richardson, BLM National Advisory Council Coordinator, by email at crichardson@blm.gov or by phone at (202) 501–2634. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C.

3501 *et seq.*, and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public’s reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 11, 2024 (89 FR 49183).

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

- (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) How the agency could minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BLM collects the information on the Resource Advisory Council Application (Form No. 1120–19) to determine education, training, and experience related to possible service on advisory committees established under the authority of Section 309 of the Federal Land Policy

and Management Act (43 U.S.C. 1739) and the Federal Advisory Committee Act, 5 U.S.C. App. 2. This information is necessary to ensure that each advisory council is structured to provide fair membership balance, both geographic and interest-specific, in terms of the functions to be performed and points of view to be represented, as prescribed by its charter. The BLM is requesting minor changes to Form 1120–19. The changes include removing some of the previously collected information that is not needed and, in response to user feedback, clarifying certain portions of the form. A complete description of the changes is provided in the ICR that has been submitted to OMB. This OMB control number is scheduled to expire on April 30, 2025. This request is for OMB to renew with revisions this OMB control number for an additional three (3) years.

Title of Collection: Bureau of Land Management Resource Advisory Council Application (43 CFR Subpart 1784).

OMB Control Number: 1004–0204.

Form Number: 1120–19.

Type of Review: Extension with revision of a currently approved collection.

Respondents/Affected Public: Persons who apply for positions on Resource Advisory Councils.

Total Estimated Number of Annual Respondents: 200.

Total Estimated Number of Annual Responses: 200.

Estimated Completion Time per Response: 4 hours.

Total Estimated Number of Annual Burden Hours: 800.

Respondent’s Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

Reason for Change: Some of the previously collected information is not needed.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2024–29983 Filed 12–17–24; 8:45 am]

BILLING CODE 4331–31–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[PO4820000251]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Desert Land Entry Application**AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice of information collection; request for comment.**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.**DATES:** Interested persons are invited to submit comments on or before January 17, 2025.**ADDRESSES:** Written comments and recommendations for this information collection request (ICR) should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.**FOR FURTHER INFORMATION CONTACT:** Jeff Holdren by email at jholdren@blm.gov or by telephone at (703) 472–2399. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.**SUPPLEMENTARY INFORMATION:** In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 23, 2024 (89 FR 59770).

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is especially interested in public comment addressing the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How agency could minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BLM uses the information to determine if an individual is eligible to make a desert land entry for agricultural purposes. This OMB control number is currently scheduled to expire on April 30, 2025. The BLM request that OMB renew this OMB control number for an additional three (3) years.

Title of Collection: Desert Land Entry Application (43 CFR part 2520).

OMB Control Number: 1004–0004.

Form Number: 2520–1.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public:

Individuals who wish to make a desert land entry for agricultural purposes.

Total Estimated Number of Annual Respondents: 3.

Total Estimated Number of Annual Responses: 3.

Estimated Completion Time per Response: 2 hours.

Total Estimated Number of Annual Burden Hours: 6.

Respondent’s Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour

Burden Cost: \$45.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2024–29984 Filed 12–17–24; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[BLM_CO_FRN_MO4500182759]

Notice of Joint and Individual Colorado Resource Advisory Council Meetings**AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice of public meetings.**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Colorado’s Northwest Resource Advisory Council (RAC), Southwest RAC, and Rocky Mountain RAC will meet as indicated below.

DATES: The Northwest, Southwest, and Rocky Mountain RACs will participate in a joint meeting on April 2, 2025, from 8:30 a.m. to 4:30 p.m. mountain time (MT). The Northwest and Southwest RACs will participate in a joint meeting from 9 a.m. to noon MT on April 3, 2025. The Rocky Mountain RAC will also meet April 3, 2025, from 9 a.m. to 2:45 p.m. MT. The meetings will be held in-person with a virtual participation option available. All meeting are open to the public.

ADDRESSES: The April 2 and April 3, 2025, meetings will be held at the Morgridge Commons, 815 Cooper Avenue, Glenwood Springs, Colorado 81601.

FOR FURTHER INFORMATION CONTACT: Northwest RAC—Jim Michels, BLM Northwest District Office, 455 Emerson St. Craig, CO 81625; jmichels@blm.gov; (970) 749–7399. Southwest RAC—D. Maggie Magee, BLM Southwest District Office, 2465 S Townsend Ave.,

Montrose, CO 81401; dmagee@blm.gov; (970) 318–9495. Rocky Mountain RAC—Levi Spellman, BLM Rocky Mountain District Office, 3028 E Main St., Canon City, CO 71212; lsPELLMAN@blm.gov; (719) 269–8553. For information about the joint April 2, 2025, meeting, contact Kirby-Lynn Shedlowski, BLM Colorado State Office; kshedlowski@blm.gov; (303) 239–3671.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Colorado RACs advise the Secretary of the Interior, through the BLM, on a variety of public land issues in Colorado. Agenda items for the April 2, 2025, joint RAC meetings include presentations on range management and recreation management. Agenda items for the Northwest and Southwest April 3, 2025, joint meeting include an update on the Escalante Ranch acquisition. Agenda items for the Rocky Mountain April 3, 2025, meeting include a district update, and discussions on recreation, land use planning, and energy and minerals management. A public comment period will be offered during each meeting. Depending on the number of people who wish to comment during the public comment period, individual comments may be limited. Written comments may be submitted in advance of the RAC meetings via email to the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Please include “RAC Comment” in your submission. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Final agendas and virtual participation instructions will be available online two weeks prior to the meetings at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado>.

Requests for Accommodations: Please make requests in advance for sign language interpreter services, assistive

listening devices, language translation services, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least 14 business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Summary minutes for the RAC meetings will be made available within 90 days following the meetings online at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado>.

(Authority: 43 CFR 1784.4–2)

Douglas J. Vilsack,
BLM Colorado State Director.

[FR Doc. 2024–29439 Filed 12–17–24; 8:45 am]

BILLING CODE 4331–16–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[**PO4820000251**]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Application for Land for Recreation or Public Purposes

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 17, 2025.

ADDRESSES: Written comments and recommendations for this information collection request (ICR) should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Jeff Holdren by email at jholdren@blm.gov, or by telephone at (703) 472–2399. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access

telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps the BLM assess the impacts of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 15, 2024 (89 FR 57429).

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is especially interested in public comment addressing the following:

- (1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) How the agency could minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Abstract: The BLM uses the information collection to decide whether or not to lease or sell certain public lands to applicants under the Recreation and Public Purposes Act, 43 U.S.C. 869 to 869–4. OMB Control Number 1004–0012 is scheduled to expire on April 30, 2025. This request is for OMB to renew this OMB Control Number for an additional three (3) years.

Title of Collection: Application for Land for Recreation or Public Purposes (43 CFR 2740 and 2912).

OMB Control Number: 1004–0012.

Form Number: 2740–01.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State, Territory, County, and Local governments; nonprofit corporations; and nonprofit associations.

Total Estimated Number of Annual Respondents: 23.

Total Estimated Number of Annual Responses: 23.

Estimated Completion Time per Response: 40 hours.

Total Estimated Number of Annual Burden Hours: 920.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: \$2,300.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2024–29985 Filed 12–17–24; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039214;
PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Los Angeles County Museum of Natural History, Los Angeles, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Los

Angeles County Museum of Natural History (LACMNH) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Amy E. Gusick, NAGPRA Officer, Los Angeles County Museum of Natural History, 900 Exposition Boulevard, Los Angeles, CA 90007, telephone (213) 763–3370, email agusick@nhm.org.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LACMNH, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Human remains representing, at least, one individual have been identified. No associated funerary objects are present. The individual was removed from Elizabeth Lake, Deadman's Cave, Los Angeles County, CA. A nearly complete skeleton was found unnumbered in the LACMNH collections with no accession records (HSRA–46). In 1995, LACMNH conducted an inventory of human remains in its collections and identified these remains to be female with an age range at the time of death to be between 40–60. “Elizabeth Lake” is written on one of the bones and “Elizabeth Lake, Deadman's Cave” is written on the mandible. There are no known individuals.

Since this initial assessment, in consultation with representatives of the Yuhaaviatam of San Manuel Nation (*previously* listed as San Manuel Band of Mission Indians, California), Morongo Band of Mission Indians, California and non-federally recognized California Indian groups including the Fernandeano Tataviam Band of Mission Indians, the LACMNH has investigated the collection history of these human remains but have not been able to identify further information.

Based on biological and geographical information, the human remains are determined to be Native American. Archaeologists have asserted that Serrano and Tataviam peoples have continuously occupied the Antelope Valley, the San Gabriel Mountains, and

the surrounding areas for up to 5,000–6,000 years BP. Ethnographer, John Peabody Harrington recorded several Serrano place names throughout the Antelope Valley during his interviews with Yuhaaviatam leader, Santos Manuel in 1918. Manuel's testimony and Serrano Traditional Knowledge identify Elizabeth Lake as home to Serrano peoples since time immemorial.

Human remains representing, at least, 22 individuals have been identified. No associated funerary objects are present. The individuals were removed from the Vasquez Rocks (CA–LAN–361) site in northern Los Angeles County, CA. Owners of the land on which the site now rests, Dr. Ascher and family, spent many years digging at the site in the mid-1900s. In 1966, the location was bulldozed by vandals. Between 1967–1970, LACMNH curator Dr. Charles Rozaire, as part of the California State University, Northridge Archaeological School, held field schools at the site, where students and supervisors excavated the bulldozed site and recovered artifacts and bone originally identified as faunal (non-human) bone. As a result of the looting and bulldozing, the artifacts and bones recovered from the site were not in original context and were highly fragmented.

In consultation with representatives of the Yuhaaviatam of San Manuel Nation (*previously* listed as San Manuel Band of Mission Indians, California) and non-federally recognized California Indian groups including the Fernandeano Tataviam Band of Mission Indians, in 2021, LACMNH conducted a detailed bioarcheological assessment of the bone recovered from CA–LAN–361 resulting in identification of human remains. The report identified 14 children with an age range between 37–39 weeks gestation/perinate and 10–12 years old. It is likely that some of the children whose specific age ranges could not be assessed were older than 12 years. There are at least eight adults represented. Among them, two are likely males (represented by a mandible and a temporal bone fragment) and one older adult. Most of the remains are extremely fragmented and there are some non-human skeletal remains in the assemblages. Most of the remains were impacted by the history of vandalism and heat from cremation with varying temperatures and exposure. There are no known humans.

Based on archaeological context and information learned from consultations, these individuals are Native American. Based on UFO artifact assemblage typologies, obsidian hydration readings and one radiocarbon date, archaeological evidence demonstrates

that Vasquez Rocks (CA-LAN-361) was used as a cemetery between 2315 BCE—79 BCE (Caruso 1988, Garza 2012, King et al. 1974), the Middle Holocene Period. Archaeologists have asserted that Serrano and Tataviam peoples have continuously occupied the San Gabriel Mountains and the surrounding areas for up to 5,000–6,000 years BP.

Linguistic sources demonstrate a strong continuous shared group identity between those people using Vasquez Rocks roughly 3000 years ago and modern Native Americans of Serrano and Tataviam descent. Ethnographic evidence and Traditional Knowledge document the Agua Dulce and Sierra Pelona regions as home to Serrano and Tataviam peoples since time immemorial.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition history of the human remains described in this notice.

Determinations

The LACMNH has determined that:

- The human remains described in this notice represent the physical remains of 23 individuals of Native American ancestry.
- There is a connection between the human remains described in this notice and the Yuhaaviatam of San Manuel Nation (*previously* listed as San Manuel Band of Mission Indians, California) and the Morongo Band of Mission Indians, California.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the authorized representative identified in this notice under

ADDRESSES. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the human remains described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the LACMNH must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request

and not competing requests. The LACMNH is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29943 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0039221;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: Western Washington University, Department of Anthropology, Bellingham, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Western Washington University, Department of Anthropology (WWU), has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from 45-WH-10 and 45-WH-11, Birch Bay, Whatcom County, WA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after January 17, 2025.

ADDRESSES: Dr. Judith Pine, Western Washington University, Department of Anthropology, Arntzen Hall 340, 516 High Street, Bellingham, WA 98225, telephone (360) 650-4783, email pinej@www.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the WWU, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Human remains representing, at least, three individuals have been identified. The 18 associated funerary objects are bone, stone and antler tools, red ochre, dentalium, a whale rib, and a bone medallion.

Three separate projects completed over the course of 45 years contributed to the 45-WH-10 and 45-WH-11 collections housed at WWU. In 1970–71, WWU field school students worked at both sites under the direction of Dr. Garland Grabert. Brief notes indicate that surface collection and a small-scale excavation occurred, but no report was completed. The original 1995 WWU NAGPRA Inventory listed one human premolar from 45-WH-10. This ancestral remain was repatriated to the Lummi Nation in 2001, upon their request (Rollins, 2001 “Inventory of Remains in Preparation for Reinterment”). During the WWU 2018–2020 Repatriation and Rehousing Project described above, previously unknown associated funerary objects were identified from 45-WH-10 by Lummi Cultural Specialist R. Tom.

Three human burials were unearthed from 45-WH-11 during this work. One was found in a test unit while the remains of two other individuals were surface collected from a ditch. The three individuals from 1970–71 excavations were reported in the original 1995 WWU NAGPRA Inventory and repatriated to the Lummi Nation upon their request in 2001.

In 1975, WWU signed a contract with Arcomm Construction Company, Inc. of Seattle to conduct “salvage archaeology” during the development of the Birch Bay sewage treatment facility. Jeannette Gaston and Garland Grabert (WWU) led the project. Most of the work consisted of monitoring and salvage archaeology during construction activities throughout the summer of 1975. During this project, twenty-six test cuts were excavated within the pipeline right-of-way (Gaston and Grabert, 1975) within the boundaries of 45-WH-11. Human remains were also encountered during this project and reported in the original 1995 WWU NAGPRA Inventory. All of the known human remains from the 1970–71 and 1975 projects were repatriated to the Lummi Nation in 2001, upon their request.

The third project, completed between May and August of 2015 by Drayton Archaeology (DA), consisted of data recovery excavations, construction monitoring and mitigation data recovery under Department of Archaeology and Historic Preservation (DAHP) archaeological site excavation and

disturbance permit #2015–06 at 45–WH–11. During this work, several units were excavated for data collection purposes.

During the WWU 2018–2020 Repatriation and Rehousing Project described above, additional ancestral remains were found in the “faunal” bags from 1970–71, Test Cut 2. These newly identified remains were reported in a revised inventory and in published federal notice N5472. Subsequent work in the collections and consultation between WWU and the Lummi Nation has resulted in the identification of additional human remains and associated funerary objects from 45–WH–11.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains and associated funerary objects described in this notice.

Determinations

The WWU has determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The 18 objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a connection between the human remains and associated funerary objects described in this notice and the Lummi Tribe of the Lummi Reservation and the Nooksack Indian Tribe.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the human remains and associated funerary objects described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the WWU must determine the most appropriate requestor prior to

repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The WWU is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29951 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–NAGPRA–NPS0039217;
PPWOCRADNO–PCU00RP14.R50000]**

Notice of Inventory Completion: University of California, Davis, Davis, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), University of California, Davis has completed an inventory of associated funerary objects and has determined that there is a cultural affiliation between the associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the associated funerary objects in this notice may occur on or after January 17, 2025.

ADDRESSES: Megon Noble, Repatriation Coordinator, University of California, Davis, 412 Mrak Hall, One Shields Avenue, Davis, CA 95616, telephone (530) 752–8501, email mnoble@ucdavis.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service’s administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of California, Davis and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

The two lots of associated funerary objects are one lot of clamshell disc beads and one lot of *Olivella* beads. The associated funerary objects were anonymously mailed to the University of California, Davis Repatriation Coordinator with a return address of a mail depot in Tucson, Arizona. Enclosed with the associated funerary objects was a tag describing the items as “burial beads” found “in Wintun Indian graves located on Gordon sight[sic] in California west of Sacramento River.” The tag also indicates that Jack and Vera Mills, amateur archaeologists from Arizona, purchased the beads in 1974. Based on search of records, UC Davis believes the Gordon site most likely refers to CA–NAP–448 (also known as CA–NAP–997, P–28–001171) or to another site in the Gordon Valley, Napa County.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition history of the associated funerary objects described in this notice.

Determinations

The University of California, Davis has determined that:

- The two objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a connection between the associated funerary objects described in this notice and the Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Kletsel Dehe Wintun Nation of the Cortina Rancheria (*previously* listed as Kletsel Dehe Band of Wintun Indians); and the Yocha Dehe Wintun Nation, California.

Requests for Repatriation

Written requests for repatriation of the associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the associated funerary objects described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the University of California, Davis must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the associated funerary objects are considered a single request and not competing requests. The University of California, Davis is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29946 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039218;
PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were collected at the Fort Mohave Indian School, Mohave County, AZ, the Hopi Agency, Navajo County, AZ, the Sherman Institute, Riverside County, CA, Crownpoint, McKinley County, NM, the U.S. Indian Vocational School, Bernalillo County, NM, and the Laboratory of Anthropology, Santa Fe County, NM.

DATES: Repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Jane Pickering, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617)

496–2374, email jpickering@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Based on the information available, human remains representing, at minimum, one individual was collected at the Fort Mohave Indian School, Mohave County, AZ. The human remains are hair clippings collected from one individual who was recorded as being 19 years old and identified as “Navajo.” Timothy G. Mackey took the hair clippings at the Fort Mohave Indian School between 1930 and 1933. Mackey sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Based on the information available, human remains representing, at minimum, 16 individuals were collected at the Hopi Agency, Navajo County, AZ. The human remains are hair clippings collected from one individual who was recorded as being 20 years old, two individuals who were recorded as being 19 years old, three individuals who were recorded as being 18 years old, one individual who was recorded as being 17 years old, three individuals who were recorded as being 16 years old, one individual who was recorded as being 15 years old, one individual who was recorded as being 14 years old, one individual who was recorded as being 13 years old, one individual who was recorded as being 12 years old, one individual who was recorded as being 8 years old, and one individual who was recorded as being “Adult” and all identified as “Navajo.” Edgar K. Miller took the hair clippings at the Hopi Agency between 1930 and 1933. Miller sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Based on the information available, human remains representing, at minimum, nine individuals were collected at the Sherman Institute, Riverside County, CA. The human remains are hair clippings collected from one individual who was recorded as being 23 years old, four individuals

who were recorded as being 20 years old, two individuals who were recorded as being 19 years old, one individual who was recorded as being 18 years old, and one individual who was recorded as being 17 years old and all identified as “Navajo.” Samuel H. Gilliam took the hair clippings at the Sherman Institute between 1930 and 1933. Gilliam sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Based on the information available, human remains representing, at minimum, 27 individuals were collected at Crownpoint, McKinley County, NM. The human remains are hair clippings collected from one individual who was recorded as being 70 years old, one individual who was recorded as being 57 years old, one individual who was recorded as being 54 years old, one individual who was recorded as being 50 years old, one individual who was recorded as being 45 years old, one individual who was recorded as being 38 years old, one individual who was recorded as being 35 years old, one individual who was recorded as being 17 years old, one individual who was recorded as being 16 years old, two individuals who were recorded as being 15 years old, four individuals who were recorded as being 14 years old, and 12 individuals who were recorded as being “Adult” and all identified as “Navajo.” E. Stacher took the hair clippings at Crownpoint between 1930 and 1933. Stacher sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Based on the information available, human remains representing, at minimum, 21 individuals were collected at the U.S. Indian Vocational School, Bernalillo County, NM. The human remains are hair clippings collected from one individual who was recorded as being 18 years old, three individuals who were recorded as being 17 years old, five individuals who were recorded as being 16 years old, three individuals who were recorded as being 15 years old, six individuals who were recorded as being 14 years old, one individual who was recorded as being 13 years old, and two individuals with no age recorded and all identified as “Navajo.” Reuben Perry took the hair clippings at the U.S. Indian Vocational School between 1930 and 1933. Perry sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Based on the information available, human remains representing, at minimum, three individuals were collected at the Laboratory of Anthropology, Santa Fe County, NM. The human remains are hair clippings collected from one individual who was recorded as being 18 years old, one individual who was recorded as being 17 years old, and one individual who was recorded as being 16 years old and all identified as "Navajo." An unknown collector took the hair clippings at the Laboratory of Anthropology between 1930 and 1933. They sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Cultural Affiliation

Based on the available information and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains described in this notice.

Determinations

The PMAE has determined that:

- The human remains described in this notice represent the physical remains of 77 individuals of Native American ancestry.
- There is a reasonable connection between the human remains described in this notice and the Navajo Nation, Arizona, New Mexico, & Utah.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25

U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29947 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0039211;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Intended Repatriation: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) intends to repatriate certain cultural items that meet the definition of sacred objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural items in this notice may occur on or after January 17, 2025.

ADDRESSES: Deanna Byrd, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 384-0672, email deannabyrd@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE, and additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

A total of two cultural items have been requested for repatriation. The two sacred objects are one shield and one cover. According to PMAE records, Mr. Sprigellburg, of Santa Fe, New Mexico, purchased the shield and cover, at an unknown date, from a member of the Santa Ana Pueblo community, after "trying to buy it for 20 years and from 3 generations." Dr. Samuel Kirkland Lothrop purchased the shield and cover

from Mr. Sprigellburg in 1915, and subsequently donated both the shield and cover to PMAE in 1916.

Determinations

The PMAE has determined that:

- The two sacred objects described in this notice are specific ceremonial objects needed by a traditional Native American religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.

- There is a reasonable connection between the cultural items described in this notice and the Pueblo of Santa Ana, New Mexico.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004 and the implementing regulations, 43 CFR 10.9.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29940 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS–WASO–NAGPRA–NPS0039212;
PPWOCRADN0–PCU00RP14.R50000]

**Notice of Inventory Completion:
Louisiana State University, Museum of
Natural Science, Baton Rouge, LA**

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Louisiana State University, Museum of Natural Science (LSUMNS) has completed an inventory of an associated funerary object and has determined that there is a cultural affiliation between the associated funerary object and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the associated funerary object in this notice may occur on or after January 17, 2025.

ADDRESSES: Dr. Irene Martí Gil, LSU Museum of Natural Science, 119 Foster Hall, LSU, Baton Rouge, LA 70803, telephone (225) 578–2855, email imart23@lsu.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LSUMNS, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

One associated funerary object has been identified after re-inventorying the LSUMNS archaeological collections. The associated funerary object is a small, anthropomorphic, pottery figurine. This figurine was recovered from the Morton Shell Mound site (16IB3) (also known as Weeks Island or LMS 33–I–3), located on the Weeks Island salt dome in Iberia Parish, LA, by a local individual and donated to the LSU Museum of Natural Science when Mr. Robert Neuman was the Curator. The LSUMNS never formally accessioned this object and we do not possess any further information.

This notice supplements the original 2022 Notice of Inventory Completion published in the **Federal Register** (87 FR 69307–69313, November 18, 2022), which identified only human remains representing 275 individuals removed

from the site as part of an intensive research program under the direction of then-LSUMNS Curator of Anthropology Robert Neuman between 1969 and 1971.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition history of the associated funerary objects described in this notice.

Determinations

The LSUMNS has determined that:

- The one object described in this notice is reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a connection between the associated funerary object described in this notice and the Chitimacha Tribe of Louisiana.

Requests for Repatriation

Written requests for repatriation of the associated funerary object in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the associated funerary object described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the LSUMNS must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the associated funerary object are considered a single request and not competing requests. The LSUMNS is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29941 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS–WASO–NAGPRA–NPS0039224;
PPWOCRADN0–PCU00RP14.R50000]

**Notice of Inventory Completion: U.S.
Department of the Interior, Bureau of
Reclamation, Boise, ID**

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the U.S. Department of the Interior, Bureau of Reclamation, Interior Region 9: Columbia-Pacific Northwest Region (Reclamation Region 9) has completed an inventory of associated funerary objects and has determined that there is a cultural affiliation between the associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the associated funerary objects in this notice may occur on or after January 17, 2025.

ADDRESSES: Dr. Sean Hess, Supervisory Regional Archaeologist, Columbia-Pacific Northwest Regional Office, Bureau of Reclamation, 1150 N Curtis Road, Boise, ID 83706, telephone (208) 378–5316, email shess@usbr.gov.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Reclamation Region 9, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Site 45ST118 is on Federal lands associated with operation and maintenance of Grand Coulee Dam within the exterior boundary of the Spokane Indian Reservation. The collection from 45ST118 that has not been repatriated consists of two associated funerary objects (AFOs): a cedar wood stake and a vial of wood fibers. There are no associated human remains. The AFOs are currently housed at Washington State University in Pullman, Washington.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is reasonably identified by the geographical location or acquisition

history of the associated funerary objects described in this notice.

Determinations

The Reclamation Region 9 has determined that:

- The two objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- There is a connection between the associated funerary objects described in this notice and the Spokane Tribe of the Spokane Reservation.

Requests for Repatriation

Written requests for repatriation of the associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the associated funerary objects described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the Reclamation Region 9 must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the associated funerary objects are considered a single request and not competing requests. The Reclamation Region 9 is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29952 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039213; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Repatriation: History Colorado (formerly the Colorado Historical Society), Denver, CO

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), History Colorado intends to repatriate a certain cultural item that meets the definition of a sacred object and that has a known lineal descendant.

DATES: Repatriation of the cultural item in this notice may occur on or after January 17, 2025.

ADDRESSES: Chance Ward, NAGPRA Collections Specialist, History Colorado, 1200 N Broadway, Denver CO 80203, telephone (303) 866–5751, email chance.ward@state.co.us.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of History Colorado, and additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

A total of one cultural item has been requested for repatriation. The one item is a headdress (E.1993.2) that belonged to Sapiyah, or Buckskin Charley. Through consultation with authorized tribal representatives and known lineal descendants, this item has been determined to belong to an individual who performed religious ceremonies and the headdress is a sacred object. The headdress was removed from La Plata County, Colorado at an unknown date, and later donated to History Colorado (then the Colorado Historical Society) in 1961.

Determinations

History Colorado has determined that:

- The one sacred object described in this notice is a specific ceremonial object needed by a traditional Native American religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant,

Indian Tribe, or Native Hawaiian organization.

- A known lineal descendant (name withheld per request) is connected to the cultural item described in this notice.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, History Colorado must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. History Colorado is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004 and the implementing regulations, 43 CFR 10.9.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29942 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039220; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and has determined that there is a cultural affiliation between the

human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were collected at the Chemawa (Salem) Indian School, Marion County, OR.

DATES: Repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Jane Pickering, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-2374, email jpickering@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the PMAE.

Abstract of Information Available

Based on the information available, human remains representing, at minimum, two individuals were collected at the Chemawa (Salem) Indian School, Marion County, OR. The human remains are hair clippings collected from two individuals who were recorded as being 15 years old and identified as "Blackfoot." James T. Ryan took the hair clippings at the Chemawa (Salem) Indian School between 1930 and 1933. Ryan sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Cultural Affiliation

Based on the available information and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains described in this notice.

Determinations

The PMAE has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- There is a reasonable connection between the human remains described in this notice and the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official

identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29949 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS-WASO-NAGPRA-NPS0039219;
PPWOCRADNO-PCU00RP14.R50000]**

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were collected at the Chilocco Indian Agricultural School, Kay County, OK.

DATES: Repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Jane Pickering, Peabody Museum of Archaeology and Ethnology,

Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-2374, email jpickering@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Based on the information available, human remains representing, at minimum, two individuals were collected at the Chilocco Indian Agricultural School, Kay County, OK. The human remains are hair clippings collected from one individual who was recorded as being 17 years old and one individual who was recorded as being 14 years old and identified as "Wichita." Lawrence C. Correll took the hair clippings at the Chilocco Indian Agricultural School between 1930 and 1933. Correll sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Cultural Affiliation

Based on the available information and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains described in this notice.

Determinations

The PMAE has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- There is a reasonable connection between the human remains described in this notice and the Wichita and Affiliated Tribes (Wichita, Keechi, Waco, & Tawakonie), Oklahoma.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or

a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29948 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[DOI-2024-0015; PPWOWMADH8
PPMPSAS1Y.YH0000]

Privacy Act of 1974; System of Records

AGENCY: National Park Service, Interior.

ACTION: Rescinding of a system of records notice.

SUMMARY: The Department of the Interior (DOI) is issuing a public notice of its intent to rescind the National Park Service (NPS) Privacy Act system of records, INTERIOR/NPS-5, Retirement Record, from its existing inventory.

DATES: These changes take effect on December 18, 2024.

ADDRESSES: You may send comments identified by docket number [DOI-2024-0015] by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for sending comments.

- *Email:* DOI_Privacy@ios.doi.gov. Include docket number [DOI-2024-0015] in the subject line of the message.

- *U.S. mail or hand-delivery:* Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI-2024-0015]. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

You should be aware your entire comment including your personally identifiable information, such as your address, phone number, email address, or any other personal information in your comment, may be made publicly available at any time. While you may request to withhold your personally identifiable information from public review, we cannot guarantee we will be able to do so.

FOR FURTHER INFORMATION CONTACT: (1) Monica E. Holguin, Chief, Retirement & Benefits Branch, National Park Service, 7175 West Jefferson Avenue, Lakewood CO 80235, mholguingutierrez@nps.gov or 720-417-3154 or (2) Felix Uribe, Associate Privacy Officer, National Park Service, 12201 Sunrise Valley Drive, Reston, VA 20192, nps_privacy@nps.gov or 202-354-6925.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the DOI is rescinding the INTERIOR/NPS-5, Retirement Record, system of records notice (SORN) and removing it from its system of records inventory. The primary purpose of the system of records was to maintain employees' Federal employment history and retirement contributions. During a review of NPS SORNs, it was determined that this notice is no longer necessary as the records in the system are covered under the Department-wide SORN, INTERIOR/DOI-85, Payroll, Attendance, Retirement, and Leave Records, 83 FR 34156 (July 19, 2018). Therefore, DOI is rescinding the INTERIOR/NPS-5, Retirement Record, SORN to eliminate an unnecessary duplicate notice and ensure compliance with the Privacy Act of 1974 and Office of Management and Budget Circular A-108, *Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act*. Rescinding the INTERIOR/NPS-5, Retirement Record, SORN will have no adverse impact on individuals as the records are covered under the INTERIOR/DOI-85, Payroll, Attendance, Retirement, and Leave Records, SORN. This rescinding will also promote the overall streamlining and management of DOI Privacy Act systems of records.

SYSTEM NAME AND NUMBER:

INTERIOR/NPS-5, Retirement Record.

HISTORY:

48 FR 51699 (November 10, 1983); modification published at 73 FR 63992 (October 28, 2008).

Teri Barnett,

Departmental Privacy Officer, U.S. Department of the Interior.

[FR Doc. 2024-29908 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0039215;
PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: Vanderbilt University, Nashville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Vanderbilt University has completed an inventory of human remains and has determined that there is no lineal descendant and no Indian Tribe or Native Hawaiian organization with cultural affiliation.

DATES: Upon request, repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Steve Wernke, Professor and Chair, Department of Anthropology, Vanderbilt University, VU Station B #356050, 2301 Vanderbilt Place, Nashville, TN 37235, telephone (615) 343-2518, email s.wernke@vanderbilt.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Vanderbilt University, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Human remains representing, at least, 86 individuals have been identified. No associated funerary objects are present. In approximately the 1960s, human remains representing, at minimum, 86 individuals were removed from the Ganier site in a location near Bells Bend, Nashville (Davidson County), Tennessee. Vanderbilt University believes that the then-owner of the private property contacted Ronald Spores, Professor of Anthropology at

Vanderbilt University, to excavate the human remains after they became visible following erosion affecting the riverbank where they had been buried. The human remains include those of individuals both male and female, ranging in age from infant to adult. No known individuals were identified.

Consultation

Vanderbilt University, through faculty member Tiffany Tung, initiated consultation on October 7, 2021 with the following Indian Tribes: Alabama-Coushatta Tribe of Texas; Cherokee Nation; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; The Chickasaw Nation; The Muscogee (Creek) Nation; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Representatives from the Eastern Band of Cherokee Indians and The Chickasaw Nation responded to the invitation and participated in consultation with Vanderbilt University.

Cultural Affiliation

The following types of information about the cultural affiliation of the human remains in this notice are available: geographical. Specifically, the representative from The Chickasaw Nation noted that the location along the Cumberland River where the human remains were located could be linked to several federally recognized Indian Tribes. The representative for the Eastern Band of Cherokee Indians advised that the site falls within the traditional Cherokee aboriginal territory. The information, including the results of consultation, identified:

1. No earlier group connected to the human remains.
2. No Indian Tribe or Native Hawaiian organization connected to the human remains.
3. No relationship of shared group identity between the earlier group and the Indian Tribe or Native Hawaiian organization that can be reasonably traced through time.

Determinations

Officials of Vanderbilt University have determined that:

- The human remains described in this notice represent the physical remains of 86 individuals of Native American ancestry.
- No known lineal descendant who can trace ancestry to the human remains in this notice has been identified.
- No Indian Tribe or Native Hawaiian organization with cultural affiliation to the human remains in this notice has been clearly or reasonably identified.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the authorized representative identified in this notice under

ADDRESSES. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Upon request, repatriation of the human remains described in this notice may occur on or after January 17, 2025. If competing requests for repatriation are received, Vanderbilt University must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. Vanderbilt University is responsible for sending a copy of this notice to any consulting lineal descendant, Indian Tribe, or Native Hawaiian organization.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29944 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0039223; PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: Harvard University Archives, Pusey Library, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Harvard University Archives, Pusey Library (HUA), has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the human remains in this notice may occur on or after January 17, 2025.

ADDRESSES: Virginia Hunt, Harvard University Archives, Pusey Library, 1 Harvard Yard, Cambridge, MA 02138,

telephone (617) 495-3240, email virginia_hunt@harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the HUA, and additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Human remains representing, at least, one individual have been identified. No associated funerary objects are present. The human remains were removed by Edward Eggleston from "an Indian grave" at Lake George, Warren County, NY in 1883 and sent by him to Frederic Ward Putnam, Director of the Peabody Museum of Archaeology and Ethnology, Harvard University, the same year. In 1971, the human remains were transferred to HUA with the correspondence files of the Director of the Peabody Museum.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains described in this notice.

Determinations

The HUA has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a connection between the human remains described in this notice and the Stockbridge Munsee Community, Wisconsin.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES.** Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after January 17, 2025. If competing

requests for repatriation are received, the HUA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The HUA is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29950 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039216;
PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Repatriation: The Children's Museum of Indianapolis, Indianapolis, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), The Children's Museum of Indianapolis intends to repatriate a certain cultural item that meets the definition of an unassociated funerary object and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural item in this notice may occur on or after January 17, 2025.

ADDRESSES: Jennifer Noffze, The Children's Museum of Indianapolis, 3000 N Meridian Street, Indianapolis, IN 46208, telephone (317) 334–3722, email jenn@childrensmuseum.org.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of The Children's Museum of Indianapolis, and additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

A total of one cultural item has been requested for repatriation. The one unassociated funerary object is a red and brown stone animal effigy pipe. It was found in a mound near Marietta, Ohio, prior to 1900, and it was formerly a part of the Judge Claude U. Stone Collection at Peoria, Illinois. It was donated to the museum in 1968 by Earl Townsend, Jr. Marietta, Ohio is part of the ancestral homelands of the Shawnee Nation, which includes the Eastern Shawnee Tribe of Oklahoma and the Absentee-Shawnee Tribe of Indians of Oklahoma.

Determinations

The Children's Museum of Indianapolis has determined that:

- The one unassociated funerary object described in this notice is reasonably believed to have been placed intentionally with or near human remains, and are connected, either at the time of death or later as part of the death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. The unassociated funerary object has been identified by a preponderance of the evidence as related to human remains, specific individuals, or families, or removed from a specific burial site or burial area of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization.

- There is a reasonable connection between the cultural item described in this notice and the Absentee-Shawnee Tribe of Indians of Oklahoma and the Eastern Shawnee Tribe of Oklahoma.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, The Children's Museum of Indianapolis must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item

are considered a single request and not competing requests. The Children's Museum of Indianapolis is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice and to any other consulting parties.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004 and the implementing regulations, 43 CFR 10.9.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–29945 Filed 12–17–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0039210;
PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Fowler Museum at UCLA, Los Angeles, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Fowler Museum at UCLA has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after January 17, 2025.

ADDRESSES: Allison Fischer-Olson, Fowler Museum at UCLA, Box 951549, Los Angeles, CA 90095–1549, telephone (310) 825–1864, email afischerolson@arts.ucla.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Fowler Museum at UCLA, and additional information on the determinations in this notice, including the results of consultation, can be found in its inventory or related records. The National Park Service is not responsible for the determinations in this notice.

Abstract of Information Available

Three bags and 2,125 individual associated funerary objects are flake tools, flakes, cores, hammerstones, an

ash/clay chunk, groundstone fragments, utilized flakes, post fragments, manos and mano fragments, shell beads, pestles and pestle fragments, battered rock, projectile points, core tools, bone awls and awl fragments, worked bone, polished bone, chipping debitage, stone fragments, faunal bone, gorges, arrow shaft straightener, burned and unburned acorns, bone whistle parts, a dirt root cast, charcoal beam fragments, scrapers, mortars, pounders, baked clay, cobbles, charcoal, boiling stones, and shell fragments. Of the total associated funerary objects, three bags and 62 individual items are present. The associated funerary objects were recovered from the Case Site (4-TEH-S246), which is located in southern Tehama County near Vina, California. In 1965, UCLA Archaeological Survey excavated the site under the direction of Donald S. Miller and Phil Burnham. The collection was recorded as never having been received until a small portion was found mixed with another accession/ collection. The remainder may have been retained by the property owner. Human remains were found at the site by the property owner but are not present. During consultations, the Tribal Representative from Paskenta Band of Nomlaki Indians identified this as a Wintun site that is within the ancestral territory of the Tribe. Due to the presence of human remains, the representative identified the entire site, and any material found there, as culturally sensitive. There is no known use of potentially hazardous substances for treatment of the associated funerary objects.

Human remains representing, at least, two individuals have been identified. The 169 bags and 516 individual associated funerary objects are flakes, cores, core tools, faunal bone, bone awls and awl fragments, cobbles, fire stones, manos and mano fragments, choppers, pounding stones, acorns, projectile points and point fragments, hammerstones, nodules, bone whistle parts, flake tools, scrapers, clay fragments, metal fragments, shell pendants, fishhooks, modified bone, fire fractured stone, pestles and pestle fragments, beads, groundstone fragments, stone fragments/samples, digging stones, stone rings, shell fragments, worked flakes, boiling stones, sharpening tools, organics, charcoal, and soil samples. The human remains and associated funerary objects were recovered from the Bambauer Site (4-TEH-S247), which is located in southern Tehama County near Hamilton City, California. In 1965, UCLA Archaeological Survey excavated the

site under the direction of Donald S. Miller and Thomas Durbin. The collection is noted as initially going to California State University, Chico under the care of Keith Johnson until 2003, when it was received at UCLA. During 2024 consultations, human remains were located mixed in with faunal bone. Human remains were also recovered in 1974 excavations of the same site, which were repatriated to the Paskenta Band of Nomlaki Indians in 2023. In a 1965 site report, excavation director Thomas Durbin states that 4-TEH-S247 is known to be a Wintun site. During consultations, the Tribal Representative from Paskenta Band of Nomlaki Indians also identified this as a Wintun site that is within the ancestral territory of the Tribe. Due to the presence of human remains, the representative identified the entire site, and any material found there, as culturally sensitive. There is no known use of potentially hazardous substances for treatment of the human remains or associated funerary objects. No lineal descendant can be determined.

Cultural Affiliation

Based on the information available and the results of consultation, cultural affiliation is clearly identified by the information available about the human remains and associated funerary objects described in this notice.

Determinations

The Fowler Museum at UCLA has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- The 172 bags and 2,641 individual objects described in this notice are reasonably believed to have been placed intentionally with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a connection between the human remains and associated funerary objects described in this notice and the Paskenta Band of Nomlaki Indians of California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the authorized representative identified in this notice under **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization

not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

Repatriation of the human remains and associated funerary objects described in this notice to a requestor may occur on or after January 17, 2025. If competing requests for repatriation are received, the Fowler Museum at UCLA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Fowler Museum at UCLA is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: December 11, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-29939 Filed 12-17-24; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1428]

Certain Women's Flats With Colored Outsoles Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 13, 2024, under section 337 of the Tariff Act of 1930, as amended, on behalf of Gavrieli Brands LLC of Culver City, California. An amended complaint was filed on November 20, 2024. A supplement to the amended complaint was filed on December 2, 2024. The complaint, as amended and supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain women's flats with colored outsoles thereof by reason of infringement of the claim of one or more of U.S. Design Patent No. D681,928 (the "'928 patent"), U.S. Design Patent No. D844,950 (the "'950 patent"), U.S. Design Patent No. D844,951 (the "'951

patent”), U.S. Design Patent No. D681,927 (the “’927 patent”), U.S. Design Patent No. D781,035 (the “’035 patent”), U.S. Design Patent No. D781,032 (the “’032 patent”), U.S. Design Patent No. D686,812 (the “’812 patent”), and U.S. Design Patent No. D688,853 (the “’853 patent”). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complaint also alleges violations of section 337 based upon the importation into the United States, or in the sale of certain flats with colored outsoles thereof by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States. The complainant requests that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion, and cease and desist orders.

ADDRESSES: The complaint, as amended and supplemented, except for any confidential information contained therein, may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10 (2024).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 12, 2024, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended,

(a) an investigation be instituted to determine whether there is a violation of subsection (a)(1)(A) of section 337 in the importation or sale of certain

products identified in paragraph (2) by reason of trade dress infringement, the threat of which is to destroy or substantially injure an industry in the United States;

(b) an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of the claim of the ’928 patent; the claim of the ’950 patent; the claim of the ’951 patent; the claim of the ’927 patent; the claim of the ’035 patent; the claim of the ’032 patent; the claim of the ’812 patent; and the claim of the ’853 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is “women’s ballet flats with colored outsoles thereof”;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) *The complainant is:* Gavrieli Brands LLC, 5731 Buckingham Parkway, Culver City, California 90230.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Kijera’s OneDrop LLC, 630 Malcolm X Blvd., Suite 8M, New York, NY 10037

Craze, CSFD 1008 Maria Clara Road,

Essel Park, CSFD, Philippines

Pierjeda Information Technology Co.,

Ltd., Room 413, 4 Floor, No. 50

Huihua Road, Tonde Street, Baiyun

District, Guangzhou, China

Shengze Trading Company, 122 Linhou,

Meixi Village, Shiliu Town, Zhangpu

County, Zhangshou City, Fujian

Province, China

Guangzhou Shun Cheng Trading Co.,

Ltd., Room 501, No. 5, Lane 4,

Hongxingqiaobian Street, Shimen

Street, Baiyun District, Guangzhou,

China

Kunming Ouxiang Trading Co., Ltd., No.

1808, 18th Floor, Caizhi Xinjing

Building, No. 924 Beijing Road,

Lianmeng Street, Panlong District,

Kunming City, Yunnan Province,

China

Huihui Bianan, No. 18 West Avenue,

Huilong Weihuo B17, Huilongguan,

Changping District, Beijing, China

Bingxin Qingfeng, 3rd Floor, Building A, Apro Industrial Zone, No. 1 Shenghong Road, Huangpu Town, Zhongshan City, Guangdong, Province, China

Baiqiuju1983, 3rd Floor, Building A, Apro Industrial Zone, No. 1

Shenghong Road, Huangpu Town,

Zhongshan City, Guangdong,

Province, China

tb249835650, 3rd Floor, Building A,

Apro Industrial Zone, No. 1

Shenghong Road, Huangpu Town,

Zhongshan City, Guangdong,

Province, China

Yuyoufang Foreign Trade Store, 3rd

Floor, Building A, Apro Industrial

Zone, No. 1 Shenghong Road,

Huangpu Town, Zhongshan City,

Guangdong, Province, China

Xu Wenping 123, 3rd Floor, Building A,

Apro Industrial Zone, No. 1

Shenghong Road, Huangpu Town,

Zhongshan, City, Guangdong

Province, China

Ynwll, No. 18 West Avenue, Huilong

Weihuo B16, Huilongguan, Changping

District, Beijing No. 18, Huilongguan,

China

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination

and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 13, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-29977 Filed 12-17-24; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-750 and 731-TA-1728 (Preliminary)]

Sol Gel Alumina-Based Ceramic Abrasive Grains From China; Revised Schedule for the Subject Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: December 13, 2024.

FOR FURTHER INFORMATION CONTACT:

Keysha Martinez (202-205-2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION: On November 25, 2024, the Commission established a schedule for the conduct of the preliminary phase of the subject investigations (89 FR 95235, December 2, 2024). Subsequently, the Department of Commerce ("Commerce") extended the deadline for its initiation determination from December 16, 2024 to January 6, 2025 (89 FR 100465, December 12, 2024). The Commission, therefore, is revising its schedule to conform with Commerce's new schedule.

The Commission must reach preliminary determinations within 25 days after the date on which the Commission receives notice from Commerce of initiation of the investigations, and the Commission's

views must be transmitted to Commerce within five business days thereafter.

For further information concerning this proceeding, see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: December 13, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-30024 Filed 12-17-24; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1427]

Certain Components for Injection Molding Machines, and Products Containing the Same; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 12, 2024, under section 337 of the Tariff Act of 1930, as amended, on behalf of Husky Injection Molding Systems LTD. of Canada and Husky Injection Molding Systems, Inc. of Milton, Vermont. Husky filed a supplemental complaint on November 29, 2024, and subsequently refiled the same "supplemental" complaint as an amended complaint on December 2, 2024. The amended complaint, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain components for injection molding machines, and products containing the same by reason of the infringement of certain claims of U.S. Patent No. 9,713,891 ("the '891 patent"); U.S. Patent No. 11,794,375 ("the '375 patent"); U.S. Patent No. 10,093,053 ("the '053 patent"); U.S. Patent No. 8,834,149 ("the '149 patent"); and U.S. Patent No. 7,645,132 ("the '132 patent"). The amended complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute

an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Susan Orndoff, The Office of Docket Services, U.S. International Trade Commission, telephone (202) 205-1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2024).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 12, 2024, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1-2, 4, and 6-8 of the '891 patent; 1-3, 5-15, and 17-21 of the '375 patent; claims 1-4, 6, and 8-10 of the '053 patent; claims 1-9 and 18 of the '149 patent; and claims 1-4, 7, 10-12, 14-19, 21-24, and 26 of the '132 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is "mold products, cavity insert products, and molding apparatus products for injection molding machines, components for injection

molding machines and products containing the same”;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Husky Injection Molding Systems LTD.,
500 Queen Street South, Bolton,
Ontario, Canada L7E 5S5

Husky Injection Molding Systems, Inc.,
288 North Road, Milton, VT, USA,
05468

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:

NINGBO AO SHENG MOLD CO., LTD.,
d/b/a AOSIMI, No. 8 Xingde Rd.
Ditang Ave. YuYao, Zhejiang 315480,
China

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 12, 2024.

Lisa Barton,
Secretary to the Commission.
[FR Doc. 2024–29906 Filed 12–17–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1444]

Importer of Controlled Substances Application: Leading Pharma LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Leading Pharma LLC to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants, therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before January 17, 2025. Such persons may also file a written request for a hearing on the application on or before January 17, 2025.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <https://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <https://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on September 27, 2024, Leading Pharma LLC, 3 Oak Road, Fairfield, New Jersey 07004, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Diphenoxylate ...	9170	II

The company plans to import the listed controlled substance as an importer active pharmaceutical ingredient for research and development toward manufacturing a finished dosage product for Food and Drug Administration approval. No other activity for this drug code is authorized for this registration.

Approval of permit applications will occur only when the registrant’s business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew Strait,
Deputy Assistant Administrator.
[FR Doc. 2024–29997 Filed 12–17–24; 8:45 am]

BILLING CODE

DEPARTMENT OF JUSTICE

[OMB Number 1117–0053]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Leadership Engagement Survey (LES)

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Drug Enforcement Administration, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until January 10, 2025.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please

contact: Tammie Pugh, Section Chief, Research and Analysis Staff, Human Resources Division, DEA, Tammie.S.Pugh@dea.gov, 571-776-2496, 600 Army Navy Dr., Arlington, VA 22202.

SUPPLEMENTARY INFORMATION: The proposed information collection was previously published in the **Federal Register** on 89 FR 81113, October 7, 2024, allowing a 60-day comment period. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function and entering either the title of the information collection or the OMB Control Number [1117-0053]. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *The Title of the Form/Collection:* Leadership Engagement Survey.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* N/A.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Federal Government/DEA employees, contractors, and TFOs working at the DEA are encouraged to respond.

5. *Obligation to Respond:* The obligation to respond is voluntary.

6. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The maximum numbers of potential respondents is 15000, although the expected responses are estimated to be 5000.

7. *Estimated Time per Respondent:* The time per response is 20 minutes to complete the Leadership Engagement Survey.

8. *Frequency:* The LES is administered annually.

9. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual burden hours for this collection is approximately 1650 hours, assuming 5000 respondents at 20 minutes for each response.

10. *An estimate of the total annual cost burden associated with the collection, if applicable:* There is no cost to continue the survey since it is already fully developed and runs on an internal platform accessible only to DEA employees.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC 20530.

Dated: December 12, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-29752 Filed 12-17-24; 8:45 am]

BILLING CODE 4410-09-P9

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Toxic Substances Control Act

On December 13, 2024, the Department of Justice lodged a proposed

consent decree with the United States District Court for the Southern District of New York in the lawsuit entitled *United States, et al. v. Lilmor Management LLC, et al.*, Civil Action No. 24 Civ. 9520.

In this action, the United States seeks injunctive relief pursuant to the Toxic Substances Control Act ("TSCA") and the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA") against Lilmor Management LLC ("Lilmor"), Morris Lieberman, and 49 limited liability companies for failure to make required disclosures to prospective tenants about lead-based paint in their apartments as required by the Lead Disclosure Rule (24 CFR part 35, subpart A, and 40 CFR part 745, subpart F). As to Lilmor and Lieberman, the United States also seeks injunctive relief under TSCA for failing to comply with safe work practices and related requirements during renovations as required by the Renovation, Repair, and Painting Rule, 40 CFR part 745. The United States seeks further relief on a theory of public nuisance. The State of New York has joined in the suit to assert claims under state law.

The consent decree requires the Defendants to pay a \$3.25 million administrative penalty to the United States under TSCA and the RLBPHRA and to perform injunctive relief set forth in the consent decree, including the abatement of lead-based paint and the remediation of substandard living conditions. In settlement of its claims, New York State has agreed to payment of \$325,000 to a New York City agency and creation of a restitution fund of \$2.925 million. The settlement also provides for the hiring of a third-party housing expert to oversee settlement implementation.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, et al. v. Lilmor Management LLC, et al.*, D.J. Ref. No. 90-5-1-1-13022. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	pubcomment-ees.enrd@usdoj.gov
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

Any comments submitted in writing may be filed by the United States in whole or in part on the public court docket without notice to the commenter.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: <http://www.justice.gov/enrd/consent-decrees>. If you require assistance accessing the consent decree, you may request assistance by email or by mail to the addresses provided above for submitting comments.

Eric D. Albert,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2024-29978 Filed 12-17-24; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Roof Control Plans for Underground Coal Mines

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 17, 2025.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202-693-6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: In order to prevent occupational injuries resulting from falls of roofs, faces, and ribs, which are a leading cause of injuries and death in underground coal mines, all underground coal mine operators are required to develop and submit roof control plans to MSHA for evaluation

and approval. These plans are evaluated to determine if they are adequate for prevailing mining conditions. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 26, 2024 (89 FR 68469).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL-MSHA.

Title of Collection: Roof Control Plans for Underground Coal Mines.

OMB Control Number: 1219-0004.

Affected Public: Businesses or other for-profits.

Number of Respondents: 167.

Frequency: On occasion.

Number of Responses: 1,019.

Annual Burden Hours: 2,974 hours.

Total Estimated Annual Other Costs Burden: \$3,396.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024-29832 Filed 12-17-24; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Underground Retorts

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety

and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 17, 2025.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202-693-6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813, authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Title 30 CFR 57.22401 sets forth the safety requirements for using a retort to extract oil from shale in underground metal and nonmetal I-A and I-B mines (those that operate in a combustible ore and either liberate methane or have the potential to liberate methane based on the history of the mine or the geological area in which the mine is located). At present, this applies only to underground oil shale mines. The standard requires that prior to ignition of underground retorts; mine operators must submit a written ignition operation plan to the appropriate Mine Safety and Health Administration (MSHA) District Manager which contains site-specific safeguards and safety procedures for the underground areas of the mine which are affected by the retorts. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 15, 2024 (89 FR 66453).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and

(4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–MSHA.

Title of Collection: Underground Retorts.

OMB Control Number: 1219–0096.

Affected Public: Businesses or other for-profits.

Number of Respondents: 1.

Frequency: On occasion.

Number of Responses: 1.

Annual Burden Hours: 160 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–29835 Filed 12–17–24; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Information Collection; Attorney Acknowledgement/Instructions Relating to Representative Fee Applications; OMB Control No. 1240–0049

AGENCY: Office of Workers' Compensation Programs, Division of Federal Employees' Compensation, (OWCP/DFEC) Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance request for comment to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This request helps to ensure that: requested data can be provided in the desired format; reporting burden (time and financial resources) is minimized;

collection instruments are clearly understood; and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs, Division of Federal Employees' Compensation, (OWCP/DFEC) is soliciting comments on the information collection for Attorney Acknowledgement/Instructions Relating to Representative Fee Applications, CA–143/CA–155.

DATES: All comments must be received on or before February 18, 2025.

ADDRESSES: You may submit comment as follows. Please note that late, untimely filed comments will not be considered.

Electronic Submissions: Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments for WCPO–2024–0021–0001. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket, with no changes. Because your comment will be made public, you are responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as your or anyone else's Social Security number or confidential business information.

- If your comment includes confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission.

Written/Paper Submissions: Submit written/paper submissions in the following way:

- *Mail/Hand Delivery:* Mail or visit DOL–OWCP/DFEC, Office of Workers' Compensation Programs, Division of Federal Employees' Compensation, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3323, Washington, DC 20210.

- OWCP/DFEC will post your comment as well as any attachments, except for information submitted and marked as confidential, in the docket at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs, Office of Workers' Compensation Programs, Division of Federal Employees' Longshore, and Harbor Workers' Compensation, OWCP/DFELHWC, at suggs.anjanette@dol.gov (email); (202) 354–9660.

SUPPLEMENTARY INFORMATION:

I. Background

The Division of Federal Employees' Compensation (DFEC) administers the Federal Employees' Compensation Act (FECA). A Federal employee who sustains a work-related injury is entitled to receive compensation under the FECA. Under 5 U.S.C. 8127(a) and in accordance with 20 CFR 10.700 and 702.131, a claimant may authorize an attorney or other individual to represent his or her interests in any proceeding before the Office of Workers' Compensation Programs (OWCP). Under 5 U.S.C. 8127(b) and in accordance with 20 CFR 10.702 and 702.132, fees for representatives' services must first be approved by the Secretary. The representative is entitled to request a fee for services under 20 CFR 10.700–703 (Federal Employees' Compensation Act (FECA)). The fee must be approved by the OWCP before any demand for payment can be made by the representative.

See: <https://www.dol.gov/owcp/dfec/regs/statutes/feca.htm>.

eCFR: 20 CFR part 10—Claims for Compensation Under the Federal Employees' Compensation Act, as Amended.

II. Desired Focus of Comments

OWCP/DFEC is soliciting comments concerning the proposed information collection related to the Attorney Acknowledgement/Instructions Relating to Representative Fee Applications. OWCP/DFEC is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of OWCP/DFEC's estimate of the burden related to the information collection, including the validity of the methodology and assumptions used in the estimate;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the information collection on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Background documents related to this information collection request are available at <https://www.regulations.gov> and at DOL–OWCP/DFEC located at 200 Constitution Ave. NW, Room S–3323, Washington, DC 20210. Questions about the information collection requirements

may be directed to the person listed in the **FOR FURTHER INFORMATION** section of this notice.

III. Current Actions

This information collection request concerns the Attorney Acknowledgement/Instructions Relating to Representative Fee Applications, CA-143/CA-155. OWCP/DFEC has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, with change, of a currently approved collection.

Agency: Office of Workers' Compensation Programs, Division of Federal Employees' Compensation, OWCP/DFEC.

OMB Number: 1240-0049.

Affected Public: Private Sector—Business or other For-profits.

Number of Respondents: 6,328.

Frequency: On occasion.

Number of Responses: 6,328.

Annual Burden Hours: 3,164 hours.

Annual Respondent or Recordkeeper Cost: \$1,107,400.00.

OWCP/DFEC 1240-0049: OWCP/DFEC Attorney Acknowledgement/Instructions Relating to Representative Fee Applications.

Comments submitted in response to this notice will be summarized in the request for Office of Management and Budget approval of the proposed information collection request; they will become a matter of public record and will be available at <https://www.reginfo.gov>.

Anjanette Suggs,
Certifying Officer.

[FR Doc. 2024-29866 Filed 12-17-24; 8:45 am]

BILLING CODE 4510-CH-P

POSTAL REGULATORY COMMISSION

[Docket Nos. K2025-814; MC2025-770 and K2025-769; MC2025-793 and K2025-792; MC2025-794 and K2025-793; MC2025-795 and K2025-794; MC2025-796 and K2025-795; MC2025-797 and K2025-796; MC2025-798 and K2025-797; MC2025-799 and K2025-798; MC2025-800 and K2025-799; MC2025-801 and K2025-800; MC2025-802 and K2025-801; MC2025-803 and K2025-802; MC2025-804 and K2025-803; MC2025-805 and K2025-804; MC2025-806 and K2025-805; MC2025-807 and K2025-806; MC2025-808 and K2025-807; MC2025-809 and K2025-808; MC2025-810 and K2025-809; MC2025-811 and K2025-810; MC2025-812 and K2025-811; MC2025-813 and K2025-812; MC2025-814 and K2025-813; MC2025-815 and K2025-815; MC2025-816 and K2025-816; MC2025-817 and K2025-817]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 20, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <https://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Public Proceeding(s)
- III. Summary Proceeding(s)

I. Introduction

Pursuant to 39 CFR 3041.405, the Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to Competitive negotiated service agreement(s). The request(s) may propose the addition of a negotiated service agreement from the Competitive product list or the modification of an existing product currently appearing on the Competitive product list.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<https://www.prc.gov>).

www.prc.gov). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

Section II identifies the docket number(s) associated with each Postal Service request, if any, that will be reviewed in a public proceeding as defined by 39 CFR 3010.101(p), the title of each such request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each such request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 and 39 CFR 3000.114 (Public Representative). Section II also establishes comment deadline(s) pertaining to each such request.

The Commission invites comments on whether the Postal Service's request(s) identified in Section II, if any, are consistent with the policies of title 39. Applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3041. Comment deadline(s) for each such request, if any, appear in Section II.

Section III identifies the docket number(s) associated with each Postal Service request, if any, to add a standardized distinct product to the Competitive product list or to amend a standardized distinct product, the title of each such request, the request's acceptance date, and the authority cited by the Postal Service for each request. Standardized distinct products are negotiated service agreements that are variations of one or more Competitive products, and for which financial models, minimum rates, and classification criteria have undergone advance Commission review. See 39 CFR 3041.110(n); 39 CFR 3041.205(a). Such requests are reviewed in summary proceedings pursuant to 39 CFR 3041.325(c)(2) and 39 CFR 3041.505(f)(1). Pursuant to 39 CFR 3041.405(c)-(d), the Commission does not appoint a Public Representative or request public comment in proceedings to review such requests.

II. Public Proceeding(s)

1. *Docket No(s):* K2025-814; *Filing Title:* Request of the United States Postal Service Concerning Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY25-2; *Filing Acceptance*

¹ See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19-22 (Order No. 4679).

18. *Docket No(s)*: MC2025–808 and K2025–807; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1051 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR

3035.105, and 39 CFR 3041.310; *Public Representative*: Christopher Mohr; *Comments Due*: December 20, 2024.

19. *Docket No(s)*: MC2025–809 and K2025–808; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1052 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Christopher Mohr; *Comments Due*: December 20, 2024.

20. *Docket No(s)*: MC2025–810 and K2025–809; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1053 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Almaroof Agoro; *Comments Due*: December 20, 2024.

21. *Docket No(s)*: MC2025–811 and K2025–810; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1054 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Almaroof Agoro; *Comments Due*: December 20, 2024.

22. *Docket No(s)*: MC2025–812 and K2025–811; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1055 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Almaroof Agoro; *Comments Due*: December 20, 2024.

23. *Docket No(s)*: MC2025–813 and K2025–812; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1056 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Almaroof Agoro; *Comments Due*: December 20, 2024.

24. *Docket No(s)*: MC2025–814 and K2025–813; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1057 to the Competitive Product List and Notice of Filing

Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Gregory Stanton; *Comments Due*: December 20, 2024.

25. *Docket No(s)*: MC2025–815 and K2025–815; *Filing Title*: USPS Request to Add Priority Mail & USPS Ground Advantage Contract 533 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Gregory Stanton; *Comments Due*: December 20, 2024.

26. *Docket No(s)*: MC2025–816 and K2025–816; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1058 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Gregory Stanton; *Comments Due*: December 20, 2024.

27. *Docket No(s)*: MC2025–817 and K2025–817; *Filing Title*: USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 1059 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date*: December 12, 2024; *Filing Authority*: 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative*: Gregory Stanton; *Comments Due*: December 20, 2024.

III. Summary Proceeding(s)

None. See Section II for public proceedings.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2024–30053 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 931 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–669, K2025–668.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–29878 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 971 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–715, K2025–714.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–30032 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 946 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–688, K2025–687.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29899 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 940 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–682, K2025–681.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29893 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 510 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–647, K2025–646.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29841 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 10, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 986 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–733, K2025–732.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30047 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 509 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–644, K2025–643.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29840 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 941 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–683, K2025–682.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29894 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 923 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–659, K2025–658.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29870 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 936 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–677, K2025–676.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29883 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 933 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–671, K2025–670.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29880 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 919 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–653, K2025–652.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29856 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 912 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–642, K2025–641.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29849 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 976 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–720, K2025–719.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30037 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 955 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–697, K2025–696.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30003 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 926 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–663, K2025–662.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29873 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 972 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–716, K2025–715.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30033 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 965 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–709, K2025–708.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30013 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 909 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–639, K2025–638.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29846 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 968 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–712, K2025–711.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30016 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 977 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–721, K2025–720.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30038 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 980 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–725, K2025–724.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30041 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 964 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–708, K2025–707.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30012 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 982 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-727, K2025-726.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30043 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 950 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-692, K2025-691.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29903 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 929 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-667, K2025-666.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29876 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 973 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025-717, K2025-716.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30034 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 514 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-657, K2025-656.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29845 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 924 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–660, K2025–659.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29871 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.
DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 913 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–643, K2025–642.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29850 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 916 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–648, K2025–647.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29853 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 920 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–654, K2025–653.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29857 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 945 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–687, K2025–686.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29898 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 10, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 987 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–731, K2025–730.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30048 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 969 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–713, K2025–712.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30017 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 512 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–651, K2025–650.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29843 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 942 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–684, K2025–683.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29895 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 915 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–646, K2025–645.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29852 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 958 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–701, K2025–700.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30006 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 974 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–718, K2025–717.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30035 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 937 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–678, K2025–677.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29884 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 963 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–706, K2025–705.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30011 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 520 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–707, K2025–706.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30000 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 519 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–698, K2025–697.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29999 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 961 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–704, K2025–703.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30009 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 979 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–723, K2025–722.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30040 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 513 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–656, K2025–655.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29844 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 948 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–690, K2025–689.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29901 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 914 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–645, K2025–644.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29851 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:*
December 18, 2024.

FOR FURTHER INFORMATION CONTACT:
Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 984 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–729, K2025–728.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30045 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 983 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–728, K2025–727.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30044 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 951 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–693, K2025–692.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29904 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 911 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–641, K2025–640.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29848 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 938 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–680, K2025–679.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29885 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 949 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–691, K2025–690.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29902 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 956 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–699, K2025–698.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30004 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 953 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–695, K2025–694.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29998 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 910 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–640, K2025–639.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29847 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 943 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–685, K2025–684.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29896 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 922 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–658, K2025–657.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29859 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement****AGENCY:** Postal Service™.**ACTION:** Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 939 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-681, K2025-680.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29892 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 934 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-672, K2025-671.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29881 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 917 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-674, K2025-673.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29854 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 962 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025-705, K2025-704.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30010 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 978 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-722, K2025-721.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30039 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 518 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–679, K2025–678.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–29889 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 930 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–668, K2025–667.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–29877 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 517 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–676, K2025–675.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–29888 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 10, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 988 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–732, K2025–731.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–30049 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: *Date of notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 12, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 53 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–770 and K2025–769.

Kevin Rayburn,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2024–29963 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT:

Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 966 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–710, K2025–709.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30014 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 516 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–666, K2025–665.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29887 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 932 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–670, K2025–669.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29879 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 515 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–661, K2025–660.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29886 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 985 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–730, K2025–729.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30046 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 967 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–711, K2025–710.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30015 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 975 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-719, K2025-718.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30036 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 944 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-686, K2025-685.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29897 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 957 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-700, K2025-699.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-30005 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 927 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025-664, K2025-663.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29874 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE**Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 511 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025-673, K2025-672.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024-29842 Filed 12-17-24; 8:45 am]
BILLING CODE 7710-12-P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202-268-8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby

gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 10, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 989 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–734, K2025–733.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30050 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.
DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 935 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–675, K2025–674.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29882 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service

Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 947 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–689, K2025–688.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29900 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 921 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–655, K2025–654.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29858 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 954 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–696, K2025–695.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30002 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 959 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–702, K2025–701.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30007 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 981 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–726, K2025–725.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30042 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 6, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 925 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–662, K2025–661.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29872 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 960 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–703, K2025–702.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–30008 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a

domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 918 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–652, K2025–651.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29855 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.
ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 5, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 928 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–665, K2025–664.

Sean C. Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2024–29875 Filed 12–17–24; 8:45 am]
BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 970 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2025–714, K2025–713.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–30031 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE**Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement**

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 9, 2024, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 952 to Competitive Product List*. Documents

are available at www.prc.gov, Docket Nos. MC2025–694, K2025–693.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2024–30001 Filed 12–17–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101895; File No. SR–EMERALD–2024–27]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for Dedicated Cross Connection Access to the Testing Systems Environment

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on November 29, 2024, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Emerald Options Exchange Fee Schedule (the “Fee Schedule”) to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings>, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection. The testing systems environment is a virtual trading system environment for Members³ and non-Members to test (i) upcoming Exchange software and code releases, (ii) product enhancements, and (iii) firm-developed software, prior to implementation in the Exchange's production (e.g., live trading) environment. Further, the testing systems environment allows unlimited testing of existing functionality, such as order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancellations, and purge requests. The testing systems environment is built to closely approximate the production environment to enable Members and non-Members the ability to test their systems and mimics the live trading environment.⁴

There are currently three methods by which Members and non-Members may access the Exchange's testing systems environment. One, Members and non-Members may access the Exchange's testing systems environment via a virtual private network (“VPN”) that operates over the internet and provides site-to-site access. VPN access is provided for free to all Members and non-Members.

A second method is via a dedicated cross connection that allows Members and non-Members to access the testing systems environment and is available as either a 1 gigabit (“Gb”) or 10Gb connection. Members and non-Members that utilize a VPN or a dedicated cross connection to access the testing systems environment of the Exchange are also able to access the testing systems environments of each of the Exchange's

³ The term “Member” means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed “members” under the Exchange Act. See Exchange Rule 100.

⁴ Business continuity and disaster recovery testing is performed separately and not within the testing systems environment that is the subject of this filing.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

affiliated options markets—MIAX Sapphire, LLC (“MIAX Sapphire”), MIAX PEARL, LLC⁵ (“MIAX Pearl Options”), and Miami International Securities Exchange, LLC (“MIAX”). This dedicated cross connection would provide subscribers access to the testing systems environment of the Exchange, as well as each of its affiliate options exchanges, via a single connection.

Third, access is also provided through the production connections for each 1Gb or 10Gb ULL connection for the applicable fee⁶ for such connection and no additional charge. These 1Gb and 10Gb ULL connections provide access to the Exchange’s production environment (*i.e.*, live trading) and allow the receipt of proprietary real-time market data. However, the Exchange previously announced that it will phase out the ability to connect to the testing systems environment via the existing 1Gb and 10Gb ULL production connections by February 28, 2025.⁷

* * * * *

The Exchange now proposes to amend the Fee Schedule to establish a monthly fee for Members and non-Members that choose to access the testing systems environment via a dedicated cross connect. In particular, the Exchange proposes to establish a monthly fee of \$1,000 per dedicated cross connection to the testing systems environment for Members and non-Members. The proposed fee is the same whether a Member or non-Member chooses to connect to the testing systems environment via a 1Gb or 10Gb cross connect. The proposed fees would be set forth under new Sections 4)e) and 4)f) of the Fee Schedule. Proposed Sections 4)e) and 4)f) would also codify that VPN access to the test environment is

provided for free for all Members and non-Members.

* * * * *

Members and non-Members that access the testing systems environment through any one of the available access methods, including a dedicated cross connection, receive functionally the same testing experience. Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture or not utilize the testing systems environment at all. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Regardless of access method, all Members and non-Members are provided the same testing systems environment experience and are able to perform all of the same functions.

Implementation

The proposed fee change will be effective December 1, 2024.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act¹⁰ because it represents an equitable allocation of reasonable dues, fees and other charges among market participants using any facility or system which the Exchange operates or controls.

Free VPN Access to the Firm Test Bed Is a Reasonable Substitute

In 2019, Commission staff published guidance suggesting the types of information that self-regulatory organizations (“SROs”) may use to demonstrate that their fee filings comply with the standards of the Exchange Act (the “Staff Guidance”).¹¹ The Staff Guidance provides that in assessing the reasonableness of a fee, the Staff would consider whether the fee is constrained by significant competitive forces. To determine whether a proposed fee is constrained by significant competitive

forces, the Staff Guidance further provides that the Staff would consider whether the evidence provided by an SRO in a Fee Filing proposal demonstrates (i) that there are reasonable substitutes for the product or service that is the subject of a proposed fee; (ii) that “platform” competition constrains the fee; and/or (iii) that the revenue and cost analysis provided by the SRO otherwise demonstrates that the proposed fee would not result in the SRO taking supra-competitive profits.¹² The proposed fee is reasonable because there is a reasonable substitute for the service that is the subject of this proposed fee as set forth below.

This filing includes the following evidence that demonstrates that there is a reasonable substitute to purchasing a dedicated cross connection to access the Exchange’s testing systems environment. That reasonable substitute is VPN access, which is provided for free and will continue to be free for all Members and non-Members. Members and non-Members may access the testing systems environment through either a VPN or a dedicated cross connection and will receive functionally the same testing environment and are able to perform all of the same functions. The testing systems environment, whether accessed via a dedicated cross connection or VPN, provides Members and non-Members the same scope of abilities to test their systems and software in the Exchange’s testing systems environment, which replicates the Exchange’s production trading environment. Like a dedicated cross connection, a VPN provides access to the testing systems environment of not only the Exchange, but also each of its affiliate options exchanges over the same single access point. Accessing the testing systems environment via a dedicated cross connection provides no advantage to Members and non-Members compared to those market participants that elect to access the testing systems environment via a VPN for free.

Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Accessing the testing systems environment via the proposed dedicated cross connection may not provide utility to all Members

⁵ All references to “MIAX PEARL” in this filing are to the options trading facility of MIAX PEARL, LLC, referred to herein as “MIAX Pearl Options.” Members and non-Members that choose to utilize the testing systems environment of MIAX Pearl Equities, the equities trading facility of MIAX PEARL, LLC, must utilize a separate dedicated cross connection as MIAX Pearl Equities’ testing systems environment operates on a separate network from the affiliated options markets.

⁶ See MIAX Emerald Fee Schedule, Sections 5)a)–b) for the fees for 1Gb and 10Gb ULL production connectivity.

⁷ See MIAX Options, MIAX Pearl Options and MIAX Emerald Options Exchanges—Announcing New Extranet Access to Firm Test Beds (FTB1 and FTB2) and Decommissioning of Access via Production Connections Beginning in October 2024, dated September 12, 2024, available at <https://www.miaxglobal.com/alert/2024/09/12/miax-options-miax-pearl-options-and-miax-emerald-options-exchanges-2?nav=all>; and Securities Exchange Act Release No. 100855 (August 28, 2024), 89 FR 71941 (September 4, 2024) (SR-EMERALD–2024–25).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

¹² *Id.*

and non-Members based on their business models and needs, and such users may choose to access the testing systems environment for free through the VPN and perform the same testing functions. As such, the Exchange believes that the proposed fee for access to the testing systems environment is reasonable and Members and non-Members have the choice, but are not obligated to access the testing systems environment via a dedicated cross connection. Otherwise, a user may choose to access the test environment via a VPN for free to test system functionality. For example, of the Exchange's thirty-seven Members¹³ and one non-Member that provide connectivity to the Exchange, ten Members and non-Members currently use a VPN to access the Exchange's testing systems environment instead of the other two currently available options, *i.e.*, a dedicated cross connection or their existing 1Gb or 10Gb ULL connection to the production environment. Some Members and non-Members also choose not to access the testing systems environment at all.

Lastly, supporting a proposed non-transaction fee change by arguing the availability of reasonable substitutes is not novel. Commission Staff has published for immediate effectiveness filings regarding non-transaction fees by exchanges who argued that the fees were consistent with the Exchange Act because of reasonable substitutes were available as provided for in the Commission Staff Guidance.¹⁴

Fee is Constrained by Competition and the Availability of Free VPN Access

If the Exchange prices the fee for dedicated cross connection access to the testing systems environment too high, Members and non-Members may choose not to subscribe and continue to perform the same testing functions via VPN internet access for no fee if they do not find the fee for accessing the testing systems environment via a dedicated cross connection to be of value. Again, the Exchange notes that accessing the testing systems environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the

test environment. The Exchange also has Members and non-Members that do not utilize the testing systems environment at all.

The Exchange operates in a highly competitive environment in which 18 U.S. registered equity options exchanges compete for market share. Based on publicly available information for the month of October 2024, no single options exchange had more than approximately 12–13% of the equity options market share and the Exchange represented only approximately 4.48% of the market share of equity options for that month.¹⁵ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁶ The proposed fee for optional access via a dedicated cross connection to the test environment is the result of the competitive environment of the U.S. options industry.

Exchanges compete for order flow by providing testing opportunities and robust testing environments. Services like a testing environment provide Members and non-Members with the opportunity to test Exchange functionality prior to sending real order flow to be executed in the Exchange's production environment. As mentioned above, numerous exchanges provide testing environments to market participants to test functionality and gain comfort with their exchange offering.¹⁷ This is intended to attract

market share by offering a risk free way to gain comfort that their orders would be handled within the Exchange's production environment as expected. Exchanges seek to further encourage market participants to utilize their testing environments by providing multiple methods to connect. Some are provided for free while others and require a fee. Providing multiple methods to connect to a test environment provides market participants a choice on how to engage with the testing environment and a choice regarding the access method that best meets their business and operational needs.

If the Exchange proposed a fee that Members and non-Members viewed as excessively high, then the proposed fee would simply serve to reduce demand for access via a dedicated cross connection to the test environment, which as noted, is entirely optional as the Exchange will continue to provide free access to the test environment through VPN through the internet for site-to-site access. This could, in turn, reduce the attractiveness of the Exchange's live trading production environment because Members and non-Members may be unwilling to test functionality prior to entering live orders. Again, other options exchanges currently offer, or are able to introduce at their own cost, their own comparable testing environments with lower prices to better compete with the Exchange's offering and several competing exchanges already provide a similar service.

Selling different products and services, such as proposed herein, is a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting market participants to purchase the dedicated cross connection to the test environment proposed herein, the Exchange may earn revenue and further enhance market participants' interactions on the Exchange, which would increase value of its other products and services to all market participants. If the market deems the proposed fee to be too high, Members and non-Members can choose not to use or discontinue their use of dedicated cross connection to the test environment and perform the same testing functions via the VPN internet access for free. The Exchange, therefore, believes that the

provide Members and non-Members access to the Exchange's certification environment to test proprietary systems and applications . . . The certification environment facilitates testing using replicas of the Exchange's production environment process configurations which provide for a robust and realistic testing experience . . .”).

¹³ See the Exchange's Membership Directory available at https://www.miaxglobal.com/miax_emerald_options_exchange_members.pdf.

¹⁴ See, e.g., Securities Exchange Act Release Nos. 101096 (September 18, 2024), 89 FR 77913 (September 24, 2024) (SR-ISE-2024-46); 98974 (November 16, 2023), 88 FR 81468 (November 22, 2023) (SR-NYSEARCA-2023-78); 87795 (December 18, 2019), 84 FR 71043 (December 26, 2019) (SR-NYSEArca-2019-88); and 90409 (November 12, 2020), 85 FR 73522 (November 18, 2020) (SR-NYSEArca-2020-95).

¹⁵ See the “Market Share” section of the Exchange's website, available at <https://www.miaxglobal.com/> (last visited November 18, 2024).

¹⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁷ The Exchange notes that other exchange families offer a similar dedicated connection to their testing environment for their members and non-members. See, e.g., Nasdaq Options Test Facility (NTF) Abstract, Version 1.4.4 (March 2024), available at https://www.nasdaq.com/Nasdaq_Test_Facility_NTF_Guide (last visited July 16, 2024) (“. . . the Nasdaq Test Facility . . . where market participants can test their trading applications with the INET trading system. The NTF environment allows members to test sending and executing quotes and orders offered by our six options exchanges . . .”); see also Securities Exchange Act Release No. 100442 (June 27, 2024), 89 FR 55296 (July 3, 2024) (SR-ChoeBZX-2024-058) (“. . . the Exchange also offers corresponding ports which

proposed fee for dedicated cross connection to the test environment reflects the competitive environment of U.S. options exchanges and would be properly assessed to Members and non-Members that subscribe.

The Proposed Fee Is Reasonable Because it Is Similar to or Lower Than Like Fees Charged by Other Exchanges

The Exchange believes the proposed fees are reasonable as the proposed fees are similar to or lower than fees charged by competing exchanges for similar services. For example, The Nasdaq Stock Market, LLC assesses a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port plus a one-time installation fee of \$1,000 per hand-off.¹⁸ The Exchange's proposed fee is, therefore, lower because it does not charge a separate installation fee. Cboe BZX Exchange, Inc. ("Cboe BZX") Options assesses a lower fee of \$250 per month for each certification logical port, which only provides access to the Cboe BZX testing environment, and not to the testing environment of any of Cboe BZX's affiliates.¹⁹ The fee to access the Cboe BZX testing environment and the testing environment of each of its three affiliated options exchange becomes incrementally higher with each Cboe BZX affiliate charging a \$250 monthly fee to access each testing environment, totaling as much as \$1,000.00 per month.²⁰ Accordingly, the Exchange

believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act.

The Proposed Fee Is Not Unfairly Discriminatory

The Exchange also believes the proposed fee is equitable and not unfairly discriminatory as the fee would apply equally to all Members and non-Members who choose to subscribe. It is a business and operational decision of each Member or non-Member that chooses to subscribe. The Exchange's proposed fee would not differentiate between Members and non-Members or connectivity types and is set at a modest level that would allow any interested Member and non-Member to subscribe based on their business and operational needs.

The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act²¹ in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The Exchange does not believe that the proposed fee is unfairly discriminatory to subscribers to the test environment via a dedicated cross connection because, unlike the live trading environment where the capacity of connectivity to the Exchange may confer a competitive advantage to a market participant and therefore price differentiation is appropriate for the benefit conferred, there is no such benefit conferred in the testing systems environment.

The Exchange does not believe that the proposed fee is unfairly discriminatory among subscribers to the test environment because all Members and non-Members that subscribe to the service will be assessed the same fee. Because the proposed fee does not discriminate between 1Gb and 10Gb cross connection options, Members and non-Members are able to subscribe to the test environment without regard to the cost of their capacity election. The Exchange believes that not discriminating on this basis will encourage participants to connect to the test environment in the same manner as they do to the live trading environment,

and thereby help the test environment more closely mirror the live trading environment. Providing a more useful and accurate test environment will serve to improve live trading on the Exchange and the national market system by permitting Members and non-Members the ability to accurately test changes prior to implementing them in the live trading environment, thereby reducing the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

The Proposed Fee Is Equitable

The Exchange believes that the proposed fee is equitably allocated because all Members and non-Members that choose to connect to the test environment will be assessed a uniform fee for those services. The Exchange believes that offering subscribers the option to subscribe to either a 1Gb or 10Gb dedicated cross connection for the same fee is an equitable allocation of fees because, unlike the live trading environment, there is no competitive advantage to possessing a higher capacity connection in the test environment. The test environment is designed to closely mirror the live trading environment for Members and non-Members, including matching the capacity of the live trading environment connection of each Member and non-Member. In the absence of any competitive advantage, charging a uniform fee for both a 1Gb or 10Gb dedicated cross connection is an equitable allocation of fees. The Exchange believes that charging a uniform fee rather than mirroring the fees for the live trading environment will encourage Members and non-Members to subscribe to the test environment and further encourage those that subscribe to use the same hardware as is used by them for connectivity to the live trading environment.

* * * * *

Finally, and as noted above, the Exchange's test environment provides a robust and realistic testing experience using a replica of the Exchange's production environment process configurations. This environment enables market participants to test upcoming Exchange software and code releases, product enhancements, as well as test firm software prior to implementation in the production environment. Further, the test environment allows unlimited firm-level testing of order types, order entry, order management, order throughput, acknowledgements, risk settings, mass

¹⁸ See, e.g., Nasdaq, Options 7: Pricing Schedule, Section 13 Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%20Options%207>. Nasdaq's affiliates, like Nasdaq PHLX LLC ("PHLX"), also charge the same fee. See e.g., PHLX Options 7: Pricing Schedule, Section 9. Other Member Fees, E. Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207> (assessing a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port and a one-time installation fee of \$1,000 per hand-off). See also Securities Exchange Act Release No. 76259 (October 26, 2015), 80 FR 66947 (October 30, 2015) (SR-NASDAQ-2015-117) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Options Testing Facility). Like the Exchange's testing environment, a single connection to Nasdaq's test environment provides access to the other test environments of its affiliate options markets, PHLX and Nasdaq BX, Inc.

¹⁹ See also Cboe BZX Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/bzx/. See, e.g., Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/.

²⁰ See also Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/; Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees, Certification Logical Ports, available at Cboe_FeeSchedule.pdf; and Cboe

C2 Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/c2/.

²¹ 15 U.S.C. 78f(b)(5).

cancellations, and purge requests. By providing firms the ability to test all of these features in the test environment prior to implementing them in the live trading environment, the Exchange believes this will reduce the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange made connectivity access to the test environment available to keep pace with technological changes in the industry and evolving customer needs and demands, and believes the product will contribute to robust competition among national securities exchanges. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange believes the proposed fee would not cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable testing environments for free or lower prices, which several competing exchanges already provide.²² The Exchange operates in a highly competitive environment, and its ability to price access to the test environment is constrained by the optional nature of accessing the test environment via a dedicated cross connect. Providing access to the test environment via dedicated cross connection is provided purely for convenience, in response to Member demand, and, again, would be entirely optional. The Exchange notes that use of accessing the test environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. Members who do not prefer the to access the test environment via a dedicated cross connection and pay the applicable fee will be able to continue to perform the same testing functions when accessing the test environment via the existing VPN internet access for free. The Exchange must consider this in its pricing discipline in order to attract subscribers. The Exchange believes that if it were to propose a fee that is excessively high, it would simply serve to reduce demand for the Exchange's product, which as

discussed, Members and non-Members are under no obligation to utilize.

The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed fee applies uniformly to any purchaser in that the Exchange does not differentiate between subscribers that wish to access the testing systems environment via a dedicated cross connect via either a 1Gb or 10Gb connection. The proposed fee is set at a modest level that would allow any interested market participant to purchase access to the test environment based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,²³ and Rule 19b-4(f)(2)²⁴ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-EMERALD-2024-27 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-EMERALD-2024-27. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-EMERALD-2024-27 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29924 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101902; File No. SR-PEARL-2024-57]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAx Pearl Equities Fee Schedule To Make a Non-Substantive Change

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

²⁵ 17 CFR 200.30-3(a)(12).

²² See *supra* note 18.

(“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 4, 2024, MIAX PEARL, LLC (“MIAX Pearl” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a “non-controversial” rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b–4(f)(6) thereunder,⁴ which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fee schedule (the “Fee Schedule”) applicable to MIAX Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange’s website at <https://www.miaxglobal.com/markets/us-equities/pearl-equities/rule-filings>, at MIAX Pearl’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the table in Section (1)(a) of the Fee Schedule, which provides the Exchange’s standard rates for adding or removing liquidity in all securities, to make a non-substantive, clarifying change.

Background

Currently, the Standard Rates table in Section (1)(a) of the Fee Schedule provides the standard rates for executions of orders in all securities that add or remove liquidity from the Exchange as well as the corresponding liquidity indicator code applicable to such transaction. In particular, the Exchange provides a standard rebate of (\$0.0021)⁵ per share for executions of orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes.⁶ The Exchange provides a standard rebate of 0.15% of the total dollar value of the transaction for executions of orders in securities priced below \$1.00 per share that add displayed liquidity to the Exchange across all tapes.⁷ The Exchange provides in the Standard Rates table in Section (1)(a) of the Fee Schedule that the liquidity indicator codes that apply to the above-described transactions are “AA” (Adds Liquidity, Displayed Order (Tape A)); “AB” (Adds Liquidity, Displayed Order (Tape B)); “AC” (Adds Liquidity, Displayed Order (Tape C)); and “AR” (Retail Order, Adds Liquidity, Displayed Order (All Tapes)).⁸ Effective beginning July 1, 2021, the Exchange established liquidity indicator code “AR,” which provides a higher standard rebate for executions of Retail Orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes. This is the “standard rate” of (\$0.0037) per share for such Retail Order transactions.⁹

Proposal

The Exchange proposes to amend the Standard Rates table in Section (1)(a) of the Fee Schedule to add a new column that will describe the rebate applicable to executions of Retail Orders in all securities that add displayed liquidity to the Exchange across all tapes. The Exchange proposes to delete liquidity indicator code “AR” from the first column of rebates titled “Adding Liquidity Displayed Order” and create a new column titled “Adding Liquidity

Displayed Retail Order,” which will apply only to liquidity indicator code “AR”. Since liquidity indicator code “AR” is currently in the first column of the Standard Rates table, this suggests incorrectly that the rebate for executions of Retail Orders in securities at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes is (\$0.0021) per share; however, since July 2021, the Exchange has provided market participants the correct rebate of (\$0.0037) per share for such transactions in Retail Orders. This proposal will eliminate the erroneous text regarding the rebate applicable to executions of Retail Orders in securities at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes.

The proposed new column will describe the current standard rates applicable to executions of Retail Orders in all securities that add displayed liquidity to the Exchange across all tapes. In particular, the first row of the new column will show the standard rebate of (\$0.0037) per share for executions Retail Orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes. The second row will show the standard rebate of 0.15% of the total dollar value of the transaction for executions Retail Orders in securities priced below \$1.00 per share that add displayed liquidity to the Exchange across all tapes. Finally, the third row will show the applicable liquidity indicator code of “AR.” The Exchange does not propose to amend any rebates or fees. The purpose of the proposed change is to provide greater clarity within the Fee Schedule.

2. Statutory Basis

The Exchange believes that the proposed change is consistent with Section 6(b) of the Act¹⁰ in general, and further the objectives of Section 6(b)(5) of the Act,¹¹ in particular, in that it is designed to promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest.

The Exchange believes the proposed changes promote just and equitable principles of trade and remove impediments to and perfects the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b–4(f)(6).

⁵ Rebates are indicated by parentheses. See the General Notes section of the Fee Schedule.

⁶ See Fee Schedule, Section (1)(a).

⁷ *Id.*

⁸ A “Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 2626(a)(2).

⁹ See Securities Exchange Act Release No. 92452 (July 20, 2021), 86 FR 40092 (July 26, 2021) (SR–PEARL–2021–34).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system because the proposed changes will provide greater clarity to Equity Members¹² and the public regarding the Exchange's Fee Schedule. This is because the Fee Schedule, as currently stated, may be unclear as to which rebate market participants will receive for executions of Retail Orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange, which is (\$0.0037) per share and not (\$0.0021) per share.¹³ The proposed changes will provide greater clarity within the Fee Schedule by eliminating what could be read as an inapplicable rebate of (\$0.0021) per share for executions of Retail Orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange since the Exchange established the rebate of (\$0.0037) per share for such transactions in Retail Orders in July 2021 and has provided the correct rebate since that time.

With the addition of the new column, the Exchange will provide greater clarity regarding the standard rates in the Fee Schedule. The Exchange believes this proposed change will make it easier for Equity Members to interpret the Exchange's Fee Schedule, render the Fee Schedule more accurate and reduce potential investor confusion, which removes impediments to and perfects the mechanism of a free and open market and a national market system. The Exchange does not propose to amend any rebates or fees. It is in the public interest for the Exchange's Fee Schedule to be clear and consistent so as to eliminate the potential for confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes the proposed change will not impose any burden on intra-market competition as there is no change to the Exchange's rebates or fees and because the Exchange's Fee Schedule will continue to apply equally to all market participants. The proposal will have no impact on competition as it is not designed to address any competitive issue but rather is designed to provide clarity regarding the Exchange's rebates for certain types of

transactions. The proposal will not impose any burden on competition; rather it will make it easier for Equity Members to interpret the Exchange's Fee Schedule, which may reduce potential investor confusion.

The Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing greater clarity regarding the Exchange's standard rate for executions of Retail Orders in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange across all tapes. The Exchange does not believe that the proposal will harm another exchange's ability to compete. Accordingly, the Exchange does not believe the proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and Rule 19b-4(f)(6)¹⁵ thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁶ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁷ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁶ 17 CFR 240.19b-4(f)(6).

¹⁷ 17 CFR 240.19b-4(f)(6)(iii).

Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that the proposed rule change does not significantly affect the protection of investors or the public interest because the proposed addition of a new column to show the standard rates for executions of Retail Orders in all securities that add displayed liquidity to the Exchange across all tapes is a non-substantive, clarifying edit that does not propose to amend any current fees or rebates. Further, the Exchange states that is in the public interest for the Fee Schedule to be clear and consistent. The proposed rule change does not raise any new or novel issues, and is intended to reduce the potential for confusion within the Exchange's Fee Schedule. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.¹⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2024-57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

¹⁸ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² The term "Equity Member" is a Member authorized by the Exchange to transact business on MIAx Pearl Equities. See Exchange Rule 1901.

¹³ See Fee Schedule, Section (1)(a).

All submissions should refer to file number SR-PEARL-2024-57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2024-57 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29928 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101890; File No. SR-DTC-2023-801]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Amendment No. 1 to Advance Notice To Raise Prefunded Liquidity Resources Through the Periodic Issuance and Private Placement of Senior Notes

December 12, 2024.

On August 15, 2023, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission

("Commission") advance notice SR-DTC-2023-801 ("Initial Filing") pursuant Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")¹ and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Act").² The Initial Filing was published for comment in the **Federal Register** on August 31, 2023.³ The Commission has received comment on the Initial Filing.⁴ Notice is hereby given that on December 3, 2024, DTC filed with the Commission Amendment No. 1 to the Initial Filing as described in Items I, II and III below, which Items have been prepared by the clearing agency. This Amendment No. 1 supersedes and replaces the Initial Filing in its entirety. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

Pursuant to the Clearing Supervision Act⁵ and Rule 19b-4(n)(1)(i) under the Act,⁶ DTC is filing this Amendment No. 1 to advance notice SR-DTC-2023-801⁷ in connection with a proposal to raise prefunded liquidity resources through the periodic issuance and private placement of senior notes ("Debt Issuance"). The proceeds from the Debt Issuance would supplement DTC's existing default liquidity risk management resources, as described in greater detail below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments on the advance notice have not been solicited or received. DTC will notify the Commission of any written comments received by DTC. If any written comments are received by DTC, they will be publicly filed as an Exhibit 2 to this filing.

Persons submitting comments are cautioned that, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at www.sec.gov/regulatory-actions/how-to-submit-comments. General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at tradingandmarkets@sec.gov or 202-551-5777.

DTC reserves the right not to respond to any comments received.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Proposed Change

DTC is proposing to raise prefunded liquidity through the periodic issuance and private placement of senior notes to qualified institutional investors in an aggregate amount not to exceed \$3 billion, as described in greater detail below. The proceeds of the Debt Issuance would supplement DTC's qualifying liquidity resources, which are described in the Clearing Agency Liquidity Risk Management Framework ("Framework")⁸ and include cash deposits to its Participants Fund and cash that would be obtained by drawing upon DTC's committed 364-day credit facility with a consortium of banks ("Line of Credit").⁹

¹ 12 U.S.C. 5465(e)(1).

² 17 CFR 240.19b-4(n)(1)(i).

³ Securities Exchange Act Release No. 98227 (Aug. 25, 2023), 88 FR 60251 (Aug. 31, 2023).

⁴ Comments on the Initial Filing are available at <https://www.sec.gov/comments/sr-dtc-2023-801/srdtc2023801.htm>.

⁵ 12 U.S.C. 5465(e)(1).

⁶ 17 CFR 240.19b-4(n)(1)(i).

⁷ See Securities Exchange Act Release No. 98227 (Aug. 25, 2023), 88 FR 60251 (Aug. 31, 2023) (SR-DTC-2023-801).

⁸ See Securities Exchange Act Release Nos. 82377 (Dec. 21, 2017), 82 FR 61617 (Dec. 28, 2017) (SR-DTC-2017-004; SR-FICC-2017-008; SR-NSCC-2017-005). Following the completion of the initial issuance and private placement of senior notes, the Clearing Agencies would file a proposed rule change to amend the Framework to include the proceeds of the Debt Issuance as an additional qualifying liquidity resource of DTC.

⁹ Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC ("Rules") available at www.dtcc.com/-/

Continued

¹⁹ 17 CFR 200.30-3(a)(12).

More precisely, while the specific terms of any future Debt Issuance would depend on a number of factors, as described in greater detail below, DTC is requesting the authority to use the proceeds of any Debt Issuance as default liquidity.¹⁰

DTC, along with its affiliates, National Securities Clearing Corporation ("NSCC") and Fixed Income Clearing Corporation ("FICC," and, together with NSCC and DTC, the "Clearing Agencies"), maintain the Framework which sets forth the manner in which DTC measures, monitors and manages the liquidity risks that arise in or are borne by it.¹¹ DTC's liquidity risk management strategy and tools are designed to maintain sufficient available liquid resources to complete system-wide settlement on each business day, with a high degree of confidence and notwithstanding the failure to settle of the Participant, or affiliated family of Participants, with the largest settlement obligation.¹²

The proposed Debt Issuance would provide DTC with an additional source of default liquidity, which would allow it to (a) diversify its sources of default liquidity, including the concentration of liquidity providers, and (b) mitigate risks to DTC that it is unable to secure default liquidity resources in an amount necessary to meet its liquidity needs. DTC utilizes certain rules-based tools, including the Net Debit Cap and the Collateral Monitor, to manage the liquidity risks its Participants' present to it.¹³ These two controls work together to protect the DTC settlement system in the event of a Participant default. The Collateral Monitor requires net debit settlement obligations, as they accrue intraday, to be fully collateralized and the Net Debit Cap limits the amount of

any Participant's net debit settlement obligation to an amount that can be satisfied with DTC's default liquidity resources.

As stated above, DTC currently maintains two key default liquidity resources to draw upon in the event of a Participant default: cash deposits to its Participants Fund and cash that would be obtained by drawing upon the Line of Credit.¹⁴ By allowing DTC to diversify its sources of default liquidity, the proposal would allow DTC flexibility in the number of resources it has at its disposal, as well as which resources it accesses and at what levels when it has a liquidity need. Diversification mitigates the risk, for example, that DTC is unable to renew its Line of Credit, which is renewed annually and dependent on continued lender interest, at the targeted amount by providing DTC with an alternative and supplemental source of default liquidity. Additionally, diversification of DTC's sources of default liquidity would provide DTC with the flexibility needed to properly manage anticipated changes to its liquidity needs, thereby allowing DTC to optimize its liquidity resources in line with its liquidity needs. Lastly, allowing DTC to mitigate the risk that it is unable to secure default liquidity resources in an amount necessary to meet its liquidity needs, supports DTC's liquidity risk management strategy. Therefore, providing additional certainty, stability, and safety to DTC, its Participants, and the U.S. markets that it serves.

Terms of the Debt Issuance. The timing of a Debt Issuance would depend on a number of factors, including, for example, market conditions for the issuance of senior notes and the timing of any changes to DTC's liquidity needs. However, when it determines to do so it would engage a trustee and underwriting banks to issue the senior notes to qualified institutional investors through a private placement and offering in reliance on an exemption from registration under Section 4(a)(2) of the Securities Act of 1933.¹⁵ DTC would be party to certain transaction documents in connection with each issuance and private placement, including an indenture with the trustee and purchase agreements. The purchase

agreements would each be based on the standard form of dealer agreement for similar debt issuances, which is published by the Securities Industry and Financial Markets Association.

While the anticipated material terms and conditions of a future Debt Issuance are summarized below, the actual terms of a future Debt Issuance would depend on a number of factors, including DTC's liquidity needs and the debt market conditions at the time of issuance. Therefore, with the exception of the authorized aggregate amount that DTC may issue of \$3 billion, the anticipated terms summarized below are reasonable estimates, but may not reflect the actual terms of a future Debt Issuance.

DTC is proposing to issue up to an aggregate amount of \$3 billion in senior notes, as DTC deems reasonable, or as necessitated by liquidity needs. While, at the time of this filing, DTC would not need to issue up to the aggregate amount of \$3 billion based on its current liquidity requirements, DTC believes that is advisable to authorize up to this aggregate amount in order to help manage its potential future liquidity needs and the potential risk that it is not able to obtain the requisite amounts from its other sources of default liquidity.

The senior notes would be represented by unsecured, unsubordinated and non-convertible medium-term and long-term global notes held in the name of DTC (as the central securities depository) or its nominee, Cede & Co. The notes would be issued and transferred only through the book-entry system of DTC. The senior notes would be interest bearing at either fixed or floating interest rates that are set at market rates customary for such type of debt and reflective of the creditworthiness of DTC.

DTC expects the average maturity of the senior notes issued under the Debt Issuance would be no shorter than approximately two years and no longer than approximately ten years, which are the typical lengths of medium-term and long-term debt. DTC does not believe maturities over ten years would be suitable as debt with longer maturities are generally more expensive to issue and may present higher risks related to interest rates. DTC would time each debt issuance and stagger maturity dates of each issuance in order to ladder the maturities. DTC would have the ability to make use of optional features to redeem the issued senior notes, in whole or in part, at any time prior to the maturity date of notes. More specifically, DTC would have the option to prepay any amount of principal owed on the issued senior notes before such

[media/Files/Downloads/legal/rules/dtc_rules.pdf](#). See also Securities Exchange Act Release No. 80605 (May 5, 2017), 82 FR 21850 (May 10, 2017) (SR-DTC-2017-802; SR-NSCC-2017-802).

¹⁰ In addition to default liquidity, DTC may use the proceeds of a Debt Issuance to prepay a prior Debt Issuance before maturity but would not use the proceeds for any other purpose. DTC filed as a confidential exhibit to this filing a sample term sheet that may be indicative of the possible terms of any future Debt Issuance.

¹¹ *Supra* note 6. Each of the Clearing Agencies is a wholly owned subsidiary of The Depository Trust & Clearing Corporation, which operates on a shared service model with respect to the Clearing Agencies. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides relevant services to the Clearing Agencies.

¹² *Id.*

¹³ A description of the calculation of each Participant's Net Debit Cap and Collateral Monitor is available in the Settlement Service Guide. See DTC Settlement Service Guide, available at www.dtcc.com/-/media/Files/Downloads/legal/service-guides/Settlement.pdf.

¹⁴ Under DTC Rule 10 (Discretionary Termination) and DTC Rule 11 (Mandatory Termination), a Participant will be in default if it fails to pay any amount due to DTC within specified timeframes, including the failure to fund a settlement obligation, to pay required deposits to the Participants Fund or to pay adequate assurances to DTC within the required timeframes. See *supra* note 7.

¹⁵ 15 U.S.C. 77d(a)(2).

payment is due, *i.e.*, before the maturity date.

DTC would hold the proceeds from the Debt Issuance in either its cash deposit account at the Federal Reserve Bank of New York (“FRBNY”) or in accounts at other creditworthy financial institutions in accordance with the Clearing Agency Investment Policy.¹⁶ These amounts would be available to draw to complete settlement as needed.

DTC Liquidity Risk Management. DTC’s liquidity needs for settlement are driven by protecting DTC against the possibility that a Participant may fail to pay its settlement obligations on a business day. The tools available to DTC under its Rules (*e.g.*, the Participants Fund, Net Debit Cap and Collateral Monitor) allow it to regularly test the sufficiency of liquid resources on an intraday and end-of-day basis and adjust to stressed circumstances during a settlement day to protect itself and Participants against liquidity exposure under normal and stressed market conditions.¹⁷ DTC calculates its liquidity needs per Participant (at a legal entity level) and further aggregates these amounts at a family level (that is, including all affiliated Participants, based on the assumption that all such affiliates may fail simultaneously). In this regard, DTC monitors settlement flows and net-debit obligations on a daily basis, determines the appropriateness of each Participant’s Net Debit Cap and monitors net settlement activity.

As noted above, the Framework describes DTC’s liquidity risk management strategy, which is designed to maintain sufficient liquid resources to complete system-wide settlement on each business day, with a high degree of confidence and notwithstanding the failure to settle of the Participant, or affiliated family of Participants, with the largest settlement obligation.¹⁸ The Framework also describes how DTC meets its requirement to hold qualifying liquid resources, as such term is defined

in Rule 17ad–22(a)(14) under the Act,¹⁹ sufficient to meet its minimum liquidity resource requirement in each relevant currency for which it has payment obligations owed to its Participants. DTC considers each of its existing default liquidity resources to be qualifying liquid resources, and the proceeds from the Debt Issuance would also be default liquidity that is considered a qualifying liquid resource.

The proceeds from the Debt Issuance would provide DTC with additional, prefunded, and readily available qualifying liquid resources to be used to complete system-wide settlement if a Participant defaults. For DTC, the Participants Fund, Net Debit Cap and Collateral Monitor tools work together to limit potential liquidity requirements in default scenarios both on an intra-day and end-of-day basis. So, while DTC’s current available liquidity resources are sufficient to satisfy the single-largest family default under stressed but plausible conditions, the Debt Issuance would allow DTC to diversify its sources of default liquidity and mitigate risks to DTC that it is unable to secure default liquidity resources in an amount necessary to meet its liquidity needs. More specifically, the proposal would provide DTC with the flexibility to reduce its reliance on the Line of Credit, which is renewed annually and dependent on continued lender interest and meet any increased liquidity needs it may face in the future. As a source of prefunded, default liquidity, the Debt Issuance would provide additional certainty, stability, and safety to DTC, its Participants, and the U.S. markets that it serves.

By diversifying DTC’s sources of qualifying liquid resources, the Debt Issuance could also mitigate concentration risks related to its liquidity providers. More specifically, while DTC would not limit the potential qualified institutional investors that purchase senior notes and therefore, is not able to ensure that the Debt Issuance would reduce concentration risk, the types of entities who typically invest in senior notes (for example, insurance companies, asset managers and pension funds) are generally not Participants of DTC or lenders under the Line of Credit. Therefore, the prospective investors in the senior notes are not expected to be the same firms that currently provide any material amount of default liquidity resources to DTC either through the Line of Credit, or as DTC Participants. In this way, the proposed Debt Issuance would reduce the concentration risk related to its liquidity providers, by

reducing the likelihood that an impairment of a liquidity provider to perform under one qualifying liquid resource would impact DTC’s ability to fully access its other qualifying liquid resources.

Anticipated Effect on and Management of Risk

In connection with its role as a central securities depository (“CSD”), DTC provides for both the settlement of book-entry transfer and pledge of interests in eligible deposited securities and net funds settlement. A financially strong and well-managed, well-designed CSD, with appropriate risk management arrangements, can reduce the risk faced by participants, contributing to the goal of systemic financial stability. In order to sufficiently perform this role, it is critical that DTC has access to adequate liquidity resources to enable it to complete system-wide settlement every business day, including following a Participant default. DTC believes that the overall impact of the proposed Debt Issuance on risks presented by DTC would be to reduce the liquidity risks associated with DTC’s net settlement obligations by providing it with an additional source of liquidity to complete system-wide settlement in the event of a Participant default. DTC further believes that a reduction in its liquidity risk would reduce systemic risk and would have a positive impact on the safety and soundness of the wider financial system.

While the proposed Debt Issuance, like any liquidity resource, would involve certain risks, most of these risks are standard in any debt issuance. One risk associated with the proposed Debt Issuance would be the risk that DTC does not have sufficient funds to repay issued senior notes when the notes mature. DTC believes that this risk is extremely remote, as the proceeds of the Debt Issuance would be used only in the event of a Participant default, and DTC would replenish that cash, as it would replenish any of its liquidity resources that are used to facilitate settlement in the event of a Participant default, with the proceeds of the close out of that defaulted Participant’s portfolio. This notwithstanding, in the event that proceeds from the close out are insufficient to fully repay a liquidity borrowing, then DTC would look to its loss waterfall to repay any outstanding liquidity borrowings.²⁰ DTC would further mitigate this risk through the timing of each debt issuance and by staggering the maturity dates of the

¹⁶ See Securities Exchange Act Release Nos. 79528 (Dec. 12, 2016), 81 FR 91232 (Dec. 16, 2016) (SR–DTC–2016–007, SR–FICC–2016–005, SR–NSCC–2016–003); 84949 (Dec. 21, 2018), 83 FR 67779 (Dec. 31, 2018) (SR–DTC–2018–012, SR–FICC–2018–014, SR–NSCC–2018–013). Following the issuance of a Notice of No Objection by the Commission of this proposal, the Clearing Agencies would file a proposed rule change to amend the Clearing Agency Investment Policy to include the proceeds as default liquidity funds, within the definition of “Investable Funds,” as such term is defined therein, and provide that such amounts would be held in bank deposits at eligible commercial banks or at DTC’s cash deposit account at the FRBNY.

¹⁷ *Supra* note 6.

¹⁸ *Supra* note 7.

¹⁹ 17 CFR 240.17ad–22(a)(14).

²⁰ See Rule 4 (Participants Fund and Participants Investment) of the Rules, *supra* note 7.

issued senior notes in a way that would provide DTC with time to complete the close out of a defaulted Participant's portfolio. A second risk is that DTC may be unable to issue new senior notes as issued notes mature due to, for example, stressed markets at the time the issued debt matures. This risk is mitigated by the fact that DTC maintains a number of different default liquidity resources, described above, and would not depend on the Debt Issuance as its sole source of liquidity.

DTC may be exposed to interest rate risk, which is the risk that a change in interest rates could cause an increase to the net cost of carry of the Debt Issuance.²¹ DTC would mitigate this risk by issuing senior notes at different maturities and at both fixed interest rates and floating interest rates. The interest rates for the senior notes issued at floating interest rates would generally correlate with the rates on investments of those proceeds and would be expected to result in a largely stable net spread between the borrowing interest rate and the investment interest rate, mitigating this risk. For the senior notes issued with a fixed interest rate, DTC would consider interest rate swaps as a method to mitigate interest rate risk, depending on market environment at that time.

DTC could also face a related financial risk that the expense of a Debt Issuance exceeds DTC's income and may have a negative impact on DTC's financial health or its creditworthiness. DTC would mitigate this risk by evaluating the expected net cost of carry (discussed above) of a Debt Issuance prior to issuing any debt, and if the financing costs for the issuance of senior notes increase, such that it is not financially advisable to issue additional senior notes, then DTC may determine to use its alternative liquidity resources to meet its liquidity needs during those market conditions.

DTC believes that the significant systemic risk mitigation benefits of providing DTC with additional, prefunded liquidity resources outweigh these risks.

Consistency With Clearing Supervision Act

DTC believes that that proposal would be consistent with Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing

Supervision Act"), specifically with the risk management objectives and principles of Section 802(b)(1), and with certain of the risk management standards adopted by the Commission pursuant to Section 805(a)(2), for the reasons described below.²²

(i) Consistency With Section 805(b)(1) of the Clearing Supervision Act

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, its stated purpose is instructive: to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.²³

DTC believes the proposal is consistent with Section 805(b)(1) of the Clearing Supervision Act because it would support the mitigation of systemic risk in the financial system and promote financial stability in the event of a Participant default by strengthening DTC's liquidity. The proposed Debt Issuance is designed to reduce DTC's liquidity risks by providing it with an additional source of liquidity to complete system-wide settlement in the event of a Participant default. By supplementing DTC's existing default liquidity resources with prefunded liquidity, the proposal would contribute to DTC's goal of assuring that DTC has adequate liquidity resources to meet its settlement obligations notwithstanding the default of any of its Participants.

In its critical role as a CSD, DTC provides for both the settlement of book-entry transfer and pledge of interests in eligible deposited securities and net funds settlement. In order to sufficiently perform this role, it is critical that DTC has access to adequate liquidity resources to enable it to complete system-wide settlement every business day, including following a Participant default. Therefore, a reduction in DTC's liquidity risk would reduce systemic risk and would have a positive impact on the safety and soundness of the wider financial system.

As a result, DTC believes the proposed Debt Issuance would be consistent with the objectives and principles of Section 805(b)(1) of the Clearing Supervision Act, which specify the promotion of robust risk management, promotion of safety and soundness, reduction of systemic risks

and support of the stability of the broader financial system by, among other things, strengthening the liquidity of systemically important financial market utilities, such as DTC.²⁴

(ii) Consistency With Rule 17ad-22(e)(7)(i) and (ii) Under the Act

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like DTC, and financial institutions engaged in designated activities for which the Commission is the supervisory agency or the appropriate financial regulator.²⁵ The Commission has accordingly adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act²⁶ and Section 17A of the Act ("Covered Clearing Agency Standards").²⁷ The Covered Clearing Agency Standards require covered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.²⁸

DTC believes that the proposed Debt Issuance is consistent with Rule 17ad-22(e)(7)(i) and (ii) of the Covered Clearing Agency Standards for the reasons described below.²⁹

Rule 17ad-22(e)(7)(i) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain sufficient liquid resources at the minimum in all relevant currencies to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios that includes, but is not limited to, the default of the participant family that would generate the largest aggregate payment obligation for the covered clearing agency in extreme but plausible market conditions.³⁰ Rule 17ad-22(e)(7)(ii) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to hold qualifying liquid resources sufficient to meet the minimum liquidity resource requirement under Rule 17ad-22(e)(7)(i)

²⁴ 12 U.S.C. 5464(b)(1).

²⁵ 12 U.S.C. 5464(a)(2).

²⁶ *Id.*

²⁷ 17 CFR 240.17ad-22(e).

²⁸ *Id.*

²⁹ 17 CFR 240.17ad-22(e)(7)(i), (ii).

³⁰ 17 CFR 240.17ad-22(e)(7)(i).

²¹ The "net cost of carry" generally refers to the difference between the interest earned on the invested proceeds of an issuance and the interest rate paid on that issuance.

²² 12 U.S.C. 5464(a)(2) and (b)(1).

²³ 12 U.S.C. 5464(b)(1).

in each relevant currency for which DTC has payment obligations owed to its Participants.³¹

As described above, the proposed Debt Issuance would provide DTC with an additional resource of prefunded default liquidity, which it would use to complete system-wide settlement every business day, including following a Participant default. The proceeds of the Debt Issuance would be cash held by DTC at either its cash deposit account at the FRBNY or at a creditworthy commercial bank, pursuant to the Clearing Agency Investment Policy.³² Therefore, the proceeds of the Debt Issuance would be considered a qualifying liquid resource, as defined by Rule 17ad-22(a)(14).³³ As such, the proposed Debt Issuance would support DTC's ability to hold sufficient qualifying liquid resources to meet its minimum liquidity resource requirement under Rule 17ad-22(e)(7)(i) under the Act.³⁴

For these reasons, DTC believes the proposal would support DTC's compliance with Rule 17ad-22(e)(7)(i) and (ii) under the Act by providing it with an additional qualifying liquid resource.³⁵

III. Date of Effectiveness of the Advance Notice, and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does

not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules-regulations/self-regulatory-organization-rulemaking>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-DTC-2023-801 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.
- All submissions should refer to File Number SR-DTC-2023-801. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (www.dtcc.com/legal/sec-rule-filings).

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is

obscene or subject to copyright protection. All submissions should refer to File Number SR-DTC-2023-801 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29919 Filed 12-17-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101894; File No. SR-MIAX-2024-45]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Fees for Dedicated Cross Connection Access to the Testing Systems Environment

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 29, 2024, Miami International Securities Exchange, LLC ("MIAX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/all-options-exchanges/rule-filings>, at MIAX's principal office, and at the Commission's Public Reference Room.

³¹ 17 CFR 240.17ad-22(e)(7)(ii). For purposes of this Rule, "qualifying liquid resources" are defined in Rule 17ad-22(a)(14) as including, in part, cash held either at the central bank of issue or at creditworthy commercial banks. 17 CFR 240.17ad-22(a)(14).

³² *Supra* note 14.

³³ 17 CFR 240.17ad-22(a)(14).

³⁴ 17 CFR 240.17ad-22(e)(7)(i).

³⁵ 17 CFR 240.17ad-22(e)(7)(i), (ii).

³⁶ 17 CFR 200.30-3(a)(91).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection. The testing systems environment is a virtual trading system environment for Members³ and non-Members to test (i) upcoming Exchange software and code releases, (ii) product enhancements, and (iii) firm-developed software, prior to implementation in the Exchange's production (e.g., live trading) environment. Further, the testing systems environment allows unlimited testing of existing functionality, such as order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancellations, and purge requests. The testing systems environment is built to closely approximate the production environment to enable Members and non-Members the ability to test their systems and mimics the live trading environment.⁴

There are currently three methods by which Members and non-Members may access the Exchange's testing systems environment. One, Members and non-Members may access the Exchange's testing systems environment via a virtual private network ("VPN") that operates over the internet and provides site-to-site access. VPN access is provided for free to all Members and non-Members.

³ The term "Member" means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

⁴ Business continuity and disaster recovery testing is performed separately and not within the testing systems environment that is the subject of this filing.

A second method is via a dedicated cross connection that allows Members and non-Members to access the testing systems environment and is available as either a 1 gigabit ("Gb") or 10Gb connection. Members and non-Members that utilize a VPN or a dedicated cross connection to access the testing systems environment of the Exchange are also able to access the testing systems environments of each of the Exchange's affiliated options markets—MIAX Sapphire, LLC ("MIAX Sapphire"), MIAX PEARL, LLC⁵ ("MIAX Pearl Options"), and MIAX Emerald, LLC ("MIAX Emerald"). This dedicated cross connection would provide subscribers access to the testing systems environment of the Exchange, as well as each of its affiliate options exchanges, via a single connection.

Third, access is also provided through the production connections for each 1Gb or 10Gb ULL connection for the applicable fee⁶ for such connection and no additional charge. These 1Gb and 10Gb ULL connections provide access to the Exchange's production environment (i.e., live trading) and allow the receipt of proprietary real-time market data. However, the Exchange previously announced that it will phase out the ability to connect to the testing systems environment via the existing 1Gb and 10Gb ULL production connections by February 28, 2025.⁷

* * * * *

The Exchange now proposes to amend the Fee Schedule to establish a monthly fee for Members and non-Members that choose to access the testing systems environment via a dedicated cross connect. In particular, the Exchange proposes to establish a monthly fee of \$1,000 per dedicated cross connection to the testing systems environment for Members and non-Members. The

⁵ All references to "MIAX PEARL" in this filing are to the options trading facility of MIAX PEARL, LLC, referred to herein as "MIAX Pearl Options." Members and non-Members that choose to utilize the testing systems environment of MIAX Pearl Equities, the equities trading facility of MIAX PEARL, LLC, must utilize a separate dedicated cross connection as MIAX Pearl Equities' testing systems environment operates on a separate network from the affiliated options markets.

⁶ See MIAX Fee Schedule, Sections 5(a)–(b) for the fees for 1Gb and 10Gb ULL production connectivity.

⁷ See MIAX Options, MIAX Pearl Options and MIAX Emerald Options Exchanges—Announcing New Extranet Access to Firm Test Beds (FTB1 and FTB2) and Decommissioning of Access via Production Connections Beginning in October 2024, dated September 12, 2024, available at <https://www.miaxglobal.com/alert/2024/09/12/miax-options-miax-pearl-options-and-miax-emerald-options-exchanges-2?nav=all>; and Securities Exchange Act Release No. 100854 (August 28, 2024), 89 FR 71953 (September 4, 2024) (SR–MIAX–2024–35).

proposed fee is the same whether a Member or non-Member chooses to connect to the testing systems environment via a 1Gb or 10Gb cross connect. The proposed fees would be set forth under new Sections 4)e) and 4)f) of the Fee Schedule. Proposed Sections 4)e) and 4)f) would also codify that VPN access to the test environment is provided for free for all Members and non-Members.

* * * * *

Members and non-Members that access the testing systems environment through any one of the available access methods, including a dedicated cross connection, receive functionally the same testing experience. Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture or not utilize the testing systems environment at all. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Regardless of access method, all Members and non-Members are provided the same testing systems environment experience and are able to perform all of the same functions.

Implementation

The proposed fee change will be effective December 1, 2024.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act¹⁰ because it represents an equitable allocation of reasonable dues, fees and other charges among market participants using any facility or system which the Exchange operates or controls.

Free VPN Access to the Firm Test Bed Is a Reasonable Substitute

In 2019, Commission staff published guidance suggesting the types of information that self-regulatory organizations ("SROs") may use to demonstrate that their fee filings comply with the standards of the Exchange Act

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(4).

(the “Staff Guidance”).¹¹ The Staff Guidance provides that in assessing the reasonableness of a fee, the Staff would consider whether the fee is constrained by significant competitive forces. To determine whether a proposed fee is constrained by significant competitive forces, the Staff Guidance further provides that the Staff would consider whether the evidence provided by an SRO in a Fee Filing proposal demonstrates (i) that there are reasonable substitutes for the product or service that is the subject of a proposed fee; (ii) that “platform” competition constrains the fee; and/or (iii) that the revenue and cost analysis provided by the SRO otherwise demonstrates that the proposed fee would not result in the SRO taking supra-competitive profits.¹² The proposed fee is reasonable because there is a reasonable substitute for the service that is the subject of this proposed fee as set forth below.

This filing includes the following evidence that demonstrates that there is a reasonable substitute to purchasing a dedicated cross connection to access the Exchange’s testing systems environment. That reasonable substitute is VPN access, which is provided for free and will continue to be free for all Members and non-Members. Members and non-Members may access the testing systems environment through either a VPN or a dedicated cross connection and will receive functionally the same testing environment and are able to perform all of the same functions. The testing systems environment, whether accessed via a dedicated cross connection or VPN, provides Members and non-Members the same scope of abilities to test their systems and software in the Exchange’s testing systems environment, which replicates the Exchange’s production trading environment. Like a dedicated cross connection, a VPN provides access to the testing systems environment of not only the Exchange, but also each of its affiliate options exchanges over the same single access point. Accessing the testing systems environment via a dedicated cross connection provides no advantage to Members and non-Members compared to those market participants that elect to access the testing systems environment via a VPN for free.

Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture.

Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Accessing the testing systems environment via the proposed dedicated cross connection may not provide utility to all Members and non-Members based on their business models and needs, and such users may choose to access the testing systems environment for free through the VPN and perform the same testing functions. As such, the Exchange believes that the proposed fee for access to the testing systems environment is reasonable and Members and non-Members have the choice, but are not obligated to access the testing systems environment via a dedicated cross connection. Otherwise, a user may choose to access the test environment via a VPN for free to test system functionality. For example, of the Exchange’s forty-six Members¹³ and nine non-Members that provide connectivity to the Exchange, sixteen Members and non-Members currently use a VPN to access the Exchange’s testing systems environment instead of the other two currently available options, *i.e.*, a dedicated cross connection or their existing 1Gb or 10Gb ULL connection to the production environment. Some Members and non-Members also choose not to access the testing systems environment at all.

Lastly, supporting a proposed non-transaction fee change by arguing the availability of reasonable substitutes is not novel. Commission Staff has published for immediate effectiveness filings regarding non-transaction fees by exchanges who argued that the fees were consistent with the Exchange Act because of reasonable substitutes were available as provided for in the Commission Staff Guidance.¹⁴

Fee Is Constrained by Competition and the Availability of Free VPN Access

If the Exchange prices the fee for dedicated cross connection access to the testing systems environment too high, Members and non-Members may choose not to subscribe and continue to perform

the same testing functions via VPN internet access for no fee if they do not find the fee for accessing the testing systems environment via a dedicated cross connection to be of value. Again, the Exchange notes that accessing the testing systems environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. The Exchange also has Members and non-Members that do not utilize the testing systems environment at all.

The Exchange operates in a highly competitive environment in which 18 U.S. registered equity options exchanges compete for market share. Based on publicly available information for the month of October 2024, no single options exchange had more than approximately 12–13% of the equity options market share and the Exchange represented only approximately 6.17% of the market share of equity options for that month.¹⁵ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁶ The proposed fee for optional access via a dedicated cross connection to the test environment is the result of the competitive environment of the U.S. options industry.

Exchanges compete for order flow by providing testing opportunities and robust testing environments. Services like a testing environment provide Members and non-Members with the opportunity to test Exchange functionality prior to sending real order flow to be executed in the Exchange’s production environment. As mentioned above, numerous exchanges provide testing environments to market participants to test functionality and gain comfort with their exchange offering.¹⁷ This is intended to attract

¹³ See the Exchange’s Membership Directory available at https://www.miaxglobal.com/miax_options_exchange_members.pdf.

¹⁴ See, e.g., Securities Exchange Act Release Nos. 101096 (September 18, 2024), 89 FR 77913 (September 24, 2024) (SR–ISE–2024–46); 98974 (November 16, 2023), 88 FR 81468 (November 22, 2023) (SR–NYSEARCA–2023–78); 87795 (December 18, 2019), 84 FR 71043 (December 26, 2019) (SR–NYSEARCA–2019–88); and 90409 (November 12, 2020), 85 FR 73522 (November 18, 2020) (SR–NYSEARCA–2020–95).

¹¹ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

¹² *Id.*

¹⁵ See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/> (last visited November 5, 2024).

¹⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁷ The Exchange notes that other exchange families offer a similar dedicated connection to

market share by offering a risk free way to gain comfort that their orders would be handled within the Exchange's production environment as expected. Exchanges seek to further encourage market participants to utilize their testing environments by providing multiple methods to connect. Some are provided for free while others and require a fee. Providing multiple methods to connect to a test environment provides market participants a choice on how to engage with the testing environment and a choice regarding the access method that best meets their business and operational needs.

If the Exchange proposed a fee that Members and non-Members viewed as excessively high, then the proposed fee would simply serve to reduce demand for access via a dedicated cross connection to the test environment, which as noted, is entirely optional as the Exchange will continue to provide free access to the test environment through VPN through the internet for site-to-site access. This could, in turn, reduce the attractiveness of the Exchange's live trading production environment because Members and non-Members may be unwilling to test functionality prior to entering live orders. Again, other options exchanges currently offer, or are able to introduce at their own cost, their own comparable testing environments with lower prices to better compete with the Exchange's offering and several competing exchanges already provide a similar service.

Selling different products and services, such as proposed herein, is a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting market participants to purchase the dedicated cross connection to the test environment proposed herein, the Exchange may earn revenue and further enhance market participants'

their testing environment for their members and non-members. *See, e.g.,* Nasdaq Options Test Facility (NTF) Abstract, Version 1.4.4 (March 2024), available at https://www.nasdaq.com/Nasdaq_Test_Facility_NTF_Guide (last visited July 16, 2024) ("... the Nasdaq Test Facility ... where market participants can test their trading applications with the INET trading system. The NTF environment allows members to test sending and executing quotes and orders offered by our six options exchanges ..."); *see also* Securities Exchange Act Release No. 100442 (June 27, 2024), 89 FR 55296 (July 3, 2024) (SR-CboeBZX-2024-058) ("... the Exchange also offers corresponding ports which provide Members and non-Members access to the Exchange's certification environment to test proprietary systems and applications ... The certification environment facilitates testing using replicas of the Exchange's production environment process configurations which provide for a robust and realistic testing experience ...").

interactions on the Exchange, which would increase value of its other products and services to all market participants. If the market deems the proposed fee to be too high, Members and non-Members can choose not to use or discontinue their use of dedicated cross connection to the test environment and perform the same testing functions via the VPN internet access for free. The Exchange, therefore, believes that the proposed fee for dedicated cross connection to the test environment reflects the competitive environment of U.S. options exchanges and would be properly assessed to Members and non-Members that subscribe.

The Proposed Fee Is Reasonable Because it Is Similar to or Lower Than Like Fees Charged by Other Exchanges

The Exchange believes the proposed fees are reasonable as the proposed fees are similar to or lower than fees charged by competing exchanges for similar services. For example, The Nasdaq Stock Market, LLC assesses a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port plus a one-time installation fee of \$1,000 per hand-off.¹⁸ The Exchange's proposed fee is, therefore, lower because it does not charge a separate installation fee. Cboe BZX Exchange, Inc. ("Cboe BZX") Options assesses a lower fee of \$250 per month for each certification logical port, which only provides access to the Cboe BZX testing environment, and not to the testing environment of any of Cboe BZX's affiliates.¹⁹ The fee to access the Cboe BZX testing environment and the testing environment of each of its three affiliated options exchange becomes

¹⁸ *See, e.g.,* Nasdaq, Options 7: Pricing Schedule, Section 13 Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%20Options%207>. Nasdaq's affiliates, like Nasdaq PHLX LLC ("PHLX"), also charge the same fee. *See e.g.,* PHLX Options 7: Pricing Schedule, Section 9. Other Member Fees, E. Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207> (assessing a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port and a one-time installation fee of \$1,000 per hand-off). *See also* Securities Exchange Act Release No. 76259 (October 26, 2015), 80 FR 66947 (October 30, 2015) (SR-NASDAQ-2015-117) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Options Testing Facility). Like the Exchange's testing environment, a single connection to Nasdaq's test environment provides access to the other test environments of its affiliate options markets, PHLX and Nasdaq BX, Inc.

¹⁹ *See also* Cboe BZX Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/bzx/. *See, e.g.,* Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edx/.

incrementally higher with each Cboe BZX affiliate charging a \$250 monthly fee to access each testing environment, totaling as much as \$1,000.00 per month.²⁰ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act.

The Proposed Fee Is Not Unfairly Discriminatory

The Exchange also believes the proposed fee is equitable and not unfairly discriminatory as the fee would apply equally to all Members and non-Members who choose to subscribe. It is a business and operational decision of each Member or non-Member that chooses to subscribe. The Exchange's proposed fee would not differentiate between Members and non-Members or connectivity types and is set at a modest level that would allow any interested Member and non-Member to subscribe based on their business and operational needs.

The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act²¹ in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The Exchange does not believe that the proposed fee is unfairly discriminatory to subscribers to the test environment via a dedicated cross connection because, unlike the live trading environment where the capacity of connectivity to the Exchange may confer a competitive advantage to a market participant and therefore price differentiation is appropriate for the benefit conferred, there is no such benefit conferred in the testing systems environment.

The Exchange does not believe that the proposed fee is unfairly discriminatory among subscribers to the test environment because all Members and non-Members that subscribe to the service will be assessed the same fee.

²⁰ *See also* Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edx/; Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/c2/.

²¹ 15 U.S.C. 78f(b)(5).

Because the proposed fee does not discriminate between 1Gb and 10Gb cross connection options, Members and non-Members are able to subscribe to the test environment without regard to the cost of their capacity election. The Exchange believes that not discriminating on this basis will encourage participants to connect to the test environment in the same manner as they do to the live trading environment, and thereby help the test environment more closely mirror the live trading environment. Providing a more useful and accurate test environment will serve to improve live trading on the Exchange and the national market system by permitting Members and non-Members the ability to accurately test changes prior to implementing them in the live trading environment, thereby reducing the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

The Proposed Fee Is Equitable

The Exchange believes that the proposed fee is equitably allocated because all Members and non-Members that choose to connect to the test environment will be assessed a uniform fee for those services. The Exchange believes that offering subscribers the option to subscribe to either a 1Gb or 10Gb dedicated cross connection for the same fee is an equitable allocation of fees because, unlike the live trading environment, there is no competitive advantage to possessing a higher capacity connection in the test environment. The test environment is designed to closely mirror the live trading environment for Members and non-Members, including matching the capacity of the live trading environment connection of each Member and non-Member. In the absence of any competitive advantage, charging a uniform fee for both a 1Gb or 10Gb dedicated cross connection is an equitable allocation of fees. The Exchange believes that charging a uniform fee rather than mirroring the fees for the live trading environment will encourage Members and non-Members to subscribe to the test environment and further encourage those that subscribe to use the same hardware as is used by them for connectivity to the live trading environment.

* * * * *

Finally, and as noted above, the Exchange's test environment provides a robust and realistic testing experience using a replica of the Exchange's production environment process

configurations. This environment enables market participants to test upcoming Exchange software and code releases, product enhancements, as well as test firm software prior to implementation in the production environment. Further, the test environment allows unlimited firm-level testing of order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancelations, and purge requests. By providing firms the ability to test all of these features in the test environment prior to implementing them in the live trading environment, the Exchange believes this will reduce the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange made connectivity access to the test environment available to keep pace with technological changes in the industry and evolving customer needs and demands, and believes the product will contribute to robust competition among national securities exchanges. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange believes the proposed fee would not cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable testing environments for free or lower prices, which several competing exchanges already provide.²² The Exchange operates in a highly competitive environment, and its ability to price access to the test environment is constrained by the optional nature of accessing the test environment via a dedicated cross connect. Providing access to the test environment via dedicated cross connection is provided purely for convenience, in response to Member demand, and, again, would be entirely optional. The Exchange notes that use of accessing the test environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. Members who do not prefer the to access the test environment via a dedicated cross connection and

pay the applicable fee will be able to continue to perform the same testing functions when accessing the test environment via the existing VPN internet access for free. The Exchange must consider this in its pricing discipline in order to attract subscribers. The Exchange believes that if it were to propose a fee that is excessively high, it would simply serve to reduce demand for the Exchange's product, which as discussed, Members and non-Members are under no obligation to utilize.

The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed fee applies uniformly to any purchaser in that the Exchange does not differentiate between subscribers that wish to access the testing systems environment via a dedicated cross connect via either a 1Gb or 10Gb connection. The proposed fee is set at a modest level that would allow any interested market participant to purchase access to the test environment based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,²³ and Rule 19b-4(f)(2)²⁴ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

²² See *supra* note 18.

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-MIAX-2024-45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-MIAX-2024-45. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MIAX-2024-45 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29923 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101892; File No. SR-NASDAQ-2024-078]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower the Options Regulatory Fee (ORF) and Adopt a New Approach to ORF in 2025

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 27, 2024, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market LLC ("NOM") Pricing Schedule at Options 7, Section 5, Options Regulatory Fee.³

While the changes proposed herein are effective upon filing, the Exchange has designated certain amendments to be operative on November 1, 2024, and other amendments to be operative on January 1, 2025, as noted in the Exhibit 5 and herein.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NOM proposes to amend its current ORF in several respects. In summary, first, NOM proposes to reduce its ORF from \$0.0016 to \$0.0014 per contract side from November 1, 2024, through December 31, 2024. Second, as of January 1, 2025, NOM proposes to amend its methodology of collection to: (1) exclude options transactions in proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as "M" at The Options Clearing Corporation ("OCC"). Additionally, NOM will assess a different rate for trades executed on NOM ("Local ORF Rate") and trades executed on non-NOM exchanges ("Away ORF Rate"). Each change will be described below in greater detail.

Background on Current ORF

Today, NOM assesses its ORF for each Customer⁴ option transaction that is either: (1) executed by a Participant⁵ on NOM; or (2) cleared by a NOM Participant at OCC in the Customer range,⁶ even if the transaction was executed by a non-member of NOM, regardless of the exchange on which the transaction occurs.⁷ If the OCC clearing member is a NOM Participant, ORF is assessed and collected on all ultimately cleared Customer contracts (after adjustment for CMTA⁸); and (2) if the OCC clearing member is not a NOM Participant, ORF is collected only on the cleared Customer contracts executed at

⁴ Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the "C" range at OCC. See *supra* notes 18 and 19 for descriptions of Customers and Professionals.

⁵ The term "Options Participant" or "Participant" mean a firm, or organization that is registered with the Exchange pursuant to Options 2A of these Rules for purposes of participating in options trading on NOM as a "Nasdaq Options Order Entry Firm" or "Nasdaq Options Market Maker". See Options 1, Section 1(a)(39).

⁶ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that Participants mark orders with the correct account origin code.

⁷ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁸ CMTA or Clearing Member Trade Assignment is a form of "give-up" whereby the position will be assigned to a specific clearing firm at OCC.

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On October 31, 2024, SR-NASDAQ-2024-058 was filed to amend ORF. On November 27, 2024, SR-NASDAQ-2024-058 was withdrawn and this rule change was filed. The current proposal amends the ORF Rate for Local Customer "C" Origin Code transactions executed on NOM, Local Firm "F" Origin Code transactions executed on NOM, and Away ORF Rate Firm "F" Origin Code multi-list transactions executed on non-NOM exchanges.

NOM, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.⁹

Today, in the case where a Participant both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Participant. Today, in the case where a Participant executes a transaction and a different Participant clears the transaction, the ORF will be assessed to and collected from the Participant who clears the transaction and not the Participant who executes the transaction. Today, in the case where a non-member executes a transaction at an away market and a Participant clears the transaction, the ORF will be assessed to and collected from the Participant who clears the transaction. Today, in the case where a Participant executes a transaction on NOM and a non-member clears the transaction, the ORF will be assessed to the Participant that executed the transaction on NOM and collected from the non-member who cleared the transaction. Today, in the case where a Participant executes a transaction at an away market and a non-member ultimately clears the transaction, the ORF will not be assessed to the Participant who executed the transaction or collected from the non-member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Participant executing the trade at an away market.

ORF Revenue and Monitoring of ORF

Today, the Exchange monitors the amount of revenue collected from the ORF ("ORF Regulatory Revenue") to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.¹⁰ In determining whether an expense is considered an Options Regulatory Cost, the Exchange reviews all costs and

makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of member Customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Options Regulatory Costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses are only those expenses that are in support of the regulatory functions, such areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs. Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.¹¹

The ORF is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of its Participants, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal for November 1, 2024, Through December 31, 2024

Based on NOM's most recent review of its ORF Regulatory Revenues as compared to its ORF Regulatory Costs in light of recent fines, NOM proposes to reduce the amount of ORF that will be collected by the Exchange from \$0.0016 to \$0.0014 per contract side from November 1, 2024, through December 31, 2024. The Exchange issued an Options Trader Alert on September 16, 2024, that specified the proposed rate change for November 1, 2024.¹²

NOM notes that there can be no assurance that the Options Regulatory Costs for the remainder of 2024 will not

differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the Options Regulatory Revenue that may be generated utilizing an ORF rate of \$0.0016 per contract side may result in Options Regulatory Revenue which exceeds the Exchange's estimated Options Regulatory Costs for 2024 as a result of fines. The Exchange therefore proposes to reduce its ORF to \$0.0014 per contract side to ensure that Options Regulatory Revenue does not exceed the Exchange's estimated Options Regulatory Costs in 2024. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its Options Regulatory Costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of \$0.0016 per contract side.¹³

The Exchange will continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that Options Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed Options Regulatory Costs. If the Exchange determines Options Regulatory Revenue exceed Options Regulatory Costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹⁴ its Participants via an Options Trader Alert.¹⁵

Proposal for January 1, 2025

NOM has been reviewing its methodologies for the assessment and collection of ORF. As a result of this review, NOM proposes to revamp the current process of assessing and collecting ORF in various ways.¹⁶ Below NOM will explain the modelling it performed and the outcomes of the

⁹By way of example, if Broker A, a NOM Participant, routes a Customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by NOM from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than NOM, it was cleared by a NOM Participant in the member's OCC clearing account in the Customer range, therefore there is a regulatory nexus between NOM and the transaction. If Broker A was not a NOM Participant, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on NOM nor was it cleared by a NOM Participant.

¹⁰The regulatory costs for options comprise a subset of the Exchange's regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all Participants' options activity ("Options Regulatory Cost").

¹¹Direct and indirect expenses are based on the Exchange's 2024 Regulatory Budget.

¹²See <https://www.nasdaqtrader.com/MicroNews.aspx?id=OTA2024-53>. The Exchange plans on issuing a second Options Trader Alert announcing changes for January 1, 2025.

¹³The Exchange notes that its regulatory responsibilities with respect to Participant compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

¹⁴The Exchange will provide Participants with such notice at least 30 calendar days prior to the effective date of the change.

¹⁵The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expense.

¹⁶The Exchange proposes to delete language in the Pricing Schedule at Options 7, Section 5 that will be obsolete as of November 1, 2024.

modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, NOM proposes to assess ORF to each NOM Participant for multi-listed options transactions, excluding options transactions in proprietary products,¹⁷ cleared by OCC in all clearing ranges except market makers who clear as “M” at OCC (“Market Makers”).¹⁸ where: (1) the execution occurs on NOM or (2) the execution occurs on another exchange and is cleared by a NOM Participant. With this change, NOM proposes to amend its current ORF to assess ORF on Customer,¹⁹ Professional,²⁰ Firm²¹ and Broker-Dealer²² transactions. All market participants, except Market Makers, would be subject to ORF.

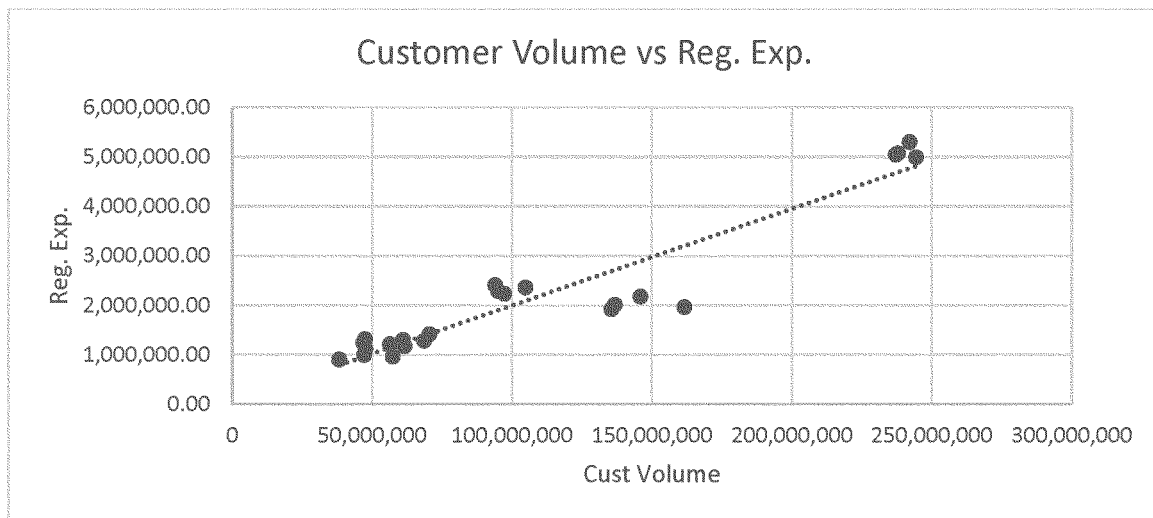
The ORF would be collected by OCC on behalf of NOM from (1) NOM clearing members for all Customer, Professional, Firm and Broker-Dealer transactions they clear or (2) non-members for all Customer, Professional, Firm and Broker-Dealer transactions they clear that were executed on NOM. This model collects ORF where there is a nexus with NOM and does not collect ORF from a non-member where the

transaction takes place away from the Exchange.

Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on NOM (“Local ORF Rate”) and trades executed on non-NOM exchanges (“Away ORF Rate”) by market participants.²³ For Customer, Professional, and broker-dealer (not affiliated with a clearing member) transactions that clear in the “C” range at OCC (collectively “Customers”) the Exchange proposes to assess a Local ORF Rate of \$0.0203 per contract and an Away ORF Rate of \$0.00 per contract. For Firm and Broker-Dealer transactions that clear in the “F” range at OCC (collectively “Firm and Broker-Dealer Transactions”) the Exchange proposes to assess a Local ORF Rate of \$0.00024 per contract and an Away ORF Rate of \$0.00024 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. NOM will ensure that ORF Regulatory Revenue does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify Participants via an Options

Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.²⁴ To that end, the Exchange plotted Customer volumes from each exchange²⁵ against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a “slope” of the line, representing the marginal cost of regulation, as well as an “intercept,” representing the fixed cost of regulation.²⁶ The Exchange considered using non-linear models, but concluded that the best R² (“R-Squared”) ²⁷ results came from a standard $y = Mx + B$ format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.



¹⁷ Proprietary products are products with intellectual property rights that are not multi-listed. NOM has no proprietary products.

¹⁸ Capacity “M” covers Market Makers registered on NOM and market makers registered at non-NOM exchanges.

¹⁹ The term “Customer” or (“C”) applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(a)(47)). See Options 7, Section 1(a).

²⁰ The term “Professional” or (“P”) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(47). All Professional orders

shall be appropriately marked by Participants. See Options 7, Section 1(a).

²¹ The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC. See Options 7, Section 1(A).

²² The term “Broker-Dealer” or (“B”) applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(a). A Broker-Dealer clears in the “F” range at OCC.

²³ The Exchange is continuing to permit NOM Participants who do not transact an equities business on Nasdaq in a calendar year to receive a refund of the fees specified in Equity 7, Section 30(b) upon written notification to the Exchange along with documentation evidencing that no equities business was conducted on Nasdaq for that calendar year. The Exchange is replicating related

rule text in Options 7, Section 5 to retain the continuity of this refund process.

²⁴ This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

²⁵ The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024 Q2 (“Time Period”).

²⁶ The Exchange utilized data from 2023 Q1 to 2024 Q3 to calculate the slope and intercept.

²⁷ R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is: $R^2 = 1 - \text{Unexplained Variation} / \text{Total Variation}$.

The results of this modelling indicated a high correlation and intercept for the baseline cost of regulating the options market as a whole. Specifically, the regression model indicated that (1) the marginal cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the “intercept” element of cost. When seeking to offset the “set-up” cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to >97% across multiple historical periods.²⁸

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a “normalization” by per options exchange. This “normalization” encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for “normalization” are negotiated regulatory contracts that were negotiated at different points in

time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange’s historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed values (for Customer Local ORF and Firm and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The “normalization” was then multiplied to a “targeted collection rate” of approximately 88% to arrive at ORF rates for Customer, Firm and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs. The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an expense is considered an Options Regulatory Cost, the Exchange would continue to review all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost. Participants will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of Participants’ transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include

direct regulatory expenses²⁹ and certain indirect expenses in support of the regulatory function.³⁰

Finally, the Exchange notes that this proposal will be sunset on July 1, 2025, at which point the Exchange would revert back to the ORF methodology and rate (\$0.0016 per contract side) that was in effect prior to this rule change.³¹

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.³² Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,³³ which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Proposal for November 1, 2024, Through December 31, 2024

The Exchange believes the proposed reduction of ORF is reasonable because it would help ensure that ORF Regulatory Revenue does not exceed a material portion of the Exchange’s ORF Regulatory Costs. As noted above, the ORF is designed to recover a material portion, but not all, of the Exchange’s ORF Regulatory Costs. Further, the Exchange believes the proposed fee change is reasonable because Customer transactions will be subject to a lower ORF than the rate that would otherwise be in effect on November 1, 2024.

The Exchange had designed the ORF to generate ORF Regulatory Revenue that would be less than the amount of the Exchange’s ORF Regulatory Costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Costs, which is

²⁹ The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations.

³⁰ The indirect expenses include support from such areas as Office of the General Counsel, technology, finance and internal audit.

³¹ The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.

³² 15 U.S.C. 78f(b).

³³ 15 U.S.C. 78f(b)(4).

³⁴ 15 U.S.C. 78f(b)(5).

²⁸ The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its ORF Regulatory Costs and ORF Regulatory Revenue which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect ORF Regulatory Revenue which would exceed its ORF Regulatory Costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate ORF Regulatory Revenue that would cover more than the approximated Exchange's projected ORF Regulatory Costs due to fines. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from \$0.0016 to \$0.0014 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Participants on all their transactions that clear in the Customer range at OCC.³⁵ The Exchange believes the ORF ensures fairness by assessing higher fees to those Participants that require more Exchange regulatory services based on the amount of Customer options business they conduct. Regulating Customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-Customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Participants, a small portion of which takes place on away exchanges. Indeed, the Exchange cannot effectively

review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")³⁶ the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to Customer trading activity of its Participants.

Proposal for January 1, 2025

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an NOM Participant or cleared by an NOM Participant. With this amendment, NOM would begin to assess Firm and Broker-Dealer Transactions an ORF, provided the transactions were executed by a NOM Participant or cleared by a NOM Participant, except transactions in proprietary products. Second, as of January 1, 2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firms and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options Regulatory Cost as all Participants, except Market Makers, would be assessed ORF.

The Exchange believes that assessing all Participants, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with

respect to their assigned options series as provided in Options 2, Section 5. Market Makers are required to quote intra-day.³⁷ Further, unlike other market participants, Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.³⁸ Market Makers are critical market participants in that they are the only market participants that are required to provide liquidity to NOM and are necessary for opening the market. Excluding Market Maker transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on NOM in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap³⁹ and therefore de minimis.

The Exchange believes excluding options transactions in proprietary products is reasonable, equitable and not unfairly discriminatory because NOM does not list any proprietary products. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF for those products. NOM notes that there are a small number of proprietary products transacted as compared to multi-list options. NOM's focus is on surveillance related to multi-

³⁵ If the OCC clearing member is a NOM Participant, ORF will be assessed and collected on all cleared Customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a NOM Participant, ORF will be collected only on the cleared Customer contracts executed at NOM, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

³⁶ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

³⁷ See Options 2, Section 5(d).

³⁸ See NOM Options 2, Section 4(a)(3) and (5).

³⁹ See NOM Options 2, Section 6(b). The total number of contracts executed by a Market Maker in options in which it is not registered as a Market Maker shall not exceed 25 percent of the total number of all contracts executed by the Market Maker in any calendar quarter.

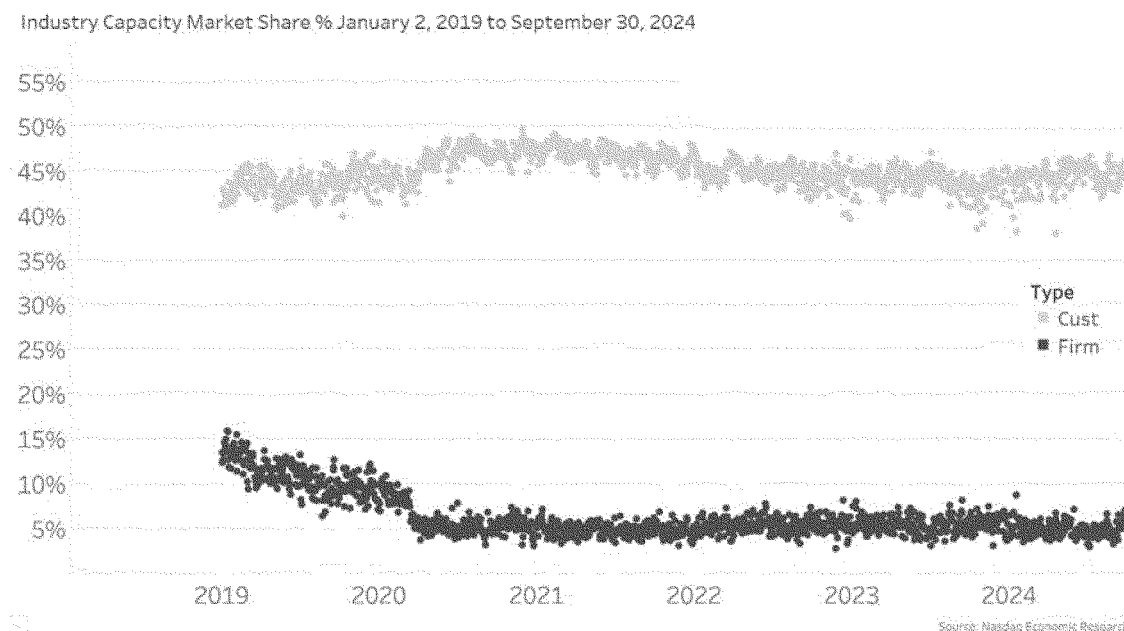
listed options. Should NOM list a proprietary product in the future, NOM would amend its ORF to collect a Local ORF on that proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for a material portion of NOM's Options Regulatory Cost.⁴⁰ Customer transactions in combination with Firm and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm and Broker-

Dealer Transactions.⁴¹ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Participants of the Exchange and is not readily available to NOM.⁴² The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a

result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that NOM's Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.



⁴⁰ The Exchange notes that the regulatory costs relating to monitoring Participants with respect to Customer trading activity are generally higher than the regulatory costs associated with Participants that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Participants that engage in Customer trading activity is generally

more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Participant's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange's overall

regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

⁴¹ See NOM Options 10 Rules.

⁴² The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

With this model, the addition of Firm and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that unlike Customer transactions, the regulation of Firm and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm and Broker-Dealer Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.⁴³ The Exchange believes that assessing

the Firm and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Participants combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm and Broker-Dealer Participants.⁴⁴ While not large in number, when compared to the overall number of Exchange rules that are surveilled by NOM for on-Exchange activity, the Away ORF that would be assessed to Firm and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-NOM exchanges avoids overlapping ORFs that would otherwise be assessed by NOM and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.⁴⁵

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on inter-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed to address any competitive issues. The

Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

Proposal for November 1, 2024, Through December 31, 2024

The Exchange's proposal to reduce its ORF from \$0.0016 to \$0.0014 per contract side from November 1, 2024, through December 31, 2024, does not create an unnecessary or inappropriate burden on intra-market competition because the ORF applies to all Customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity.

Proposal for January 1, 2025

Excluding Market Makers does not impose an undue burden on intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Market Makers are required to quote intra-day.⁴⁶ Further, unlike other market participants, Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.⁴⁷ Market Makers are critical market participants in that they are the only market participants that are required to provide liquidity to NOM and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on NOM in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange, in addition to submitting quotes. The Exchange's proposal to except orders

⁴³ NOM pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

⁴⁴ NOM conducts surveillances and enforces NOM Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some NOM trading rules are automatically enforced by NOM's System.

⁴⁵ NOM would submit a rule change to the Commission to amend ORF rates.

⁴⁶ See Options 2, Section 5(d).

⁴⁷ See NOM Options 2, Section 4(a)(3) and (5).

submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap⁴⁸ and therefore de minimis.

Uniformly excluding options transactions in proprietary products from ORF for all NOM Participants does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF for those products. There are a small number of proprietary products transacted as compared to multi-list options. Also, proprietary products are transacted on a limited number of options exchanges and would require a de minimis amount of cross market surveillance, for these reasons the Exchange believes that only a Local ORF should be applied to the extent that NOM were to list a proprietary product. NOM's focus is on surveillance related to multi-listed options. Should NOM list a proprietary product in the future, NOM would amend its ORF to collect a Local ORF on that proprietary product.

The Exchange's proposal to expand the clearing ranges to specifically include Firm and Broker-Dealer Transactions, in addition to Customer and Professional transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of NOM's Options Regulatory Cost.⁴⁹ Customer

transactions in combination with Firm and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm and Broker-Dealer Transactions.⁵⁰ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Participants of the Exchange and is not readily available to NOM.⁵¹ The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that NOM's Customer regulation occurs to a large extent on Exchange.

regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

⁴⁹ See NOM Options 10 Rules.

⁵¹ The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

The Exchange believes that assessing Firm and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm and Broker-Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as NOM Participants, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an NOM Participant. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition because while the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm and Broker-Dealer Transactions occurs both on the Exchange and across options markets.⁵² The Exchange believes that assessing Firm and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate

⁵² NOM pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

⁴⁸ See NOM Options 2, Section 6(b). The total number of contracts executed by a Market Maker in options in which it is not registered as a Market Maker shall not exceed 25 percent of the total number of all contracts executed by the Market Maker in any calendar quarter.

⁴⁹ The Exchange notes that the regulatory costs relating to monitoring Participants with respect to Customer trading activity are generally higher than the regulatory costs associated with Participants that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Participants that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Participant's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange's overall

given the lower volume that is attributed to these Participants combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm and Broker-Dealer Participants.⁵³ While not large in number, when compared to the overall number of Exchange rules that are surveilled by NOM for on-Exchange activity, the Away ORF that would be assessed to Firm and Broker-Dealer Transactions would account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-NOM exchanges does not impose a burden on intra-market competition, rather it avoids overlapping ORFs that would otherwise be assessed by NOM and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Costs borne by different Participants of the Exchange in light of the volume different Participants transact on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁵⁴ and Rule 19b-4(f)(2)⁵⁵ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the

Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2024-078 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NASDAQ-2024-078. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2024-078 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29921 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101889; File No. SR-Phlx-2024-51]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend FLEX Floor Trading

December 12, 2024.

On October 8, 2024, Nasdaq PHLX LLC filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to: (i) amend Options 8, Section 34, FLEX Trading to clarify certain functionality; (ii) list p.m.-settled FLEX Index Options whose exercise settlement value is derived from closing prices on the last trading day prior to expiration that expire on or within two business days of a third Friday-of-the-month expiration day for a non-FLEX Option; and (iii) permit FLEX Options on certain Exchange-Traded Funds to be settled by delivery in cash if the underlying security meets prescribed criteria and set forth the applicable position and exercise limits for these options; and (iv) require that position and exercise limits for FLEX Options be aggregated with non-FLEX options in certain circumstances. The proposed rule change was published for comment in the **Federal Register** on October 29, 2024.³ The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act⁴ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission will either approve the proposed rule change, disapprove the

⁵³ NOM conducts surveillances and enforces NOM Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some NOM trading rules are automatically enforced by NOM's System.

⁵⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵⁵ 17 CFR 240.19b-4(f)(2).

⁵⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 101413 (October 23, 2024), 89 FR 86007.

⁴ 15 U.S.C. 78s(b)(2).

proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 13, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change, so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates January 27, 2025, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-Phlx-2024-51).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29918 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101893; File No. SR-Phlx-2024-66]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower the Options Regulatory Fee (ORF) and Adopt a New Approach to ORF in 2025

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 27, 2024, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx's Pricing Schedule at Options 7, Section 6D, Options Regulatory Fee.³

While the changes proposed herein are effective upon filing, the Exchange has designated certain amendments to be operative on November 1, 2024, and other amendments to be operative on January 1, 2025, as noted in the Exhibit 5 and herein.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx proposes to amend its current ORF in several respects. In summary, first, Phlx proposes to reduce its ORF from \$0.0034 to \$0.0022 per contract side from November 1, 2024, through December 31, 2024. Second, as of January 1, 2025, Phlx proposes to amend its methodology of collection to: (1) specify that it is including options transactions in Phlx proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as “M” at The Options Clearing Corporation (“OCC”). Additionally, Phlx will assess a different rate for trades executed on Phlx (“Local ORF Rate”) and trades executed on non-Phlx exchanges

(“Away ORF Rate”). Each change will be described below in greater detail.

Background on Current ORF

Today, Phlx assesses its ORF for each Customer⁴ option transaction that is either: (1) executed by a member organization⁵ on Phlx; or (2) cleared by a Phlx member organization at OCC in the Customer range,⁶ even if the transaction was executed by a non-member organization of Phlx, regardless of the exchange on which the transaction occurs.⁷ If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all ultimately cleared Customer contracts (after adjustment for CMTA⁸); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared Customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.⁹

Today, in the case where a member organization both executes a transaction and clears the transaction, the ORF will

⁴ Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the “C” range at OCC. See *supra* notes 18 and 19 for descriptions of Customers and Professionals.

⁵ The term “member organization” means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of General 3, Sections 5 and 10 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization. See General 1, Section 1(17).

⁶ Market participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that member organizations mark orders with the correct account origin code.

⁷ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁸ CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

⁹ By way of example, if Broker A, a Phlx member organization, routes a Customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by Phlx from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than Phlx, it was cleared by a Phlx member organization in the member organization's OCC clearing account in the Customer range, therefore there is a regulatory nexus between Phlx and the transaction. If Broker A was not a Phlx member organization, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on Phlx nor was it cleared by a Phlx member organization.

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On October 31, 2024, SR-Phlx-2024-50 was filed to amend ORF. On November 27, 2024, SR-Phlx-2024-50 was withdrawn and this rule change was filed. The current proposal amends the ORF Rate for Local Customer “C” Origin Code transactions executed on Phlx, Local Firm “F” Origin Code transactions executed on Phlx, and Away ORF Rate Firm “F” Origin Code multi-list transactions executed on non-Phlx exchanges.

be assessed to and collected from that member organization. Today, in the case where a member organization executes a transaction and a different member organization clears the transaction, the ORF will be assessed to and collected from the member organization who clears the transaction and not the member organization who executes the transaction. Today, in the case where a non-member organization executes a transaction at an away market and a member organization clears the transaction, the ORF will be assessed to and collected from the member organization who clears the transaction. Today, in the case where a member organization executes a transaction on Phlx and a non-member organization clears the transaction, the ORF will be assessed to the member organization that executed the transaction on Phlx and collected from the non-member organization who cleared the transaction. Today, in the case where a member organization executes a transaction at an away market and a non-member organization ultimately clears the transaction, the ORF will not be assessed to the member organization who executed the transaction or collected from the non-member organization who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the member organization executing the trade at an away market.

ORF Revenue and Monitoring of ORF

Today, the Exchange monitors the amount of revenue collected from the ORF ("ORF Regulatory Revenue") to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.¹⁰ In determining whether an expense is considered an Options Regulatory Cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and

regulation of member Customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Options Regulatory Costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses are only those expenses that are in support of the regulatory functions, such areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs. Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.¹¹

The ORF is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of its member organizations, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal for November 1, 2024, Through December 31, 2024

Based on Phlx's most recent review of its ORF Regulatory Revenues as compared to its ORF Regulatory Costs in light of recent fines, Phlx proposes to reduce the amount of ORF that will be collected by the Exchange from \$0.0034 to \$0.0022 per contract side from November 1, 2024, through December 31, 2024. The Exchange issued an Options Trader Alert on September 16, 2024, that specified the proposed rate change for November 1, 2024.¹²

Phlx notes that there can be no assurance that the Options Regulatory Costs for the remainder of 2024 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the Options Regulatory Revenue that may be generated utilizing an ORF rate of \$0.0034 per contract side may result in Options Regulatory Revenue which exceeds the Exchange's estimated

Options Regulatory Costs for 2024 as a result of fines. The Exchange therefore proposes to reduce its ORF to \$0.0022 per contract side to ensure that Options Regulatory Revenue does not exceed the Exchange's estimated Options Regulatory Costs in 2024. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its Options Regulatory Costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of \$0.0034 per contract side.¹³

The Exchange will continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that Options Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed Options Regulatory Costs. If the Exchange determines Options Regulatory Revenue exceed Options Regulatory Costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹⁴ its members and member organizations via an Options Trader Alert.¹⁵

Proposal for January 1, 2025

Phlx has been reviewing its methodologies for the assessment and collection of ORF. As a result of this review, Phlx proposes to revamp the current process of assessing and collecting ORF in various ways.¹⁶ Below Phlx will explain the modelling it performed and the outcomes of the modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, Phlx proposes to assess ORF to each Phlx member organization for multi-listed options transactions and options transactions in Phlx proprietary

¹³ The Exchange notes that its regulatory responsibilities with respect to member and member organization compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

¹⁴ The Exchange will provide members and member organizations with such notice at least 30 calendar days prior to the effective date of the change.

¹⁵ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expense.

¹⁶ The Exchange proposes to delete language in the Pricing Schedule at Options 7, Section 6D that will be obsolete as of November 1, 2024.

¹⁰ The regulatory costs for options comprise a subset of the Exchange's regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all member organizations' options activity ("Options Regulatory Cost").

¹¹ Direct and indirect expenses are based on the Exchange's 2024 Regulatory Budget.

¹² See <https://www.nasdaqtrader.com/MicroNews.aspx?id=OTA2024-53>. The Exchange plans on issuing a second Options Trader Alert announcing changes for January 1, 2025.

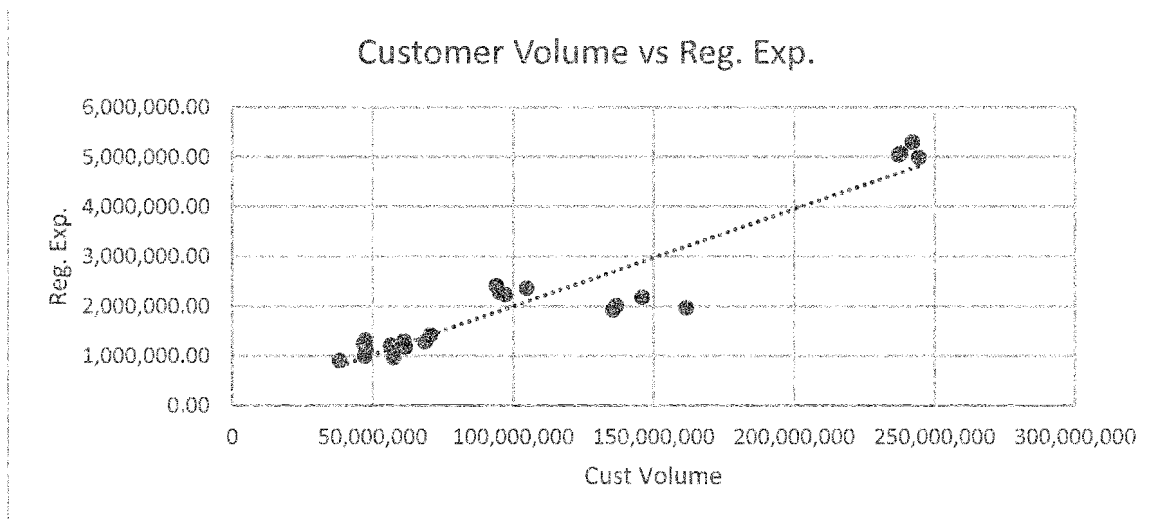
products,¹⁷ cleared by OCC in all clearing ranges except market makers who clear as “M” at OCC (“Market Makers”) ¹⁸ where: (1) the execution occurs on Phlx or (2) the execution occurs on another exchange and is cleared by a Phlx member organization. With this change, Phlx proposes to amend its current ORF to assess ORF on Customer,¹⁹ Professional,²⁰ Firm ²¹ and Broker-Dealer ²² transactions. All market participants, except Market Makers, would be subject to ORF.

The ORF would be collected by OCC on behalf of Phlx from (1) Phlx clearing members for all Customer, Professional, Firm and Broker-Dealer transactions they clear or (2) non-members for all Customer, Professional, Firm and Broker-Dealer transactions they clear that were executed on Phlx. This model collects ORF where there is a nexus with Phlx and does not collect ORF from a non-member organization where the transaction takes place away from the Exchange.

Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on

Phlx (“Local ORF Rate”) and trades executed on non-Phlx exchanges (“Away ORF Rate”) by market participants. For Customer, Professional, and broker-dealer (not affiliated with a clearing member) transactions that clear in the “C” range at OCC (collectively “Customers”) the Exchange proposes to assess a Local ORF Rate of \$0.0190 per contract and an Away ORF Rate of \$0.00 per contract. For Firm and Broker-Dealer transactions that clear in the “F” range at OCC (collectively “Firm and Broker-Dealer Transactions”) the Exchange proposes to assess a Local ORF Rate of \$0.00022 per contract and an Away ORF Rate of \$0.00022 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. Phlx will ensure that ORF Regulatory Revenue does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify member organizations via an Options Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.²³ To that end, the Exchange plotted Customer volumes from each exchange²⁴ against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a “slope” of the line, representing the marginal cost of regulation, as well as an “intercept,” representing the fixed cost of regulation.²⁵ The Exchange considered using non-linear models, but concluded that the best R² (“R-Squared”) ²⁶ results came from a standard $y = Mx + B$ format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.



The results of this modelling indicated a high correlation and

intercept for the baseline cost of regulating the options market as a

whole. Specifically, the regression model indicated that (1) the marginal

¹⁷ Proprietary products are products with intellectual property rights that are not multi-listed. Phlx lists several proprietary products.

¹⁸ Capacity “M” covers Market Makers registered on Phlx and market makers registered at non-Phlx exchanges.

¹⁹ The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(b)(45)). See Options 7, Section 1(c).

²⁰ The term “Professional” applies to transactions for the accounts of Professionals, as defined in

Options 1, Section 1(b)(45) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Options 7, Section 1(c).

²¹ The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. See Options 7, Section 1(c).

²² The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(c). A Broker-Dealer clears in the “F” range at OCC.

²³ This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

²⁴ The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024 Q2 (“Time Period”).

²⁵ The Exchange utilized data from 2023 Q1 to 2024 Q3 to calculate the slope and intercept.

²⁶ R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is: $R^2 = 1 - \text{Unexplained Variation} / \text{Total Variation}$.

cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the “intercept” element of cost. When seeking to offset the “set-up” cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to >97% across multiple historical periods.²⁷

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a “normalization” by per options exchange. This “normalization” encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for “normalization” are negotiated regulatory contracts that were negotiated at different points in time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange’s historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed

values (for Customer Local ORF and Firm and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The “normalization” was then multiplied to a “targeted collection rate” of approximately 88% to arrive at ORF rates for Customer, Firm and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs. The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an expense is considered an Options Regulatory Cost, the Exchange would continue to review all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost. Members will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of member organizations’ transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include direct regulatory expenses²⁸ and certain

indirect expenses in support of the regulatory function.²⁹

Finally, the Exchange notes that this proposal will be sunset on July 1, 2025, at which point the Exchange would revert back to the ORF methodology and rate (\$0.0034 per contract side) that was in effect prior to this rule change.³⁰

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.³¹ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,³² which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³³ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Proposal for November 1, 2024, Through December 31, 2024

The Exchange believes the proposed reduction of ORF is reasonable because it would help ensure that ORF Regulatory Revenue does not exceed a material portion of the Exchange’s ORF Regulatory Costs. As noted above, the ORF is designed to recover a material portion, but not all, of the Exchange’s ORF Regulatory Costs. Further, the Exchange believes the proposed fee change is reasonable because Customer transactions will be subject to a lower ORF than the rate that would otherwise be in effect on November 1, 2024.

The Exchange had designed the ORF to generate ORF Regulatory Revenue that would be less than the amount of the Exchange’s ORF Regulatory Costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange’s business

²⁹ The indirect expenses include support from such areas as Office of the General Counsel, technology, finance and internal audit.

³⁰ The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.

³¹ 15 U.S.C. 78f(b).

³² 15 U.S.C. 78f(b)(4).

³³ 15 U.S.C. 78f(b)(5).

²⁷ The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

²⁸ The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations.

operations. As discussed above, however, after review of its ORF Regulatory Costs and ORF Regulatory Revenue which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect ORF Regulatory Revenue which would exceed its ORF Regulatory Costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate ORF Regulatory Revenue that would cover more than the approximated Exchange's projected ORF Regulatory Costs due to fines. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from \$0.0034 to \$0.0022 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all member organizations on all their transactions that clear in the Customer range at OCC.³⁴ The Exchange believes the ORF ensures fairness by assessing higher fees to those member organizations that require more Exchange regulatory services based on the amount of Customer options business they conduct. Regulating Customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-Customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its members and member organizations, a small portion of which takes place on away exchanges. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own

surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")³⁵ the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to Customer trading activity of its members and member organizations.

Proposal for January 1, 2025

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an Phlx member organization or cleared by an Phlx member organization. With this amendment, Phlx would begin to assess Firm and Broker-Dealer Transactions an ORF, provided the transactions were executed by a Phlx member organization or cleared by a Phlx member organization. Additionally, the Exchange would assess an ORF for options transactions in Phlx proprietary products. Second, as of January 1, 2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firms and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options Regulatory Cost as all member organizations, except Market Makers, would be assessed ORF.

The Exchange believes that assessing all member organizations, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5.

Lead Market Makers are obligated to quote in the Opening Process and intra-day.³⁶ Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.³⁷ Further, unlike other market participants, Lead Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.³⁸ Also, Lead Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay Streaming Quote Trader Fees,³⁹ Remote Market Maker Organization (RMO) Fee,⁴⁰ and Remote Lead Market Maker Fee⁴¹ in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to Phlx and are necessary for opening the market. Excluding Market Maker transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on Phlx in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders

³⁴ If the OCC clearing member is a Phlx member organization, ORF will be assessed and collected on all cleared Customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a Phlx member organization, ORF will be collected only on the cleared Customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.

³⁵ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

³⁶ See Phlx Options 3, Section 8 and Options 2, Section 5.

³⁷ *Id.*

³⁸ See Phlx Options 2, Section 5(a)(3) and (5).

³⁹ See Phlx Options 7, Section 8, B.

⁴⁰ See Phlx Options 7, Section 8, C.

⁴¹ See Phlx Options 7, Section 8, D.

submitted by Market Makers in their unassigned options series are far below the cap⁴² and therefore de minimis.

The Exchange believes including options transactions in Phlx proprietary products is reasonable, equitable and not unfairly discriminatory because Phlx lists various proprietary products for which the Exchange incurs Options Regulatory Costs. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. Phlx notes that there are a small number of Phlx proprietary products transacted as compared to multi-list options. Also, Phlx would only collect an ORF for proprietary products transacted on its market. As such, the Exchange believes that only a Local ORF should be applied to a Phlx proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for a material portion of Phlx's Options Regulatory Cost.⁴³ Customer transactions in

combination with Firm and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm and Broker-Dealer Transactions.⁴⁴ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by member organizations of the Exchange and is not readily available to Phlx.⁴⁵ The Exchange may have to take

human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the member organization's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

⁴⁴ See Phlx Options 10 Rules.

⁴⁵ The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

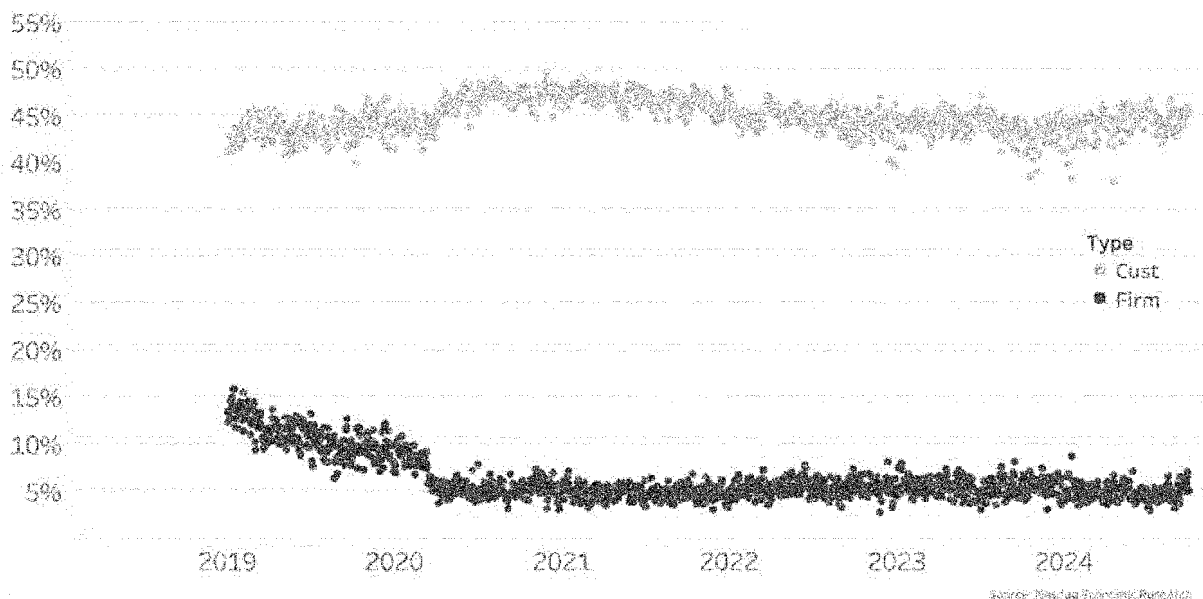
additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (*e.g.*, staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that Phlx's Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.

⁴² See Phlx Options 2, Section 6(a). The total number of contracts executed during a quarter by a Market Maker and Lead Market Maker in options series to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts executed by the Market Maker and Lead Market Maker in options series.

⁴³ The Exchange notes that the regulatory costs relating to monitoring member organizations with respect to Customer trading activity are generally higher than the regulatory costs associated with member organizations that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating member organizations that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of

Industry Capacity Market Share % January 2, 2019 to September 30, 2024



With this model, the addition of Firm and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that unlike Customer transactions, the regulation of Firm and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Range Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options

Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.⁴⁶ The Exchange believes that assessing the Firm and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these member organizations combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm and Broker-Dealer Members.⁴⁷ While

⁴⁶ Phlx pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

⁴⁷ Phlx conducts surveillances and enforces Phlx Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin

not large in number, when compared to the overall number of Exchange rules that are surveilled by Phlx for on-Exchange activity, the Away ORF that would be assessed to Firm and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-Phlx exchanges avoids overlapping ORFs that would otherwise be assessed by Phlx and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.⁴⁸

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

and position limits. Of note, some Phlx trading rules are automatically enforced by Phlx's System.

⁴⁸ Phlx would submit a rule change to the Commission to amend ORF rates.

any burden on intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on intra-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed to address any competitive issues. The Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

Proposal for November 1, 2024, Through December 31, 2024

The Exchange's proposal to reduce its ORF from \$0.0034 to \$0.0022 per contract side from November 1, 2024, through December 31, 2024, does not create an unnecessary or inappropriate burden on intra-market competition because the ORF applies to all Customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity.

Proposal for January 1, 2025

Excluding Market Makers does not impose an undue burden on intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Lead Market Makers are obligated to quote in the Opening Process and intra-day.⁴⁹ Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.⁵⁰ Further, unlike other market participants, Lead Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.⁵¹ Also, Lead Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject

to a number of fees, unlike other market participants. Market Makers pay Streaming Quote Trader Fees,⁵² Remote Market Maker Organization (RMO) Fee,⁵³ and Remote Lead Market Maker Fee⁵⁴ in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to Phlx and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on Phlx in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange, in addition to submitting quotes. The Exchange's proposal to except orders submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap⁵⁵ and therefore de minimis.

Uniformly including options transactions in Phlx proprietary products in ORF for all Phlx member organizations does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. Phlx notes that there are a small number of Phlx proprietary products transacted as compared to multi-list options. Also, Phlx would

only collect an ORF for proprietary products transacted on its market.

The Exchange's proposal to expand the clearing ranges to specifically include Firm and Broker-Dealer Transactions, in addition to Customer and Professional transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of Phlx's Options Regulatory Cost.⁵⁶ Customer transactions in combination with Firm and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm and Broker-Dealer Transactions.⁵⁷ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by member organizations of the Exchange and is not readily available to Phlx.⁵⁸ The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example,

⁵⁶ The Exchange notes that the regulatory costs relating to monitoring Members with respect to customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of customers, but also the Member's relationship with its customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component of the regulatory program.

⁵⁷ See Phlx Options 10 Rules.

⁵⁸ The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

⁴⁹ See Phlx Options 3, Section 8 and Options 2, Section 5.

⁵⁰ *Id.*

⁵¹ See Phlx Options 2, Section 5(a)(3) and (5).

⁵² See Phlx Options 7, Section 8, B.

⁵³ See Phlx Options 7, Section 8, C.

⁵⁴ See Phlx Options 7, Section 8, D.

⁵⁵ See Phlx Options 2, Section 6. The total number of contracts executed during a quarter by a Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded. In the Exchange's experience, Market Maker's are generally below the 25% cap.

there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that Phlx's Customer regulation occurs to a large extent on Exchange.

The Exchange believes that assessing Firm and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm and Broker-Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as Phlx member organizations, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an Phlx member organization. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition because while the regulation of Firm and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm and Broker-Dealer transactions occurs both on the Exchange and across options markets.⁵⁹ The Exchange believes that assessing Firm and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these member organizations combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm and Broker-Dealer member organizations.⁶⁰ While not large in number, when compared to the overall number of Exchange rules that are surveilled by Phlx for on-Exchange activity, the Away ORF that would be assessed to Firm and Broker-Dealer Transactions would account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-Phlx exchanges does not impose a burden on intra-market competition, rather it avoids overlapping ORFs that would otherwise be assessed by Phlx and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Costs borne by different member organizations of the Exchange in light of the volume different member organizations transact on the Exchange.

⁵⁹ Phlx pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

⁶⁰ Phlx conducts surveillances and enforces Phlx Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some Phlx trading rules are automatically enforced by Phlx's System.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁶¹ and Rule 19b-4(f)(2)⁶² thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-Phlx-2024-66. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

⁶¹ 15 U.S.C. 78s(b)(3)(A)(ii).

⁶² 17 CFR 240.19b-4(f)(2).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2024-66 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶³

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29922 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-015, OMB Control No. 3235-0021]

Proposed Collection; Comment Request; Extension: Rule 6a-3

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 6a-3 (17 CFR 240.6a-3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Section 6 of the Act sets out a framework for the registration and regulation of national securities exchanges. Under Rule 6a-3, one of the rules that implements Section 6, a

national securities exchange (or an exchange exempted from registration as a national securities exchange based on limited trading volume) must provide certain supplemental information to the Commission, including any material (including notices, circulars, bulletins, lists, and periodicals) issued or made generally available to members of, or participants or subscribers to, the exchange. Rule 6a-3 also requires the exchanges to file monthly reports that set forth the volume and aggregate dollar amount of certain securities sold on the exchange each month.

The information required to be filed with the Commission pursuant to Rule 6a-3 is designed to enable the Commission to carry out its statutorily mandated oversight functions and to ensure that registered and exempt exchanges continue to be in compliance with the Act.

The Commission estimates that each respondent makes approximately 12 such filings on an annual basis. Each response takes approximately 0.5 hours. Currently, 26 respondents (26 national securities exchanges) are subject to the collection of information requirements of Rule 6a-3. The Commission estimates that the total time burden for all respondents is 156 hours per year.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by February 18, 2025.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Austin Gerig, Director/Chief Data Officer, Securities and Exchange Commission, c/o Tanya Ruttenberg, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: December 12, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29915 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-275, OMB Control No. 3235-0235]

Proposed Collection; Comment Request; Extension: Rule 17a-8

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17a-8 (17 CFR 270.17a-8) under the Investment Company Act of 1940 (the "Act") (15 U.S.C. 80a-1 *et seq.*) is entitled "Mergers of affiliated companies." Rule 17a-8 exempts certain mergers and similar business combinations ("mergers") of affiliated registered investment companies ("funds") from prohibitions under section 17(a) of the Act (15 U.S.C. 80a-17(a)) on purchases and sales between a fund and its affiliates. The rule requires fund directors to consider certain issues and to record their findings in board minutes. The rule requires the directors of any fund merging with an unregistered entity to approve procedures for the valuation of assets received from that entity. These procedures must provide for the preparation of a report by an independent evaluator that sets forth the fair value of each such asset for which market quotations are not readily available. The rule also requires a fund being acquired to obtain approval of the merger transaction by a majority of its outstanding voting securities, except in certain situations, and requires any surviving fund to preserve written records describing the merger and its terms for six years after the merger (the first two in an easily accessible place).

The average annual burden of meeting the requirements of rule 17a-8 is estimated to be 7 hours for each fund. The Commission staff estimates that

⁶³ 17 CFR 200.30-3(a)(12).

each year approximately 200 funds rely on the rule. The estimated total average annual burden for all respondents therefore is 1,400 hours.

The average cost burden of preparing a report by an independent evaluator in a merger with an unregistered entity is estimated to be \$16,180. The average net cost burden of obtaining approval of a merger transaction by a majority of a fund's outstanding voting securities is estimated to be \$131,302. The Commission staff estimates that each year approximately 24 funds hold shareholder votes that would not otherwise have held a shareholder vote. The total annual cost burden of meeting these requirements is estimated to be \$3,151,248.

The estimates of average burden hours and average cost burdens are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by February 18, 2025.

Please direct your written comments to: Austin Gerig, Director/Chief Data Officer, Securities and Exchange Commission, c/o Tanya Ruttenberg, 100 F Street NE, Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: December 12, 2024.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29913 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101897; File No. SR-PEARL-2024-56]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAx Pearl Options Fee Schedule LLC To Adopt Fees for Dedicated Cross Connection Access to the Testing Systems Environment

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 29, 2024, MIAx PEARL, LLC ("MIAx Pearl" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAx Pearl Options Exchange Fee Schedule ("Fee Schedule") to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection.³

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings> at MIAx Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection. The testing systems environment is a virtual trading system environment for Members⁴ and non-Members to test (i) upcoming Exchange software and code releases, (ii) product enhancements, and (iii) firm-developed software, prior to implementation in the Exchange's production (e.g., live trading) environment. Further, the testing systems environment allows unlimited testing of existing functionality, such as order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancellations, and purge requests. The testing systems environment is built to closely approximate the production environment to enable Members and non-Members the ability to test their systems and mimics the live trading environment.⁵

There are currently three methods by which Members and non-Members may access the Exchange's testing systems environment. One, Members and non-Members may access the Exchange's testing systems environment via a virtual private network ("VPN") that operates over the internet and provides site-to-site access. VPN access is provided for free to all Members and non-Members.

A second method is via a dedicated cross connection that allows Members and non-Members to access the testing systems environment and is available as either a 1 gigabit ("Gb") or 10Gb connection. Members and non-Members that utilize a VPN or a dedicated cross connection to access the testing systems environment of the Exchange are also able to access the testing systems environments of each of the Exchange's affiliated options markets—MIAx

⁴ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See the Definitions section of the Fee Schedule and Exchange Rule 100.

⁵ Business continuity and disaster recovery testing is performed separately and not within the testing systems environment that is the subject of this filing.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ All references to the "Exchange" or "MIAx Pearl" in this filing refer to MIAx Pearl Options. Any references to the equities trading facility of MIAx PEARL, LLC will specifically be referred to as "MIAx Pearl Equities."

Sapphire, LLC (“MIAX Sapphire”), Miami International Securities Exchange, LLC (“MIAX”), and MIAX Emerald, LLC (“MIAX Emerald”).⁶ This dedicated cross connection would provide subscribers access to the testing systems environment of the Exchange, as well as each of its affiliate options exchanges, via a single connection.

Third, access is also provided through the production connections for each 1Gb or 10Gb ULL connection for the applicable fee⁷ for such connection and no additional charge. These 1Gb and 10Gb ULL connections provide access to the Exchange’s production environment (*i.e.*, live trading) and allow the receipt of proprietary real-time market data. However, the Exchange previously announced that it will phase out the ability to connect to the testing systems environment via the existing 1Gb and 10Gb ULL production connections by February 28, 2025.⁸

* * * * *

The Exchange now proposes to amend the Fee Schedule to establish a monthly fee for Members and non-Members that choose to access the testing systems environment via a dedicated cross connect. In particular, the Exchange proposes to establish a monthly fee of \$1,000 per dedicated cross connection to the testing systems environment for Members and non-Members. The proposed fee is the same whether a Member or non-Member chooses to connect to the testing systems environment via a 1Gb or 10Gb cross connect. The proposed fees would be set forth under new Sections 4(e) and 4(f) of the Fee Schedule. Proposed Sections 4(e) and 4(f) would also codify that VPN access to the test environment is provided for free for all Members and non-Members.

* * * * *

Members and non-Members that access the testing systems environment

through any one of the available access methods, including a dedicated cross connection, receive functionally the same testing experience. Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture or not utilize the testing systems environment at all. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Regardless of access method, all Members and non-Members are provided the same testing systems environment experience and are able to perform all of the same functions.

Implementation

The proposed fee change will be effective December 1, 2024.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act¹¹ because it represents an equitable allocation of reasonable dues, fees and other charges among market participants using any facility or system which the Exchange operates or controls.

Free VPN Access to the Firm Test Bed Is a Reasonable Substitute

In 2019, Commission staff published guidance suggesting the types of information that self-regulatory organizations (“SROs”) may use to demonstrate that their fee filings comply with the standards of the Exchange Act (the “Staff Guidance”).¹² The Staff Guidance provides that in assessing the reasonableness of a fee, the Staff would consider whether the fee is constrained by significant competitive forces. To determine whether a proposed fee is constrained by significant competitive forces, the Staff Guidance further provides that the Staff would consider whether the evidence provided by an SRO in a Fee Filing proposal demonstrates (i) that there are

reasonable substitutes for the product or service that is the subject of a proposed fee; (ii) that “platform” competition constrains the fee; and/or (iii) that the revenue and cost analysis provided by the SRO otherwise demonstrates that the proposed fee would not result in the SRO taking supra-competitive profits.¹³ The proposed fee is reasonable because there is a reasonable substitute for the service that is the subject of this proposed fee as set forth below.

This filing includes the following evidence that demonstrates that there is a reasonable substitute to purchasing a dedicated cross connection to access the Exchange’s testing systems environment. That reasonable substitute is VPN access, which is provided for free and will continue to be free for all Members and non-Members. Members and non-Members may access the testing systems environment through either a VPN or a dedicated cross connection and will receive functionally the same testing environment and are able to perform all of the same functions. The testing systems environment, whether accessed via a dedicated cross connection or VPN, provides Members and non-Members the same scope of abilities to test their systems and software in the Exchange’s testing systems environment, which replicates the Exchange’s production trading environment. Like a dedicated cross connection, a VPN provides access to the testing systems environment of not only the Exchange, but also each of its affiliate options exchanges over the same single access point. Accessing the testing systems environment via a dedicated cross connection provides no advantage to Members and non-Members compared to those market participants that elect to access the testing systems environment via a VPN for free.

Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Accessing the testing systems environment via the proposed dedicated cross connection may not provide utility to all Members and non-Members based on their business models and needs, and such users may choose to access the testing systems environment for free through the VPN and perform the same testing

⁶ Members and non-Members that choose to utilize the testing systems environment of MIAX Pearl Equities, the equities trading facility of MIAX PEARL, LLC, must utilize a separate dedicated cross connection as MIAX Pearl Equities’ testing systems environment operates on a separate network from the affiliated options markets.

⁷ See MIAX Pearl Fee Schedule, Sections 5(a)–(b) for the fees for 1Gb and 10Gb ULL production connectivity.

⁸ See MIAX Options, MIAX Pearl Options and MIAX Emerald Options Exchanges—Announcing New Extranet Access to Firm Test Beds (FTB1 and FTB2) and Decommissioning of Access via Production Connections Beginning in October 2024, dated September 12, 2024, available at <https://www.miaxglobal.com/alert/2024/09/12/miax-options-miax-pearl-options-and-miax-emerald-options-exchanges-2?nav=all>; and Securities Exchange Act Release No. 100856 (August 28, 2024), 89 FR 71950 (September 4, 2024) (SR-PEARL-2024-38).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(4).

¹² See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

¹³ *Id.*

functions. As such, the Exchange believes that the proposed fee for access to the testing systems environment is reasonable and Members and non-Members have the choice, but are not obligated to access the testing systems environment via a dedicated cross connection. Otherwise, a user may choose to access the test environment via a VPN for free to test system functionality. For example, of the Exchange's forty-one Members¹⁴ and three non-Members that provide connectivity to the Exchange, eleven Members and non-Members currently use a VPN to access the Exchange's testing systems environment instead of the other two currently available options, *i.e.*, a dedicated cross connection or their existing 1Gb or 10Gb ULL connection to the production environment. Some Members and non-Members also choose not to access the testing systems environment at all.

Lastly, supporting a proposed non-transaction fee change by arguing the availability of reasonable substitutes is not novel. Commission Staff has published for immediate effectiveness filings regarding non-transaction fees by exchanges who argued that the fees were consistent with the Exchange Act because of reasonable substitutes were available as provided for in the Commission Staff Guidance.¹⁵

Fee Is Constrained by Competition and the Availability of Free VPN Access

If the Exchange prices the fee for dedicated cross connection access to the testing systems environment too high, Members and non-Members may choose not to subscribe and continue to perform the same testing functions via VPN internet access for no fee if they do not find the fee for accessing the testing systems environment via a dedicated cross connection to be of value. Again, the Exchange notes that accessing the testing systems environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. The Exchange also has Members and non-Members that do not utilize the testing systems environment at all.

The Exchange operates in a highly competitive environment in which 18 U.S. registered equity options exchanges compete for market share. Based on publicly available information for the month of October 2024, no single options exchange had more than approximately 12–13% of the equity options market share and the Exchange represented only approximately 3.28% of the market share of equity options for that month.¹⁶ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁷ The proposed fee for optional access via a dedicated cross connection to the test environment is the result of the competitive environment of the U.S. options industry.

Exchanges compete for order flow by providing testing opportunities and robust testing environments. Services like a testing environment provide Members and non-Members with the opportunity to test Exchange functionality prior to sending real order flow to be executed in the Exchange's production environment. As mentioned above, numerous exchanges provide testing environments to market participants to test functionality and gain comfort with their exchange offering.¹⁸ This is intended to attract

market share by offering a risk free way to gain comfort that their orders would be handled within the Exchange's production environment as expected. Exchanges seek to further encourage market participants to utilize their testing environments by providing multiple methods to connect. Some are provided for free while others and require a fee. Providing multiple methods to connect to a test environment provides market participants a choice on how to engage with the testing environment and a choice regarding the access method that best meets their business and operational needs.

If the Exchange proposed a fee that Members and non-Members viewed as excessively high, then the proposed fee would simply serve to reduce demand for access via a dedicated cross connection to the test environment, which as noted, is entirely optional as the Exchange will continue to provide free access to the test environment through VPN through the internet for site-to-site access. This could, in turn, reduce the attractiveness of the Exchange's live trading production environment because Members and non-Members may be unwilling to test functionality prior to entering live orders. Again, other options exchanges currently offer, or are able to introduce at their own cost, their own comparable testing environments with lower prices to better compete with the Exchange's offering and several competing exchanges already provide a similar service.

Selling different products and services, such as proposed herein, is a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting market participants to purchase the dedicated cross connection to the test environment proposed herein, the Exchange may earn revenue and further enhance market participants' interactions on the Exchange, which would increase value of its other products and services to all market participants. If the market deems the proposed fee to be too high, Members and non-Members can choose not to use or discontinue their use of dedicated cross connection to the test environment and perform the same testing functions via the VPN internet access for free. The Exchange, therefore, believes that the proposed fee for dedicated cross connection to the test environment reflects the competitive environment of U.S. options exchanges and would be

process configurations which provide for a robust and realistic testing experience . . .”).

¹⁴ See the Exchange's Membership Directory available at https://www.miaxglobal.com/miax_pearl_options_exchange_members.pdf.

¹⁵ See, e.g., Securities Exchange Act Release Nos. 101096 (September 18, 2024), 89 FR 77913 (September 24, 2024) (SR-ISE-2024-46); 98974 (November 16, 2023), 88 FR 81468 (November 22, 2023) (SR-NYSEARCA-2023-78); 87795 (December 18, 2019), 84 FR 71043 (December 26, 2019) (SR-NYSEArca-2019-88); and 90409 (November 12, 2020), 85 FR 73522 (November 18, 2020) (SR-NYSEArca-2020-95).

¹⁶ See the “Market Share” section of the Exchange's website, available at <https://www.miaxglobal.com/> (last visited November 18, 2024).

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁸ The Exchange notes that other exchange families offer a similar dedicated connection to their testing environment for their members and non-members. See, e.g., Nasdaq Options Test Facility (NTF) Abstract, Version 1.4.4 (March 2024), available at https://www.nasdaq.com/Nasdaq_Test_Facility_NTF_Guide (last visited July 16, 2024) (“... the Nasdaq Test Facility . . . where market participants can test their trading applications with the INET trading system. The NTF environment allows members to test sending and executing quotes and orders offered by our six options exchanges . . .”); see also Securities Exchange Act Release No. 100442 (June 27, 2024), 89 FR 55296 (July 3, 2024) (SR-ChoeBZX-2024-058) (“... the Exchange also offers corresponding ports which provide Members and non-Members access to the Exchange's certification environment to test proprietary systems and applications . . . The certification environment facilitates testing using replicas of the Exchange's production environment

properly assessed to Members and non-Members that subscribe.

The Proposed Fee Is Reasonable Because it is Similar to or Lower Than Like Fees Charged by Other Exchanges

The Exchange believes the proposed fees are reasonable as the proposed fees are similar to or lower than fees charged by competing exchanges for similar services. For example, The Nasdaq Stock Market, LLC assesses a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port plus a one-time installation fee of \$1,000 per hand-off.¹⁹ The Exchange's proposed fee is, therefore, lower because it does not charge a separate installation fee. Cboe BZX Exchange, Inc. ("Cboe BZX") Options assesses a lower fee of \$250 per month for each certification logical port, which only provides access to the Cboe BZX testing environment, and not to the testing environment of any of Cboe BZX's affiliates.²⁰ The fee to access the Cboe BZX testing environment and the testing environment of each of its three affiliated options exchange becomes incrementally higher with each Cboe BZX affiliate charging a \$250 monthly fee to access each testing environment, totaling as much as \$1,000.00 per month.²¹ Accordingly, the Exchange believes that comparable and

competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act.

The Proposed Fee Is Not Unfairly Discriminatory

The Exchange also believes the proposed fee is equitable and not unfairly discriminatory as the fee would apply equally to all Members and non-Members who choose to subscribe. It is a business and operational decision of each Member or non-Member that chooses to subscribe. The Exchange's proposed fee would not differentiate between Members and non-Members or connectivity types and is set at a modest level that would allow any interested Member and non-Member to subscribe based on their business and operational needs.

The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act²² in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The Exchange does not believe that the proposed fee is unfairly discriminatory to subscribers to the test environment via a dedicated cross connection because, unlike the live trading environment where the capacity of connectivity to the Exchange may confer a competitive advantage to a market participant and therefore price differentiation is appropriate for the benefit conferred, there is no such benefit conferred in the testing systems environment.

The Exchange does not believe that the proposed fee is unfairly discriminatory among subscribers to the test environment because all Members and non-Members that subscribe to the service will be assessed the same fee. Because the proposed fee does not discriminate between 1Gb and 10Gb cross connection options, Members and non-Members are able to subscribe to the test environment without regard to the cost of their capacity election. The Exchange believes that not discriminating on this basis will encourage participants to connect to the test environment in the same manner as they do to the live trading environment, and thereby help the test environment more closely mirror the live trading environment. Providing a more useful and accurate test environment will serve

to improve live trading on the Exchange and the national market system by permitting Members and non-Members the ability to accurately test changes prior to implementing them in the live trading environment, thereby reducing the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

The Proposed Fee Is Equitable

The Exchange believes that the proposed fee is equitably allocated because all Members and non-Members that choose to connect to the test environment will be assessed a uniform fee for those services. The Exchange believes that offering subscribers the option to subscribe to either a 1Gb or 10Gb dedicated cross connection for the same fee is an equitable allocation of fees because, unlike the live trading environment, there is no competitive advantage to possessing a higher capacity connection in the test environment. The test environment is designed to closely mirror the live trading environment for Members and non-Members, including matching the capacity of the live trading environment connection of each Member and non-Member. In the absence of any competitive advantage, charging a uniform fee for both a 1Gb or 10Gb dedicated cross connection is an equitable allocation of fees. The Exchange believes that charging a uniform fee rather than mirroring the fees for the live trading environment will encourage Members and non-Members to subscribe to the test environment and further encourage those that subscribe to use the same hardware as is used by them for connectivity to the live trading environment.

* * * * *

Finally, and as noted above, the Exchange's test environment provides a robust and realistic testing experience using a replica of the Exchange's production environment process configurations. This environment enables market participants to test upcoming Exchange software and code releases, product enhancements, as well as test firm software prior to implementation in the production environment. Further, the test environment allows unlimited firm-level testing of order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancellations, and purge requests. By providing firms the ability to test all of these features in the test environment prior to implementing them in the live

¹⁹ See, e.g., Nasdaq, Options 7: Pricing Schedule, Section 13 Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%20Options%207>. Nasdaq's affiliates, like Nasdaq PHLX LLC ("PHLX"), also charge the same fee. See e.g., PHLX Options 7: Pricing Schedule, Section 9. Other Member Fees, E. Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207> (assessing a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port and a one-time installation fee of \$1,000 per hand-off). See also Securities Exchange Act Release No. 76259 (October 26, 2015), 80 FR 66947 (October 30, 2015) (SR-NASDAQ-2015-117) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Options Testing Facility). Like the Exchange's testing environment, a single connection to Nasdaq's test environment provides access to the other test environments of its affiliate options markets, PHLX and Nasdaq BX, Inc.

²⁰ See also Cboe BZX Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/bzx/. See, e.g., Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/.

²¹ See also Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/; Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/c2/.

²² 15 U.S.C. 78f(b)(5).

trading environment, the Exchange believes this will reduce the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange made connectivity access to the test environment available to keep pace with technological changes in the industry and evolving customer needs and demands, and believes the product will contribute to robust competition among national securities exchanges. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange believes the proposed fee would not cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable testing environments for free or lower prices, which several competing exchanges already provide.²³ The Exchange operates in a highly competitive environment, and its ability to price access to the test environment is constrained by the optional nature of accessing the test environment via a dedicated cross connect. Providing access to the test environment via dedicated cross connection is provided purely for convenience, in response to Member demand, and, again, would be entirely optional. The Exchange notes that use of accessing the test environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. Members who do not prefer the to access the test environment via a dedicated cross connection and pay the applicable fee will be able to continue to perform the same testing functions when accessing the test environment via the existing VPN internet access for free. The Exchange must consider this in its pricing discipline in order to attract subscribers. The Exchange believes that if it were to propose a fee that is excessively high, it would simply serve to reduce demand for the Exchange's product, which as discussed, Members and non-Members are under no obligation to utilize.

The Exchange does not believe the proposed rule change would cause any

unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed fee applies uniformly to any purchaser in that the Exchange does not differentiate between subscribers that wish to access the testing systems environment via a dedicated cross connect via either a 1Gb or 10Gb connection. The proposed fee is set at a modest level that would allow any interested market participant to purchase access to the test environment based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,²⁴ and Rule 19b-4(f)(2)²⁵ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2024-56 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-PEARL-2024-56. This file

number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2024-56 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29926 Filed 12-17-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101891; File No. SR-MRX-2024-45]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a New Approach to the Options Regulatory Fee (ORF) in 2025

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 27, 2024, Nasdaq MRX, LLC ("MRX" or

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²³ See *supra* note 19.

²⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁵ 17 CFR 240.19b-4(f)(2).

“Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX’s Pricing Schedule at Options 7, Section 5C, Options Regulatory Fee.³

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments to be operative on January 1, 2025.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

MRX proposes to amend its current ORF in several respects. MRX proposes to amend its methodology of collection to: (1) exclude options transactions in proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as “M” at The Options Clearing Corporation (“OCC”). Additionally, MRX will assess a different rate for trades executed on MRX (“Local ORF Rate”) and trades

executed on non-MRX exchanges (“Away ORF Rate”).

Background on Current ORF

Today, MRX assesses its ORF for each Customer⁴ option transaction that is either: (1) executed by a Member⁵ on MRX; or (2) cleared by an MRX Member at OCC in the Customer range,⁶ even if the transaction was executed by a non-Member of MRX, regardless of the exchange on which the transaction occurs.⁷ If the OCC clearing member is an MRX Member, ORF is assessed and collected on all ultimately cleared Customer contracts (after adjustment for CMTA⁸); and (2) if the OCC clearing member is not an MRX Member, ORF is collected only on the cleared Customer contracts executed at MRX, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.⁹ The current MRX ORF is \$0.0004 per contract side.

Today, in the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. Today, in the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. Today, in the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction.

⁴ Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the “C” range at OCC. See *supra* notes 13 and 14 for descriptions of Priority Customers and Professional Customers.

⁵ The term “Member” means an organization that has been approved to exercise trading rights associated with Exchange Rights. See General 1, Section 1(a)(14).

⁶ Market participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

⁷ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁸ CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

⁹ By way of example, if Broker A, an MRX Member, routes a Customer order to CBOE and the transaction executes on CBOE and clears in Broker A’s OCC Clearing account, ORF will be collected by MRX from Broker A’s clearing account at OCC via direct debit. While this transaction was executed on a market other than MRX, it was cleared by an MRX Member in the member’s OCC clearing account in the Customer range, therefore there is a regulatory nexus between MRX and the transaction. If Broker A was not an MRX Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on MRX nor was it cleared by an MRX Member.

Today, in the case where a Member executes a transaction on MRX and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on MRX and collected from the non-Member who cleared the transaction. Today, in the case where a Member executes a transaction at an away market and a non-Member ultimately clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

Today, the Exchange monitors the amount of revenue collected from the ORF (“ORF Regulatory Revenue”) to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.¹⁰ In determining whether an expense is considered an Options Regulatory Cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of member Customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Options Regulatory Costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations, and examinations. The indirect expenses are only those expenses that are in support of the regulatory functions, such areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs.

¹⁰ The regulatory costs for options comprise a subset of the Exchange’s regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all Members’ options activity (“Options Regulatory Cost”).

³ On November 5, 2024, SR-MRX-2024-39 was filed to amend ORF. On November 27, 2024, SR-MRX-2024-39 was withdrawn and this rule change was filed. The current proposal amends the ORF Rate for Local Customer “C” Origin Code transactions executed on MRX, Local Firm “F” Origin Code transactions executed on MRX, and Away ORF Rate Firm “F” Origin Code multi-list transactions executed on non-MRX exchanges.

Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.¹¹

The ORF is designed to recover a material portion of the Options Regulatory Costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal for January 1, 2025

MRX has been reviewing its methodologies for the assessment and collection of ORF. As a result of this review, MRX proposes to revamp the current process of assessing and collecting ORF in various ways. Below MRX will explain the modelling it performed and the outcomes of the modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, MRX proposes to assess ORF to each MRX Member for multi-listed options transactions, excluding options transactions in proprietary products,¹² cleared by OCC in all clearing ranges except market makers who clear as “M” at OCC (“Market Makers”)¹³ where: (1) the execution occurs on MRX or (2) the execution occurs on another exchange and is cleared by an MRX Member. With this change, MRX proposes to amend its current ORF to assess ORF on Priority Customer,¹⁴ Professional Customer,¹⁵

and Firm Proprietary¹⁶ and Broker-Dealer¹⁷ transactions. All market participants, except Market Makers, would be subject to ORF.

The ORF would be collected by OCC on behalf of MRX from (1) MRX clearing members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear or (2) non-members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear that were executed on MRX. This model collects ORF where there is a nexus with MRX and does not collect ORF from a non-Member where the transaction takes place away from the Exchange.

Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on MRX (“Local ORF Rate”) and trades executed on non-MRX exchanges (“Away ORF Rate”) by market participants. For Priority Customer, Professional Customer, and broker-dealer (not affiliated with a clearing member) transactions that clear in the “C” range at OCC (collectively “Customers”) the Exchange proposes to assess a Local ORF Rate of \$0.0149 per contract and an Away ORF Rate of \$0.00 per contract. For Firm Proprietary and Broker-Dealer transactions that clear in the “F” range at OCC (collectively “Firm Proprietary and Broker-Dealer Transactions”) the Exchange proposes to assess a Local ORF Rate of \$0.00018 per contract and an Away ORF Rate of \$0.00018 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. MRX will ensure that ORF Regulatory Revenue

Customer. See Options 7, Section 1(c). The “C” range at OCC includes both Priority Customer and Professional Customer transactions.

¹⁶ A “Firm Proprietary” order is an order submitted by a Member for its own proprietary account. See Options 7, Section 1(c).

¹⁷ A “Broker-Dealer” order is an order submitted by a Member for a broker-dealer account that is not its own proprietary account. See Options 7, Section 1(c). A Broker-Dealer clears in the “F” range at OCC.

does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify Members via an Options Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.¹⁸ To that end, the Exchange plotted Customer volumes from each exchange¹⁹ against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a “slope” of the line, representing the marginal cost of regulation, as well as an “intercept,” representing the fixed cost of regulation.²⁰ The Exchange considered using non-linear models, but concluded that the best R² (“R-Squared”)²¹ results came from a standard $y = Mx + B$ format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.

¹⁸ This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

¹⁹ The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024 Q2 (“Time Period”).

²⁰ The Exchange utilized data from 2023 Q1 to 2024 Q3 to calculate the slope and intercept.

²¹ R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is: $R^2 = 1 - \text{Unexplained Variation} / \text{Total Variation}$.

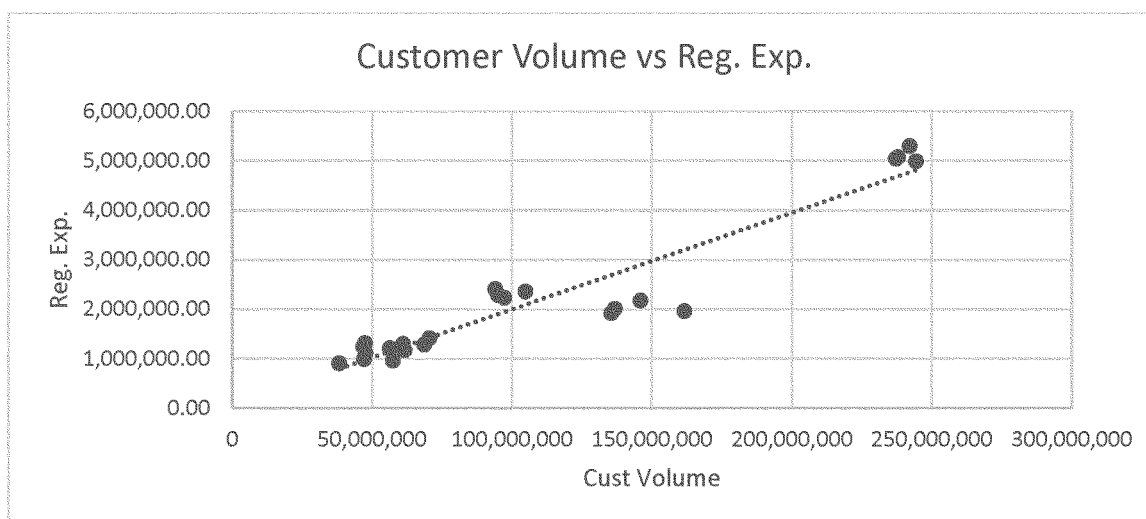
¹¹ Direct and indirect expenses are based on the Exchange’s 2024 Regulatory Budget.

¹² Proprietary products are products with intellectual property rights that are not multi-listed. MRX has no proprietary products.

¹³ Capacity “M” covers Market Makers registered on MRX and market makers registered at non-MRX exchanges.

¹⁴ A “Priority Customer” is a person or entity that is not a broker/dealer in securities and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq MRX Options 1, Section 1(a)(36). Unless otherwise noted, when used in this Pricing Schedule the term “Priority Customer” includes “Retail” as defined below. See Options 7, Section 1(c).

¹⁵ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority



The results of this modelling indicated a high correlation and intercept for the baseline cost of regulating the options market as a whole. Specifically, the regression model indicated that (1) the marginal cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the “intercept” element of cost. When seeking to offset the “set-up” cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm Proprietary and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to >97% across multiple historical periods.²²

²² The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm Proprietary and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a “normalization” by per options exchange. This “normalization” encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for “normalization” are negotiated regulatory contracts that were negotiated at different points in time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange’s historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed values (for Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The “normalization” was then multiplied to a “targeted collection rate” of approximately 88% to arrive at ORF rates for Customer, Firm Proprietary and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs. The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an expense is considered an Options Regulatory Cost, the Exchange would continue to review all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost. Members will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of Members’ transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include direct regulatory expenses²³ and certain

²³ The direct expenses include in-house and third-party service provider costs to support the

indirect expenses in support of the regulatory function.²⁴

Finally, the Exchange notes that this proposal will sunset on July 1, 2025, at which point the Exchange would revert back to the ORF methodology and rate (\$0.0004 per contract side) that was in effect prior to this rule change.²⁵

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.²⁶ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,²⁷ which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁸ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Proposal for January 1, 2025

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an MRX Member or cleared by an MRX Member. With this amendment, MRX would begin to assess Firm Proprietary and Broker-Dealer Transactions an ORF, provided the transactions were executed by an MRX Member or cleared by an MRX Member, except transactions in proprietary products. Second, as of January 1, 2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options

Regulatory Cost as all Members, except Market Makers, would be assessed ORF.

The Exchange believes that assessing all Members, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.²⁹ Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.³⁰ Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.³¹ Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees³² in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to MRX and are necessary for opening the market. Excluding Market Maker transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on MRX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This

proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap³³ and therefore de minimis.

The Exchange believes excluding options transactions in proprietary products is reasonable, equitable and not unfairly discriminatory because MRX does not list any proprietary products. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF for those products. MRX notes that there are a small number of proprietary products transacted as compared to multi-list options. MRX’s focus is on surveillance related to multi-listed options. Should MRX list a proprietary product in the future, MRX would amend its ORF to collect a Local ORF on that proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for a material portion of MRX’s Options Regulatory Cost.³⁴ Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange’s surveillance expense.

³³ See MRX Options 2, Section 6. The total number of contracts executed during a quarter by a Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded. In the Exchange’s experience, Market Maker’s are generally below the 25% cap.

³⁴ The Exchange notes that the regulatory costs relating to monitoring Members with respect to Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member’s relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the Customer component of the Exchange’s overall regulatory program are materially higher than the costs associated with administering the non-Customer component of the regulatory program.

day-to-day regulatory work such as surveillances, investigations, and examinations.

²⁴ The indirect expenses include support from such areas as Office of the General Counsel, technology, finance, and internal audit.

²⁵ The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ See MRX Options 3, Section 8 and Options 2, Section 5.

³⁰ *Id.*

³¹ See MRX Options 2, Section 4(b)(1) and (3).

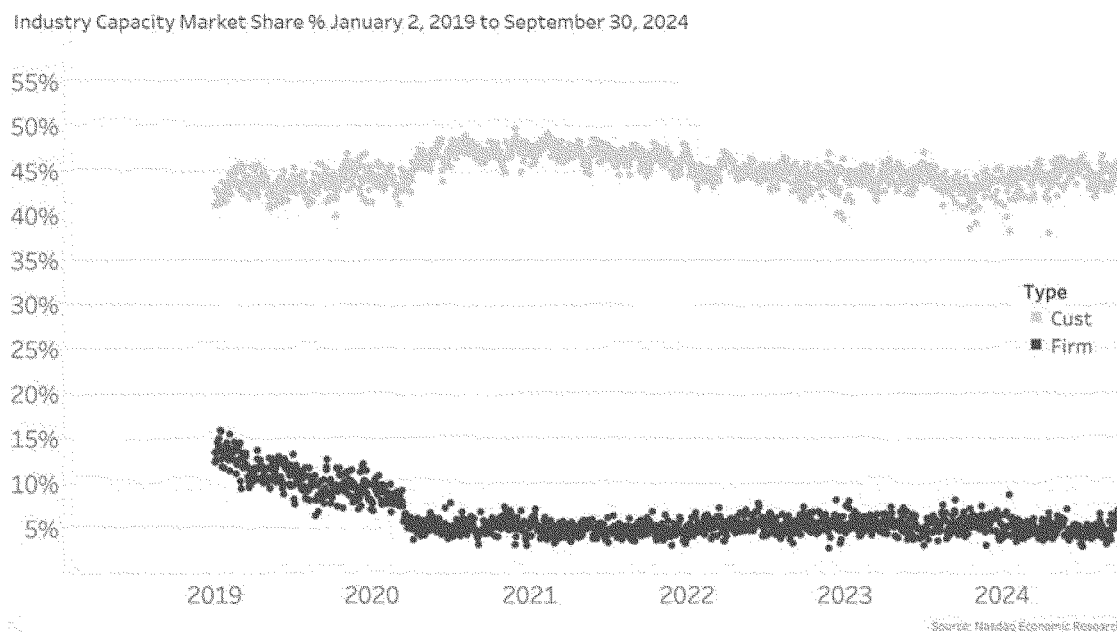
³² See MRX Options 7, Section 6, B.

Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.³⁵ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the

Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to MRX.³⁶ The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with

administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that MRX's Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm Proprietary and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.



With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm Proprietary and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of

Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to

assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

³⁵ See MRX Options 10 Rules.

³⁶ The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm Proprietary and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.³⁷ The Exchange believes that assessing the Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.³⁸ While not large in number, when compared to the overall number of Exchange rules that are surveilled by MRX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-MRX exchanges avoids overlapping ORFs that would otherwise be assessed by MRX and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees

and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.³⁹

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on inter-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed to address any competitive issues. The Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

Proposal for January 1, 2025

Excluding Market Makers does not impose an undue burden on intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.⁴⁰ Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.⁴¹ Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed

market conditions in all series of options classes to which the Market Maker is appointed.⁴² Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Market Makers pay CMM Trading Right Fees⁴³ in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to MRX and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on MRX in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange in addition to submitting quotes. The Exchange's proposal to except orders submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap⁴⁴ and therefore de minimis.

Uniformly excluding options transactions in proprietary products

³⁷ See MRX Options 2, Section 4(b)(1) and (3).

³⁸ See MRX Options 7, Section 6, B.

³⁹ See MRX Options 2, Section 6(b)(1) and (2).

The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

³⁷ MRX pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

³⁸ MRX conducts surveillances and enforces MRX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some MRX trading rules are automatically enforced by MRX's System.

³⁹ MRX would submit a rule change to the Commission to amend ORF rates.

⁴⁰ See MRX Options 3, Section 8 and Options 2, Section 5.

⁴¹ *Id.*

from ORF for all MRX Members does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF for those products. There are a small number of proprietary products transacted as compared to multi-list options. Also, proprietary products are transacted on a limited number of options exchanges and would require a de minimis amount of cross market surveillance, for these reasons the Exchange believes that only a Local ORF should be applied to the extent that MRX were to list a proprietary product. MRX's focus is on surveillance related to multi-listed options. Should MRX list a proprietary product in the future, MRX would amend its ORF to collect a Local ORF on that proprietary product.

The Exchange's proposal to expand the clearing ranges to specifically include Firm Proprietary and Broker-Dealer Transactions, in addition to Priority Customer and Professional Customer transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of MRX's Options Regulatory Cost.⁴⁵ Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.⁴⁶ For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to

Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to MRX.⁴⁷ The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory Costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into Customer complaints and the terminations of registered persons. As a result, the Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that MRX's Customer regulation occurs to a large extent on Exchange.

The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-

Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as MRX Members, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an MRX Member. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm Proprietary and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition because while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets.⁴⁸ The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.⁴⁹ While not large in number, when compared to the overall number of Exchange rules that are surveilled by MRX for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer Transactions would

⁴⁵ The Exchange notes that the regulatory costs relating to monitoring Members with respect to customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of customers, but also the Member's relationship with its customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component of the regulatory program.

⁴⁶ See MRX Options 10 Rules.

⁴⁷ The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

⁴⁸ MRX pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

⁴⁹ MRX conducts surveillances and enforces MRX Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some MRX trading rules are automatically enforced by MRX's System.

account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-MRX exchanges does not impose a burden on intra-market competition, rather it avoids overlapping ORFs that would otherwise be assessed by MRX and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm Proprietary and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Costs borne by different Members of the Exchange in light of the volume different Members transact on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁵⁰ and Rule 19b-4(f)(2)⁵¹ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

- Send an email to rule-comments@sec.gov. Please include file number SR-MRX-2024-45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-MRX-2024-45. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-MRX-2024-45 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29920 Filed 12-17-24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-101896; File No. SR-SAPPHIRE-2024-40]

Self-Regulatory Organizations; MIA X Sapphire, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIA X Sapphire Fee Schedule To Adopt Fees for Dedicated Cross Connection Access to the Testing Systems Environment

December 12, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 29, 2024, MIA X Sapphire, LLC ("MIA X Sapphire" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIA X Sapphire Options Exchange Fee Schedule (the "Fee Schedule") to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/all-options-exchanges/rule-filings>, at MIA X Sapphire's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

⁵⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵¹ 17 CFR 240.19b-4(f)(2).

⁵² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish a fee for market participants that choose to utilize the Exchange's testing systems environment via a dedicated cross connection. The testing systems environment is a virtual trading system environment for Members³ and non-Members to test (i) upcoming Exchange software and code releases, (ii) product enhancements, and (iii) firm-developed software, prior to implementation in the Exchange's production (e.g., live trading) environment. Further, the testing systems environment allows unlimited testing of existing functionality, such as order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancellations, and purge requests. The testing systems environment is built to closely approximate the production environment to enable Members and non-Members the ability to test their systems and mimics the live trading environment.⁴

There are currently three methods by which Members and non-Members may access the Exchange's testing systems environment. One, Members and non-Members may access the Exchange's testing systems environment via a virtual private network ("VPN") that operates over the internet and provides site-to-site access. VPN access is provided for free to all Members and non-Members.

A second method is via a dedicated cross connection that allows Members and non-Members to access the testing systems environment and is available as either a 1 gigabit ("Gb") or 10Gb connection. Members and non-Members that utilize a VPN or a dedicated cross connection to access the testing systems environment of the Exchange are also able to access the testing systems environments of each of the Exchange's affiliated options markets—Miami International Securities Exchange, LLC ("MIAX"), MIAX PEARL, LLC⁵ ("MIAX

Pearl Options"), and MIAX Emerald, LLC ("MIAX Emerald"). This dedicated cross connection would provide subscribers access to the testing systems environment of the Exchange, as well as each of its affiliate options exchanges, via a single connection.

Third, access is also provided through the production connections for each 1Gb or 10Gb ULL connection for the applicable fee⁶ for such connection and no additional charge. These 1Gb and 10Gb ULL connections provide access to the Exchange's production environment (i.e., live trading) and allow the receipt of proprietary real-time market data. However, the Exchange previously announced that it will phase out the ability to connect to the testing systems environment via the existing 1Gb and 10Gb ULL production connections by February 28, 2025.⁷

The Exchange now proposes to amend the Fee Schedule to establish a monthly fee for Members and non-Members that choose to access the testing systems environment via a dedicated cross connect. In particular, the Exchange proposes to establish a monthly fee of \$1,000 per dedicated cross connection to the testing systems environment for Members and non-Members. The proposed fee is the same whether a Member or non-Member chooses to connect to the testing systems environment via a 1Gb or 10Gb cross connect. The proposed fees would be set forth under new Sections 4)e) and 4)f) of the Fee Schedule. Proposed Sections 4)e) and 4)f) would also codify that VPN access to the test environment is provided for free for all Members and non-Members.

Members and non-Members that access the testing systems environment through any one of the available access methods, including a dedicated cross

LLC, referred to herein as "MIAX Pearl Options." Members and non-Members that choose to utilize the testing systems environment of MIAX Pearl Equities, the equities trading facility of MIAX PEARL, LLC, must utilize a separate dedicated cross connection as MIAX Pearl Equities' testing systems environment operates on a separate network from the affiliated options markets.

⁶ See MIAX Sapphire Fee Schedule, Sections 5)a)–b) for the fees for 1Gb and 10Gb ULL production connectivity.

⁷ See MIAX Options, MIAX Pearl Options and MIAX Emerald Options Exchanges—Announcing New Extranet Access to Firm Test Beds (FTB1 and FTB2) and Decommissioning of Access via Production Connections Beginning in October 2024, dated September 12, 2024, available at <https://www.miaxglobal.com/alert/2024/09/12/miax-options-miax-pearl-options-and-miax-emerald-options-exchanges-2?nav=all>; and Securities Exchange Act Release No. 100732 (August 15, 2024), 89 FR 67693 (August 21, 2024) (SR–SAPPHIRE–2024–07).

connection, receive functionally the same testing experience. Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture or not utilize the testing systems environment at all. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Regardless of access method, all Members and non-Members are provided the same testing systems environment experience and are able to perform all of the same functions.

Implementation

The proposed fee change will be effective December 1, 2024.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act¹⁰ because it represents an equitable allocation of reasonable dues, fees and other charges among market participants using any facility or system which the Exchange operates or controls.

Free VPN Access to the Firm Test Bed is a Reasonable Substitute

In 2019, Commission staff published guidance suggesting the types of information that self-regulatory organizations ("SROs") may use to demonstrate that their fee filings comply with the standards of the Exchange Act (the "Staff Guidance").¹¹ The Staff Guidance provides that in assessing the reasonableness of a fee, the Staff would consider whether the fee is constrained by significant competitive forces. To determine whether a proposed fee is constrained by significant competitive forces, the Staff Guidance further provides that the Staff would consider whether the evidence provided by an SRO in a Fee Filing proposal demonstrates (i) that there are reasonable substitutes for the product or service that is the subject of a proposed

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

³ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

⁴ Business continuity and disaster recovery testing is performed separately and not within the testing systems environment that is the subject of this filing.

⁵ All references to "MIAX PEARL" in this filing are to the options trading facility of MIAX PEARL,

fee; (ii) that “platform” competition constrains the fee; and/or (iii) that the revenue and cost analysis provided by the SRO otherwise demonstrates that the proposed fee would not result in the SRO taking supra-competitive profits.¹² The proposed fee is reasonable because there is a reasonable substitute for the service that is the subject of this proposed fee as set forth below.

This filing includes the following evidence that demonstrates that there is a reasonable substitute to purchasing a dedicated cross connection to access the Exchange’s testing systems environment. That reasonable substitute is VPN access, which is provided for free and will continue to be free for all Members and non-Members. Members and non-Members may access the testing systems environment through either a VPN or a dedicated cross connection and will receive functionally the same testing environment and are able to perform all of the same functions. The testing systems environment, whether accessed via a dedicated cross connection or VPN, provides Members and non-Members the same scope of abilities to test their systems and software in the Exchange’s testing systems environment, which replicates the Exchange’s production trading environment. Like a dedicated cross connection, a VPN provides access to the testing systems environment of not only the Exchange, but also each of its affiliate options exchanges over the same single access point. Accessing the testing systems environment via a dedicated cross connection provides no advantage to Members and non-Members compared to those market participants that elect to access the testing systems environment via a VPN for free.

Each Member or non-Member is free to decide how to access the testing systems environment based on their own needs and trading architecture. Again, accessing the testing systems environment via a dedicated direct connection is entirely optional and no Member or non-Member is required by rule or regulation to make use of the testing systems environment via a dedicated direct connection. Accessing the testing systems environment via the proposed dedicated cross connection may not provide utility to all Members and non-Members based on their business models and needs, and such users may choose to access the testing systems environment for free through the VPN and perform the same testing functions. As such, the Exchange believes that the proposed fee for access

to the testing systems environment is reasonable and Members and non-Members have the choice, but are not obligated to access the testing systems environment via a dedicated cross connection. Otherwise, a user may choose to access the test environment via a VPN for free to test system functionality. For example, of the Exchange’s thirty-four Members¹³ and two non-Members that provide connectivity to the Exchange, nine Members and non-Members currently use a VPN to access the Exchange’s testing systems environment instead of the other two currently available options, *i.e.*, a dedicated cross connection or their existing 1Gb or 10Gb ULL connection to the production environment. Some Members and non-Members also choose not to access the testing systems environment at all.

Lastly, supporting a proposed non-transaction fee change by arguing the availability of reasonable substitutes is not novel. Commission Staff has published for immediate effectiveness filings regarding non-transaction fees by exchanges who argued that the fees were consistent with the Exchange Act because of reasonable substitutes were available as provided for in the Commission Staff Guidance.¹⁴

Fee Is Constrained by Competition and the Availability of Free VPN Access

If the Exchange prices the fee for dedicated cross connection access to the testing systems environment too high, Members and non-Members may choose not to subscribe and continue to perform the same testing functions via VPN internet access for no fee if they do not find the fee for accessing the testing systems environment via a dedicated cross connection to be of value. Again, the Exchange notes that accessing the testing systems environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. The Exchange also has Members and non-Members that do not utilize the testing systems environment at all.

The Exchange operates in a highly competitive environment in which 18 U.S. registered equity options exchanges

compete for market share. Based on publicly available information for the month of October 2024, no single options exchange had more than approximately 12–13% of the equity options market share and the Exchange represented only approximately 1.71% of the market share of equity options for that month.¹⁵ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁶ The proposed fee for optional access via a dedicated cross connection to the test environment is the result of the competitive environment of the U.S. options industry.

Exchanges compete for order flow by providing testing opportunities and robust testing environments. Services like a testing environment provide Members and non-Members with the opportunity to test Exchange functionality prior to sending real order flow to be executed in the Exchange’s production environment. As mentioned above, numerous exchanges provide testing environments to market participants to test functionality and gain comfort with their exchange offering.¹⁷ This is intended to attract market share by offering a risk free way

¹⁵ See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/> (last visited November 5, 2024).

¹⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁷ The Exchange notes that other exchange families offer a similar dedicated connection to their testing environment for their members and non-members. See, e.g., Nasdaq Options Test Facility (NTF) Abstract, Version 1.4.4 (March 2024), available at https://www.nasdaq.com/Nasdaq_Test_Facility_NTF_Guide (last visited July 16, 2024) (“the Nasdaq Test Facility . . . where market participants can test their trading applications with the INET trading system. The NTF environment allows members to test sending and executing quotes and orders offered by our six options exchanges . . .”); see also Securities Exchange Act Release No. 100442 (June 27, 2024), 89 FR 55296 (July 3, 2024) (SR–CboeBZX–2024–058) (“the Exchange also offers corresponding ports which provide Members and non-Members access to the Exchange’s certification environment to test proprietary systems and applications . . . The certification environment facilitates testing using replicas of the Exchange’s production environment process configurations which provide for a robust and realistic testing experience . . .”).

¹³ See the Exchange’s Membership Directory available at https://www.miaxglobal.com/miax_sapphire_exchange_members.pdf.

¹⁴ See, e.g., Securities Exchange Act Release Nos. 101096 (September 18, 2024), 89 FR 77913 (September 24, 2024) (SR–ISE–2024–46); 98974 (November 16, 2023), 88 FR 81468 (November 22, 2023) (SR–NYSEARCA–2023–78); 87795 (December 18, 2019), 84 FR 71043 (December 26, 2019) (SR–NYSEARCA–2019–88); and 90409 (November 12, 2020), 85 FR 73522 (November 18, 2020) (SR–NYSEARCA–2020–95).

¹² *Id.*

to gain comfort that their orders would be handled within the Exchange's production environment as expected. Exchanges seek to further encourage market participants to utilize their testing environments by providing multiple methods to connect. Some are provided for free while others and require a fee. Providing multiple methods to connect to a test environment provides market participants a choice on how to engage with the testing environment and a choice regarding the access method that best meets their business and operational needs.

If the Exchange proposed a fee that Members and non-Members viewed as excessively high, then the proposed fee would simply serve to reduce demand for access via a dedicated cross connection to the test environment, which as noted, is entirely optional as the Exchange will continue to provide free access to the test environment through VPN through the internet for site-to-site access. This could, in turn, reduce the attractiveness of the Exchange's live trading production environment because Members and non-Members may be unwilling to test functionality prior to entering live orders. Again, other options exchanges currently offer, or are able to introduce at their own cost, their own comparable testing environments with lower prices to better compete with the Exchange's offering and several competing exchanges already provide a similar service.

Selling different products and services, such as proposed herein, is a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting market participants to purchase the dedicated cross connection to the test environment proposed herein, the Exchange may earn revenue and further enhance market participants' interactions on the Exchange, which would increase value of its other products and services to all market participants. If the market deems the proposed fee to be too high, Members and non-Members can choose not to use or discontinue their use of dedicated cross connection to the test environment and perform the same testing functions via the VPN internet access for free. The Exchange, therefore, believes that the proposed fee for dedicated cross connection to the test environment reflects the competitive environment of U.S. options exchanges and would be properly assessed to Members and non-Members that subscribe.

The Proposed Fee Is Reasonable Because It Is Similar to or Lower Than Like Fees Charged by Other Exchanges

The Exchange believes the proposed fees are reasonable as the proposed fees are similar to or lower than fees charged by competing exchanges for similar services. For example, The Nasdaq Stock Market, LLC assesses a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port plus a one-time installation fee of \$1,000 per hand-off.¹⁸ The Exchange's proposed fee is, therefore, lower because it does not charge a separate installation fee. Cboe BZX Exchange, Inc. ("Cboe BZX") Options assesses a lower fee of \$250 per month for each certification logical port, which only provides access to the Cboe BZX testing environment, and not to the testing environment of any of Cboe BZX's affiliates.¹⁹ The fee to access the Cboe BZX testing environment and the testing environment of each of its three affiliated options exchange becomes incrementally higher with each Cboe BZX affiliate charging a \$250 monthly fee to access each testing environment, totaling as much as \$1,000.00 per month.²⁰ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in

¹⁸ See, e.g., Nasdaq, Options 7: Pricing Schedule, Section 13 Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%20Options%207>. Nasdaq's affiliates, like Nasdaq PHLX LLC ("PHLX"), also charge the same fee. See e.g., PHLX Options 7: Pricing Schedule, Section 9. Other Member Fees, E. Testing Facilities, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207> (assessing a fee of \$1,000 per hand-off, per month for subscribers to the testing facility via either a 1Gb or 10Gb switch port and a one-time installation fee of \$1,000 per hand-off). See also Securities Exchange Act Release No. 76259 (October 26, 2015), 80 FR 66947 (October 30, 2015) (SR-NASDAQ-2015-117) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Options Testing Facility). Like the Exchange's testing environment, a single connection to Nasdaq's test environment provides access to the other test environments of its affiliate options markets, PHLX and Nasdaq BX, Inc.

¹⁹ See also Cboe BZX Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/bzx/. See, e.g., Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/.

²⁰ See also Cboe EDGX Exchange, Inc. Options Fee Schedule, Options Logical Port Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/edgx/; Cboe Exchange, Inc. Fee Schedule, Logical Connectivity Fees, Certification Logical Ports, available at https://www.cboe.com/us/options/membership/fee_schedule/c2/.

determining whether a proposed fee meets the requirements of the Act.

The Proposed Fee Is Not Unfairly Discriminatory

The Exchange also believes the proposed fee is equitable and not unfairly discriminatory as the fee would apply equally to all Members and non-Members who choose to subscribe. It is a business and operational decision of each Member or non-Member that chooses to subscribe. The Exchange's proposed fee would not differentiate between Members and non-Members or connectivity types and is set at a modest level that would allow any interested Member and non-Member to subscribe based on their business and operational needs.

The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act²¹ in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The Exchange does not believe that the proposed fee is unfairly discriminatory to subscribers to the test environment via a dedicated cross connection because, unlike the live trading environment where the capacity of connectivity to the Exchange may confer a competitive advantage to a market participant and therefore price differentiation is appropriate for the benefit conferred, there is no such benefit conferred in the testing systems environment.

The Exchange does not believe that the proposed fee is unfairly discriminatory among subscribers to the test environment because all Members and non-Members that subscribe to the service will be assessed the same fee. Because the proposed fee does not discriminate between 1Gb and 10Gb cross connection options, Members and non-Members are able to subscribe to the test environment without regard to the cost of their capacity election. The Exchange believes that not discriminating on this basis will encourage participants to connect to the test environment in the same manner as they do to the live trading environment, and thereby help the test environment more closely mirror the live trading environment. Providing a more useful and accurate test environment will serve to improve live trading on the Exchange

²¹ 15 U.S.C. 78f(b)(5).

and the national market system by permitting Members and non-Members the ability to accurately test changes prior to implementing them in the live trading environment, thereby reducing the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

The Proposed Fee Is Equitable

The Exchange believes that the proposed fee is equitably allocated because all Members and non-Members that choose to connect to the test environment will be assessed a uniform fee for those services. The Exchange believes that offering subscribers the option to subscribe to either a 1Gb or 10Gb dedicated cross connection for the same fee is an equitable allocation of fees because, unlike the live trading environment, there is no competitive advantage to possessing a higher capacity connection in the test environment. The test environment is designed to closely mirror the live trading environment for Members and non-Members, including matching the capacity of the live trading environment connection of each Member and non-Member. In the absence of any competitive advantage, charging a uniform fee for both a 1Gb or 10Gb dedicated cross connection is an equitable allocation of fees. The Exchange believes that charging a uniform fee rather than mirroring the fees for the live trading environment will encourage Members and non-Members to subscribe to the test environment and further encourage those that subscribe to use the same hardware as is used by them for connectivity to the live trading environment.

* * * * *

Finally, and as noted above, the Exchange's test environment provides a robust and realistic testing experience using a replica of the Exchange's production environment process configurations. This environment enables market participants to test upcoming Exchange software and code releases, product enhancements, as well as test firm software prior to implementation in the production environment. Further, the test environment allows unlimited firm-level testing of order types, order entry, order management, order throughput, acknowledgements, risk settings, mass cancelations, and purge requests. By providing firms the ability to test all of these features in the test environment prior to implementing them in the live trading environment, the Exchange

believes this will reduce the likelihood of a potentially disruptive system failure in the live trading environment, which has the potential to affect all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange made connectivity access to the test environment available to keep pace with technological changes in the industry and evolving customer needs and demands, and believes the product will contribute to robust competition among national securities exchanges. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange believes the proposed fee would not cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable testing environments for free or lower prices, which several competing exchanges already provide.²² The Exchange operates in a highly competitive environment, and its ability to price access to the test environment is constrained by the optional nature of accessing the test environment via a dedicated cross connect. Providing access to the test environment via dedicated cross connection is provided purely for convenience, in response to Member demand, and, again, would be entirely optional. The Exchange notes that use of accessing the test environment via a dedicated cross connection would be completely voluntary and is simply an additional optional means to access the test environment. Members who do not prefer the to access the test environment via a dedicated cross connection and pay the applicable fee will be able to continue to perform the same testing functions when accessing the test environment via the existing VPN internet access for free. The Exchange must consider this in its pricing discipline in order to attract subscribers. The Exchange believes that if it were to propose a fee that is excessively high, it would simply serve to reduce demand for the Exchange's product, which as discussed, Members and non-Members are under no obligation to utilize.

The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on

intramarket competition. Particularly, the proposed fee applies uniformly to any purchaser in that the Exchange does not differentiate between subscribers that wish to access the testing systems environment via a dedicated cross connect via either a 1Gb or 10Gb connection. The proposed fee is set at a modest level that would allow any interested market participant to purchase access to the test environment based on their business needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,²³ and Rule 19b-4(f)(2)²⁴ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-SAPPHIRE-2024-40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-SAPPHIRE-2024-40. This file number should be included on the

²² See *supra* note 18.

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–SAPPHIRE–2024–40 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–29925 Filed 12–17–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101900; File No. SR–NYSE–2024–79]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 309

December 12, 2024.

Pursuant to Section 19(b)(1) ¹ of the Securities Exchange Act of 1934 (“Act”) ² and Rule 19b–4 thereunder, ³ notice is hereby given that on December 10, 2024, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed

with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 309 to permit direct debiting of undisputed or final fees or other sums due the Exchange by member organizations with one or more equity trading licenses and each applicant for an equities trading license. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 309 (Failure to Pay Exchange Fees) to permit direct debiting of undisputed or final fees or other sums due to the Exchange by member organizations with one or more equity trading licenses and each applicant for an equities trading license.

Rule 309 currently governs failure to pay Exchange fees, except for fines levied in connection with a disciplinary action governed by Rule 8320 of the Exchange's disciplinary rules or failure to make timely payment of trading license fee installments as governed by Rule 300(h).

The Exchange proposes to require member organizations that hold an equities trading license, and each applicant for an equities trading license,

to provide one or more clearing account numbers that correspond to an account(s) at the National Securities Clearing Corporation (“NSCC”) for purposes of permitting the Exchange to collect through direct debit any undisputed or final fees and/or other sums due to the Exchange. The Exchange would, however, permit a member organization or applicant for a trading license to opt-out of the requirement to provide NSCC clearing account numbers and establish alternative payment arrangements. In addition, consistent with current Rule 309, the proposed change would not apply to disciplinary fines or monetary sanctions governed by Rule 8320 or failures to make payment of trading license fees governed by Rule 300(h). The proposed rule would also not apply to regulatory fees related to the Central Registration Depository (“CRD system”), which are collected by the Financial Industry Regulatory Authority, Inc. (“FINRA”).⁴ The proposed change is based on the rules of the Exchange's affiliates NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”), NYSE National, Inc. (“NYSE National”) as well as the rules of other exchanges.⁵

⁴ The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers. Certain of the regulatory fees provided in the Price List are collected and retained by FINRA via the CRD system for the registration of employees of member organizations of the Exchange that are not FINRA members. These fees would be excluded from direct debiting.

⁵ See NYSE American Rule 41 (Collection of and Failure to Pay Exchange Fees); NYSE Arca Rule 3.7 (Dues, Fees and Charges); NYSE Chicago Article 7, Rule 11 (Fixing and Paying Fees and Charges); NYSE National Rule 2.9 (Dues, Assessments and Other Charges). See also, e.g., Members Exchange Rule 15.3(a) (Collection of Exchange Fees and Other Claims and Billing Policy); Investors Exchange Rule 15.120 (Collection of Exchange Fees and Other Claims and Billing Policy); The Nasdaq Stock Market LLC Equity 7, Section 70 (Collection of Exchange Fees and Other Claims and Billing Policy); Nasdaq BX, Inc. Equity 7, Section 111 (Collection of Exchange Fees and Other Claims and Billing Policy); and Nasdaq PHLX Equity 7, Section 2 (Collection of Exchange Fees and Other Claims). The Exchange's current billing disputes policy is set forth under “I” of the General section in its Price List, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf, and provides that all fee disputes must be submitted no later than sixty days after receipt of a billing invoice. This proposed change does not modify or rescind the Exchange's billing disputes policy, and that policy would continue to apply to all billing disputes.

²⁵ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

Under the proposal, the Exchange would send a monthly invoice to each equities member organization, generally on the 5th business day of each month as is currently the practice, for the debit amount due to the Exchange for the prior month. The Exchange would also send files to NSCC each month by the 11th business day of the month in order to initiate the debit of the amount due to the Exchange as provided for in the prior month's invoice.⁶ The Exchange anticipates that NSCC will process the debits on the day it receives the file or the following business day. Because member organizations would be provided with an invoice approximately 1 week before the debit date, member organizations will have adequate time to contact the Exchange with any questions concerning the invoice. If a member organization disagrees with the invoice in whole or in part, the Exchange would not commence the debit for the disputed amount until the dispute is resolved. Specifically, the Exchange would not include the disputed amount (or the entire invoice if it is not feasible to identify the disputed amounts) in the NSCC debit amount where the member organization provides written notification of the dispute to the Exchange by the later of the 15th of the month, or the following business day if the 15th is not a business day, and the amount in dispute is at least \$10,000 or greater.

Following receipt of the file from the Exchange, NSCC would proceed to debit the amounts indicated from the account of the member organization that clears the applicable transactions ("Clearing Member Organization," *i.e.*, either a member organization that is self-clearing or another member organization that provides clearing services on behalf of the member organization) and disburse such amounts to the Exchange. Where a member organization clears through another member organization, the Exchange understands that the estimated transaction fees owed to the Exchange are typically debited by the Clearing Member Organization on a daily basis using daily transaction detail reports provided by the Exchange to the Clearing Member Organization in order to ensure adequate funds have been

escrowed. The Exchange notes that it is proposing to permit a member organization to designate one or more clearing account numbers that correspond to an account(s) at NSCC to permit member organizations that clear through multiple different clearing accounts to set up the billing process with the Exchange in a manner that is most efficient for internal reconciliation and billing purposes of the member organization.

The Exchange believes that the proposed debiting process would provide an efficient method of collecting undisputed or final fees and/or sums due to the Exchange consistent with the practice on its affiliated exchanges and other exchanges.⁷ Moreover, the Exchange believes that it is reasonable to permit member organizations and applicants for equities trading licenses to opt-out of the requirement to provide an NSCC account number to permit direct debiting and instead establish alternative payment arrangements. Finally, the Exchange believes that it is also reasonable to provide for a \$10,000 limitation on pre-debit billing disputes since it would be inefficient to delay a direct debit for a de minimis amount. Member organizations would still be able to dispute billing amounts that are less than \$10,000 pursuant to the billing policy set forth in the Price List.⁸

To effectuate this change, the Exchange would add "Collection of and" before "Failure to Pay Exchange Fees" in the heading of Rule 309. The Exchange would also add the following new subsection (a) to Rule 309 (italicized):

(a) Collection of Exchange Fees. Each member organization that has one or more equity trading licenses, and each applicant for an equities trading license, shall be required to provide one or more clearing account numbers that correspond to an account(s) at the National Securities Clearing Corporation ("NSCC") for purposes of permitting the Exchange to collect through direct debit any undisputed or final fees and/or other sums due to the Exchange; provided, however, that a member organization or applicant may request to opt-out of the requirement to provide an NSCC clearing account number and establish alternative payment arrangements. If a member organization disputes an invoice, the Exchange will not include the disputed amount in the debit if the member has disputed the amount in writing to the Exchange by the 15th of the month, or the following business day if the 15th is not a business day, and the amount in dispute is at least \$10,000 or greater. The Exchange will not debit fees related to the CRD system set

forth in the NYSE Price List, which are collected and retained by FINRA.

The current two paragraphs of Rule 309 would become new subsection (b), which would be titled "Failure to Pay Exchange Fees."

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5),¹⁰ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed direct debit process would provide member organizations with an efficient process to pay undisputed or final fees and/or sums due to the Exchange.

The Exchange believes that the proposal to debit NSCC accounts directly is reasonable because it would ease the administrative burden on member organizations of paying monthly invoices and avoiding overdue balances, and would provide efficient collection from all member organizations who owe monies to the Exchange. Moreover, the Exchange believes that the minimum time frame provided to member organizations to dispute invoices is reasonable and adequate to enable member organizations to identify potentially erroneous charges. In addition, the Exchange believes that the \$10,000 limitation on pre-debit billing disputes is reasonable because it would be inefficient to delay a direct debit for a de minimis amount. The same \$10,000 limitation is in place on exchanges that have adopted direct debit rules.¹¹ Member organizations will still be able to dispute billing amounts that are less than \$10,000 pursuant to the Exchange's Price List. Finally, the Exchange believes that it is reasonable to permit member organizations or applicants to request to opt-out of the requirement to provide NSCC account information and instead establish alternative payment arrangements with the Exchange.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ See note 5, *supra*.

⁶ As discussed below, if a member organization disputes an invoice, the Exchange would not include the disputed amount in the automatic debit if the member organization has disputed the amount in writing to the Exchange by the 15th of the month, or the following business day if the 15th is not a business day, and the disputed amount is at least \$10,000 or greater. As a practical matter, the Exchange would not send a file to the NSCC until the proposed time in Rule 309 for a member organization to dispute an invoice subject to automatic debit has passed.

⁷ See note 5, *supra*.

⁸ See note 5, *supra*.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would apply uniformly to all member organizations that have one or more trading licenses and to all applicants for equities trading licenses, and will not disproportionately burden or otherwise impact any single member organization.

The Exchange does not believe that the proposal will create an intermarket burden on competition since the Exchange will only debit fees (other than de minimis fees below \$10,000) that are undisputed by the member organization and member organizations will have a reasonable opportunity to dispute the fees both before and after the direct debit process. In addition, member organizations will have a reasonable opportunity to opt-out of the requirement to provide clearing account information and instead adopt alternative payment arrangements.

The Exchange also does not believe that the proposal will create an intramarket burden on competition, since the proposed direct debit process will be applied equally to all member organizations. Moreover, other exchanges (including the Exchange's affiliates) utilize a similar process which the Exchange believes is generally familiar to member organizations. Consequently, the Exchange does not believe that the proposal raises any new or novel issues that have not been previously considered by the Commission in connection with direct debit and billing policies of other exchanges. Further, this proposal is expected to provide a cost savings to the Exchange in that it would alleviate administrative processes related to the collection of monies owed to the Exchange. In addition, the debiting process would mitigate against member organization accounts becoming overdue.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section

19(b)(3)(A)(iii) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³ Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁵

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹⁶ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2024-79 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-NYSE-2024-79. This file number should be included on the subject line if email is used. To help the Commission process and review your

¹² 15 U.S.C. 78s(b)(3)(A)(iii).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁶ 15 U.S.C. 78s(b)(2)(B).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2024-79 and should be submitted on or before January 8, 2025.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-29927 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-329, OMB Control No. 3235-0371]

Proposed Collection; Comment Request; Extension: Rule 15a-6

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 15a-6, (17 CFR 240.15a-6), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et*

¹⁷ 17 CFR 200.30-3(a)(12).

seq.). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 15a–6 provides conditional exemptions from the requirement to register as a broker-dealer pursuant to Section 15 of the Securities Exchange Act for foreign broker-dealers that engage in certain specified activities involving U.S. persons. In particular, Rule 15a–6(a)(3) provides an exemption from broker-dealer registration for foreign broker-dealers that solicit and effect transactions with or for U.S. institutional investors or major U.S. institutional investors through a registered broker-dealer, provided that the U.S. broker-dealer, among other things, obtains certain information about, and consents to service of process from, the personnel of the foreign broker-dealer involved in such transactions, and maintains certain records in connection therewith.

These requirements are intended to ensure (a) that the registered broker-dealer will receive notice of the identity of, and has reviewed the background of, foreign personnel who will contact U.S. investors, (b) that the foreign broker-dealer and its personnel effectively may be served with process in the event enforcement action is necessary, and (c) that the Commission has ready access to information concerning these persons and their U.S. securities activities. Commission staff estimates that approximately 2,000 U.S. registered broker-dealers will spend an average of two hours of clerical staff time and one hour of managerial staff time per year obtaining the information required by the rule, resulting in a total aggregate time burden of 6,000 hours per year for complying with the rule. Assuming an hourly cost of \$78¹ for a compliance clerk and \$344² for a compliance manager, the resultant total internal labor cost of compliance for the respondents is \$1,000,000 per year (2,000 entities × ((2 hours per entity × \$78/hour) + (1 hour per entity × \$344/hour)) = \$1,000,000).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the

Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by February 18, 2025.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Austin Gerig, Director/Chief Data Officer, Securities and Exchange Commission, c/o Tanya Ruttenberg, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: December 12, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–29914 Filed 12–17–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–101901; File No. 4–698]

Joint Industry Plan; Order Approving Amendments to the National Market System Plan Governing the Consolidated Audit Trail Designed To Implement Cost Savings Measures

December 12, 2024.

I. Introduction

On March 27, 2024, and pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹ and Rule 608 of Regulation NMS thereunder,² BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., The Financial Industry Regulatory Authority, Inc., Investors’ Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The Nasdaq Stock

Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (“the Participants”) filed with the Securities and Exchange Commission (the “Commission” or the “SEC”) proposed amendments to the national market system plan governing the consolidated audit trail (the “CAT NMS Plan” or “Plan”).³ These proposed amendments (the “Proposal”) were designed to implement certain costs saving measures,⁴ including: (A) provisions that would change processing, query, and storage requirements for options market maker quotes in listed options; (B) provisions that would permit the Plan Processor⁵ to move raw unprocessed data and interim operational copies of CAT Data⁶

³ In July 2012, the Commission adopted Rule 613 of Regulation NMS, which required the Participants to jointly develop and submit to the Commission a national market system plan to create, implement, and maintain a consolidated audit trail (the “CAT”). See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (Aug. 1, 2012) (“Rule 613 Adopting Release”); 17 CFR 242.613. On November 15, 2016, the Commission approved the CAT NMS Plan. See Securities Exchange Act Release No. 78318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”). The CAT NMS Plan is Exhibit A to the CAT NMS Plan Approval Order. See CAT NMS Plan Approval Order, at 84943–85034. The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (the “Company”). Each Participant is a member of the Company and jointly owns the Company on an equal basis. The Participants submitted to the Commission a proposed amendment to the CAT NMS Plan on August 29, 2019, which they designated as effective on filing. Under the amendment, the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC serves as the CAT NMS Plan, replacing in its entirety the CAT NMS Plan. See Securities Exchange Act Release No. 87149 (Sept. 27, 2019), 84 FR 52905 (Oct. 3, 2019).

⁴ See Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated March 27, 2024, available at <https://catnmsplan.com/sites/default/files/2024-03/03.27.24-Proposed-CAT-NMS-Plan-Amendment-Cost-Savings-Amendment.pdf>. MIAX Sapphire, LLC was not a Participant to the CAT NMS Plan when the Proposal was originally filed, but the Participants filed an immediately-effective amendment to the CAT NMS Plan on July 30, 2024 to add MIAX Sapphire, LLC as a Participant. See Securities Exchange Act Release No. 100631 (July 31, 2024), 89 FR 64011 (Aug. 6, 2024).

⁵ The “Plan Processor” is “the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to SEC Rule 613 and Sections 4.3(b)(i) and 6.1, and with regard to the Initial Plan Processor, the Selection Plan, to perform the CAT processing functions required by SEC Rule 613 and set forth in this Agreement.” See CAT NMS Plan, *supra* note 3, at Section 1.1.

⁶ “CAT Data” is “data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as ‘CAT Data’ from time to time.” See *id.*

¹ The hourly rate used for a compliance clerk was from SIFMA’s Office Salaries in the Securities Industry 2013, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

² The hourly rate used for a compliance manager was from SIFMA’s Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

¹ 15 U.S.C 78k-1(a)(3).

² 17 CFR 242.608.

older than 15 days to what the Participants described as a more cost-effective storage tier; (C) provisions that would permit the Plan Processor to provide an interim CAT-Order-ID⁷ to regulatory users on an “as requested” basis, rather than on a daily basis; and (D) provisions that would codify and expand exemptive relief recently provided by the Commission related to certain recordkeeping and data retention requirements for industry testing data.⁸ The Proposal was published for comment in the **Federal Register** on April 16, 2024.⁹

On July 15, 2024, the Commission instituted proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,¹⁰ to determine whether to disapprove the Proposal or to approve the Proposal with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment (the “OIP”).¹¹

The Participants subsequently submitted an amendment to their Proposal on September 20, 2024 (the “Amendment”), which, among other things, withdrew the proposed provisions that would have permitted the Plan Processor to provide an interim CAT-Order-ID to regulatory users on an “as requested” basis, rather than on a daily basis.¹² The Amendment was published for comment in the **Federal Register** on October 7, 2024.¹³ On October 8, 2024, to provide sufficient time to consider the changes set forth in the Amendment and any comments received on the Amendment, the Commission extended the period within

which it must conclude its proceedings to December 12, 2024.¹⁴

This order approves the Proposal, as modified by the Amendment (hereinafter, the “Proposal” unless otherwise noted).

II. Description of the Proposal, as Modified by the Amendment

The Commission is approving the proposed changes to the CAT NMS Plan.¹⁵

A. Processing, Query, and Storage Requirements for Options Market Maker Quotes in Listed Options

The Participants proposed to amend the processing, query, and storage requirements that apply to Options Market Maker¹⁶ quotes in Listed Options¹⁷ through the inclusion of a new Section 3.4 in Appendix D of the CAT NMS Plan. Section 6.3(d) of the CAT NMS Plan currently requires each Participant to record and electronically report to the Central Repository¹⁸ details for all Options Market Maker quotes.¹⁹ With respect to Options Market Maker quotes in Listed Options, Section 6.4(d)(iii) of the CAT NMS Plan states that Reportable Events²⁰ required pursuant to Section 6.3(d)(ii) and (iv) shall be reported to the Central Repository by an Options Exchange in lieu of the reporting of such information

by the Options Market Maker.²¹ Section 6.4(d)(iii) of the CAT NMS Plan also requires Options Market Makers to report to an Options Exchange the time at which a quote in a Listed Option is sent to the Options Exchange (and, if applicable, any subsequent quote modifications and/or cancellation time when such modification or cancellation is originated by the Options Market Maker), pursuant to compliance rules established by the Options Exchanges.²² Quote sent time information must be reported to the Central Repository by the Options Exchange in lieu of reporting by the Options Market Maker.²³

The CAT NMS Plan requires all CAT Data reported to the Central Repository to be processed and assembled to create the complete lifecycle of each Reportable Event.²⁴ Appendix D, Section 3 of the CAT NMS Plan states that the Plan Processor must use a “daisy chain approach,” in which a series of unique order identifiers, assigned to all order events handled by CAT Reporters,²⁵ are linked together by the Central Repository and assigned a single CAT-generated CAT-Order-ID that is associated with each individual order event and used to create the complete lifecycle of an order.²⁶ Timelines for data processing and data availability are described in Section 6.1 and Section 6.2 of Appendix D of the CAT NMS Plan.²⁷ The CAT NMS Plan further provides that regulators will have access to processed CAT Data through an online targeted query tool and through user-defined direct queries and bulk extract tools described in Section 8.1 and Section 8.2 of Appendix D of the CAT NMS Plan.²⁸

The Participants proposed to amend the CAT NMS Plan to provide that Options Market Maker quotes in Listed Options will not be subject to any requirement to link and create an order lifecycle, and will not undergo any linkage validation, linkage feedback, or lifecycle enrichment processing, but

⁷ The “CAT-Order-ID” is “a unique order identifier or series of unique order identifiers that allows the central repository to efficiently and accurately link all reportable events for an order, and all orders that result from the aggregation or disaggregation of such order.” See 17 CFR 242.613(j)(1); see also CAT NMS Plan, *supra* note 3, at Section 1.1 (“CAT-Order-ID” has the same meaning provided in SEC Rule 613(j)(1).”).

⁸ See Securities Exchange Act Release No. 99023 (Nov. 27, 2023), 88 FR 84026 (Dec. 1, 2023) (“Industry Test Data Exemptive Relief Order”).

⁹ See Securities Exchange Act Release No. 99938 (Apr. 10, 2024), 89 FR 26983 (Apr. 16, 2024) (“Notice”). Comments received in response to the Notice can be found on the Commission’s website at <https://www.sec.gov/comments/4-698/4-698-d.htm>.

¹⁰ 17 CFR 242.608(b)(2)(i).

¹¹ See Securities Exchange Act Release No. 100530 (July 15, 2024), 89 FR 58838 (July 19, 2024).

¹² See Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated Sept. 20, 2024, available at <https://www.sec.gov/comments/4-698/4698-522995-1501362.pdf>.

¹³ See Securities Exchange Act Release No. 101225 (Oct 1, 2024), 89 FR 81120 (Oct. 7, 2024). Comments received in response to the Amendment can be found on the Commission’s website at <https://www.sec.gov/comments/4-698/4-698-d.htm>.

¹⁴ See Securities Exchange Act Release No. 101277 (Oct. 8, 2024), 89 FR 83068 (Oct. 15, 2024).

¹⁵ See Notice at note 9, OIP at note 11, and Amendment at note 13 for further description of the changes proposed by the Participants.

¹⁶ An “Options Market Maker” is a “broker-dealer registered with an exchange for the purpose of making markets in options contracts on the exchange.” See CAT NMS Plan, *supra* note 3, at Section 1.1. Each Participant has also promulgated rules for its members that generally govern what constitutes a “market maker quote” and/or “market maker quotation” for that Participant. See, e.g., The Nasdaq Stock Market LLC Rules, Options 2, Section 5, “Market Maker Quotations”; Cboe Exchange, Inc. Rule 5.52, “Market Maker Quotes”; NYSE Arca, Inc. Rule 6.37AP-O, “Market Maker Quotations.”

¹⁷ A “Listed Option” is “any option traded on a registered national securities exchange or automated facility of a national securities association.” See Rule 600(b)(35) of Regulation NMS; see also CAT NMS Plan, *supra* note 3, at Section 1.1. (defining a “Listed Option” as having “the meaning set forth in Rule 600(b)(35) of Regulation NMS.”). Subsequent to approval of the CAT NMS Plan, Rule 600(b)(35) was redesignated as Rule 600(b)(43) without any changes to its terms.

¹⁸ “Central Repository” means “the repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to SEC Rule 613 and [the CAT NMS Plan.]” See CAT NMS Plan, *supra* note 3, at Section 1.1.

¹⁹ See Notice, *supra* note 9, at 26985.

²⁰ A “Reportable Event” includes, but is not limited to, “the original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order.” See CAT NMS Plan, *supra* note 3, at Section 1.1.

²¹ See Notice, *supra* note 9, at 26985.

²² *Id.*

²³ *Id.*; see also CAT NMS Plan, *supra* note 3, at Section 6.4(d)(iii).

²⁴ See Notice, *supra* note 9, at 26985; see also CAT NMS Plan, *supra* note 3, at Section 6.5(b)(i) (requiring the Plan Processor to link CAT data).

²⁵ “CAT Reporter” means “each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c).” See CAT NMS Plan, *supra* note 3, at Section 1.1.

²⁶ See also Notice, *supra* note 9, at 26985.

²⁷ *Id.*

²⁸ *Id.* See also CAT NMS Plan, *supra* note 3, at Section 6.5(c)(ii).

will undergo ingestion validation.²⁹ The Participants stated that, as described in Section 5.1 (Market Maker Quotes) of the Plan Participant Technical Specifications, there are two types of events used to report Options Market Maker quotes in Listed Options: Option Quote (“OQ”) events, which are used to report a new quote or a quote replacement, and Option Quote Cancel (“OQC”) events, which are used to report when a quote is canceled.³⁰ The Participants also stated that only OQ and/or OQC events would be subject to the amended processing, query, and storage requirements.³¹ All other options events³² would continue to be subject to the requirement to link and create an order lifecycle, would continue to undergo linkage validation, linkage feedback, and linkage enrichment processing, and would continue to be available as usual to regulatory users through existing query tools.³³ The Proposal does not alter any of the reporting obligations set forth under the CAT NMS Plan³⁴ including, without limitation, obligations to accurately report OQ and OQC events, obligations related to the reporting of “all Material Terms of the Order” for Options Market Maker quotes or obligations related to the reporting of the time at which a quote in a Listed

Option is sent to an Options Exchange.³⁵

While such reporting obligations would not be altered by proposed Section 3.4 of Appendix D, the Proposal alters the Plan Processor’s obligations regarding the processing, query, and storage of Options Market Maker quotes in Listed Options. Specifically, the Plan Processor would be required by proposed Section 3.4 of Appendix D only to ingest and store Options Market Maker quotes in Listed Options.³⁶ Pursuant to proposed Section 3.4 of Appendix D, the Plan Processor would not be required to also link and create an order lifecycle for Options Market Maker quotes in Listed Options, and such data would not undergo any linkage validation, linkage feedback, or lifecycle enrichment processing, although it would undergo ingestion validation.³⁷ Proposed Section 3.4 of Appendix D would state that unlinked data for Options Market Maker quotes in Listed Options would be made available to regulators by T+1 at 12:00 p.m. Eastern Time.³⁸

The Participants clarified the impact of this change by explaining that the following data elements would no longer be available for Options Market Maker quotes in Listed Options under proposed Section 3.4 of Appendix D: Derived Next Event Timestamp/Derived Next Event Epoch Timestamp, CAT Lifecycle Sequence Number, CAT Lifecycle ID (*i.e.*, CAT Order ID and Venue Order ID), and Derived Next Event Type Code.³⁹ In addition, certain processing enrichments, which the Participants characterized as “linkage metadata,” would no longer be available under proposed Section 3.4 of Appendix D: Intra Venue Link Status Code, Unlinked Indicator, Lifecycle

Assembly Date, and Associated Lifecycles.⁴⁰ Nevertheless, proposed Section 3.4 of Appendix D would require the Plan Processor to provide to regulatory users, upon request, the business and technical requirements needed to re-create the eliminated data elements and/or enrichments, as well as the code the Plan Processor currently uses to derive these eliminated data elements and/or enrichments from the unprocessed Options Market Maker quotes in Listed Options.⁴¹

The CAT NMS Plan currently requires that the Plan Processor provide access to CAT Data to the Participants and the Commission through various query tools, including an online targeted query tool that provides authorized users with the ability to retrieve CAT Data via an online query screen that includes the ability to choose from a variety of pre-defined selection criteria and user-defined direct queries and bulk extracts that provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources.⁴² The online targeted query tool functionality provided by FINRA CAT, the current Plan Processor, is provided by tools that are sometimes referred to as “DIVER” or “MIRS.” “BDSQL” is the user-defined direct query tool provided by FINRA CAT, and “Direct Read” is the bulk extract tool provided by FINRA CAT.

Under proposed Section 3.4 of Appendix D, Options Market Maker quotes in Listed Options would be accessible through BDSQL and Direct Read interfaces only and would not be

²⁹ See Amendment, *supra* note 13, at proposed Section 3.4.

³⁰ See *id.* at 81121; see also CAT Reporting Technical Specifications for Plan Participant v. 4.1.0–r22 (Sept. 10, 2024), at Section 5.1, available at https://catnmsplan.com/sites/default/files/2024-09/9.10.2024-CAT-Reporting_Technical_Specifications_for_Participants_4.1.0-r22.pdf.

³¹ See Amendment, *supra* note 13, at 81121.

³² See Part III.B, Table 1, Note 1 *infra* for further description of other options events; see also Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated July 8, 2024, at 6–7, available at <https://www.sec.gov/comments/4-698/4698-489583-1406426.pdf> (“Participant Letter”). Additionally, when an Options Market Maker quote is on one side of an “Options Trade” or “OT” event, the Participants explained that the quote side of the OT event will not be linked to the Options Market Maker quote via the linkage process. Rather, a single event lifecycle will be created that contains only the quote side of the OT event. The Participants stated that regulators would be able to “readily identify” the Options Market Maker quote executed in an OT event via the *quoteID* field on the side of the OT event involving the Options Market Maker quote. In addition, the Participants explained that the side of the OT event that does not involve an Options Market Maker quote would be linked with the relevant order, would include the order lifecycle related to such order, and would be subject to all lifecycle enrichment processing. See Amendment, *supra* note 13, at 81121.

³³ See, *e.g.*, Participant Letter, *supra* note 32, at 6–7; Amendment, *supra* note 13, at 81121.

³⁴ See, *e.g.*, Notice, *supra* note 9, at 26984.

³⁵ See, *e.g.*, CAT NMS Plan, *supra* note 3, at Section 6.4(d)(iii); *id.* at Section 6.3(ii)(G) and (iv)(E).

³⁶ See Notice, *supra* note 9, at 26984.

³⁷ *Id.* at 26984 n.15; Amendment, *supra* note 13 at proposed Appendix D, Section 3.4. See also Amendment, *supra* note 13, at 81121 (citing Appendix B–1 and Appendix B–3 of the CAT Reporting Technical Specifications for Plan Participants, Version 4.1.0–r.21 (Apr. 15, 2024), available at https://www.catnmsplan.com/sites/default/files/2024-04/04.15.2024-CAT_Reporting_Technical_Specifications_for_Participants_4.1.0-r21.pdf, which describe data ingestion error codes and linkage validation error codes). Aside from “linkage validation,” the CAT NMS Plan would continue to obligate the Plan Processor to perform the other kinds of data validation that are required by Section 7.2 of the CAT NMS Plan.

³⁸ See Amendment, *supra* note 13, at proposed Appendix D, Section 3.4. In addition, the Participants proposed to make conforming changes to certain provisions of Appendix D to include cross-references to proposed Section 3.4. See *id.* at 81121–22; see also *id.* at proposed Appendix D, Section 3, Section 6.1, and Section 8.1.1.

³⁹ See *id.* at 81124.

⁴⁰ *Id.* The Participants also explained that the Top Indicator data element would not be affected, because it is not a processing enrichment available on Participant events like Options Market Maker quotes on Listed Options. *Id.*

⁴¹ *Id.* According to the Participants, the Plan Processor would not update this code and/or logic following approval of proposed Section 3.4; rather, it would “maintain a copy of each so that they may be provided to any regulators that might request them in the future,” such that regulators would “all receive the same version of the code and/or logic regardless of whether they make their request immediately upon the approval of the [Amendment] or at some point in the future.” See Participant Letter, *supra* note 32, at 6. However, the Participants stated that the “regulatory groups of each of the Participants have indicated that they do not require these data elements to perform their surveillance and regulatory functions and/or have the capability to derive these data elements themselves.” See Participant Letter, *supra* note 32, at 6.

⁴² See CAT NMS Plan, *supra* note 3, at Section 6.10(c); see *id.* at Appendix D, Section 8.1 and Section 8.2. See also *id.* at Section 6.5(c)(ii) (requiring the CAT to “allow the ability to return results of queries that are complex in nature, including market reconstruction and the status of order books at varying time intervals).

accessible through DIVER.⁴³ In addition, the Participants stated that elimination of linkage and feedback processes would remove Options Market Maker quotes in Listed Options from certain DIVER and/or MIRS interfaces: Options Market Replay, OLA Viewer, and All-Related Lifecycle Event queries.⁴⁴ These DIVER and MIRS tools currently enable regulatory users with less expertise in sophisticated programming skills to access CAT Data. BDSQL and Direct Read—which will be the only query tools that still contain Options Market Maker quotes in Listed Options data under the Proposal—require programming skills in remote data processing and/or knowledge of structured query programming language. The Participants explained that the BDSQL and Direct Read interfaces “represent a significantly more cost-efficient method of providing access” to the relevant data,⁴⁵ insofar as the Plan Processor estimated that “the continued optimization of Options Market Maker Quotes to make them available via DIVER would cost approximately \$2.8 million per year.”⁴⁶ The Participants stated that each of their regulatory groups would be able to conduct their regulatory programs accessing Options Market Maker quotes in Listed Options using only BDSQL and Direct Read and that each regulatory group supported the proposed modification.⁴⁷

The Participants estimated that costs related to creating lifecycles for Options Market Maker quotes in Listed Options were \$30 million in 2023.⁴⁸ However, the Participants acknowledged, in their Proposal, that they had already begun to implement certain measures to reduce the costs associated with lifecycle linkages for Options Market Maker quotes in Listed Options, pursuant to exemptive relief issued by the Commission in November 2023.⁴⁹ The Participants stated that the November

2023 Exemptive Relief Order allows the Plan Processor to create lifecycle linkages for Options Market Maker quotes in Listed Options only once by T+2 at 8 a.m. Eastern Time (as opposed to requiring both an interim lifecycle by T+1 at 9 p.m. Eastern Time and a final lifecycle by T+5 at 8 a.m. Eastern Time).⁵⁰ The Participants stated that they expected the above-described “single pass” approach to generating lifecycles for options quotes to result in annual savings of approximately \$5.4 million upon implementation in April 2024,⁵¹ and the Commission understands that this “single pass” functionality has now been implemented.

The Participants estimated that the Proposal would result in approximately \$20 million in additional annual cost savings in the first year, such that the cost impact of Options Market Maker quotes in Listed Options on the CAT would be reduced from approximately \$24.4 million (inclusive of anticipated savings resulting from the implementation of the options quotes “single pass” proposal described above) to approximately \$4.0 million annually.⁵²

According to the Participants, approximately \$12 million of these estimated \$20 million in cost savings would be attributable to “linkage processing and data processing reductions, assuming 22 processing days per month for a total of 264 processing days in a year and based on data volumes observed in the first half of 2024.”⁵³ Specifically, the Participants stated that “[l]inkage processing costs would be reduced from approximately \$27,000 per day to \$0 per day, resulting in estimated annual linkage processing savings of \$7,128,000 (\$27,000/day × 264 days). Data processing costs (*i.e.*, costs attributable to data ingestion and preparation and publication of data versions to the relevant regulatory interfaces) would be reduced from approximately \$27,000 per day to \$9,000 per day, resulting in estimated annual data processing

savings of \$4,752,000 (\$18,000/day × 264 days).”⁵⁴ The Participants explained that these estimated cost savings could increase if “data volumes continue to increase as they have historically”⁵⁵ The Participants further estimated that approximately \$8 million of the estimated \$20 million in cost savings would be attributable to “the reduction in the storage footprint for Options Market Maker Quotes in Listed Options through the elimination of versioned quote data (*i.e.*, T+2 8 a.m. ET, T+5 8 a.m. ET, DIVER and OLA copies).”⁵⁶ The Participants explained that this estimate assumed a “reduction of the current production storage footprint of approximately 37.5 petabytes (PB) per month based on the data volumes from the first half of 2024 to approximately 9 PB per month” across various storage tiers.⁵⁷

The Participants stated that one-time implementation costs, which would “generally consist of Plan Processor labor costs associated with coding and software development, as well as any related cloud fees associated with the development, testing and load testing of the proposed changes,” were expected to be “minimal relative to overall cost savings” and explained that such costs “may vary based on various factors, including the details of any requirements in any final amendment approved by the Commission and any changes in labor costs.”⁵⁸ The Participants stated that “[o]ngoing operational costs, other than cloud hosting costs” would not be affected by the proposed amendments.⁵⁹ They also stated that actual future savings could be more or less than their estimates due to changes in a number of variables on which their estimates were based, including “current CAT NMS Plan requirements; reporting by Participants, Industry Members, and market data providers; observed data rates and volumes; current storage and compute pricing discounts, compute reservations, and cost savings plans (*i.e.*, including savings attributable to the daily On-Demand Capacity Reservations and Compute Savings Plan); and associated cloud fees.”⁶⁰ The Participants stated that they believed that “the cost savings

⁴³ See Amendment, *supra* note 13, at proposed Appendix D, Section 3.4; see also Participant Letter, *supra* note 32, at 5.

⁴⁴ See Notice, *supra* note 9, at 26984.

⁴⁵ See Participant Letter, *supra* note 32, at 5.

⁴⁶ *Id.* According to the Participants, this estimate consisted of “approximately (i) \$2.2 million per year in compute costs for producing the DIVER-specific hash partition copy of Options Market Maker Quotes, and (ii) \$600,000 per year in storage costs for one year’s worth of DIVER-specific copies of Options Market Maker Quotes.” *Id.* The Participants explained that these costs were included in the larger processing and storage cost estimates described below. See Amendment, *supra* note 13, at 81123; see also notes 53–57 and associated text *infra*.

⁴⁷ See Notice, *supra* note 9, at 26985; see also Participant Letter, *supra* note 32, at 5.

⁴⁸ See Notice, *supra* note 9, at 26985.

⁴⁹ See Securities Exchange Act Release No. 98848 (Nov. 2, 2023), 88 FR 77128 (Nov. 8, 2023) (“November 2023 Exemptive Relief Order”).

⁵⁰ See Notice, *supra* note 9, at 26984 n.15 (citing November 2023 Exemptive Relief Order). The Participants stated that the Plan Processor would no longer be required to create any lifecycle linkages for Options Market Maker quotes in Listed Options under their Proposal. See *id.* at 26984.

⁵¹ *Id.* at 26984.

⁵² See *id.* at 26984–85. The Participants stated that their cost savings estimates assumed an approximate 65% reduction in compute runtime associated with options exchange events and an approximate 80% reduction in storage footprint through the elimination of versioned options quote data (*e.g.*, interim, final, DIVER-optimized, OLA copies). See *id.* at 26985 n.19.

⁵³ See Amendment, *supra* note 13, at 81123.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Participant Letter, *supra* note 32, at 2; see also Amendment, *supra* note 13, at 81122–23. “Industry Member” means “a member of a national securities exchange or a member of a national securities association.” See CAT NMS Plan, *supra* note 3, at Section 1.1.

estimates and assumptions [were] reasonable and provide[d] an adequate basis for the Commission to evaluate the costs and benefits” of their Proposal.⁶¹

Although the Participants represented that Options Market Maker quotes in Listed Options are the single largest data source for the CAT, comprising approximately 98% of all options exchange events and approximately 75% of all transaction volume stored in the CAT,⁶² the Participants stated the changes set forth in the Proposal would have a limited impact on regulators.⁶³ The Participants stated that regulators would still have access to unlinked Options Market Maker quotes in Listed Options by T+1 at 12:00 p.m. Eastern Time under the Proposal and asserted that regulatory users would be able to derive the currently available data enrichments if needed.⁶⁴ The Participants further stated that “[l]inkage validation is not necessary for Options Market Maker Quotes because the *quoteID* is an effective replacement for tying quotes to trades.”⁶⁵ Since the vast majority of Options Market Maker quotes in Listed Options lifecycles consist of just two events—the quote and its subsequent cancellation—the Participants also explained that the number of Options Market Maker quotes in Listed Options that result in an execution and/or allocation in the first place would be extremely low.⁶⁶ Finally, the Participants stated that their usage data “demonstrates” that Options Market Maker quotes in Listed Options lifecycles are “very rarely accessed by regulators.”⁶⁷

Two commenters were supportive of these aspects of the Proposal.⁶⁸ For

example, SIFMA stated that the “enormity of this data set . . . has created costs and challenges far beyond those envisioned when CAT was approved.”⁶⁹ SIFMA explained that the “quote-to-trade ratio in listed options markets is so large that the operational costs of linking quotes to trades is an unreasonable burden” that had not been supported by a cost-benefit analysis.⁷⁰ Moreover, SIFMA stated that “the ratio keeps increasing, with [its] member data showing the most recent peak of 32,000 quotes per trade in the U.S. options market in December 2023,” a ratio that they stated was “nearly 4 times greater than the ratio described” in the CAT NMS Plan Approval Order.⁷¹ SIFMA further expressed concern that there were no forces to “constrain the increase in this ratio” and asserted that “certain SEC market structure initiatives might only accelerate the increase.”⁷² Given the “extremely small number of quotes” with a “corresponding trade,” SIFMA did not believe it was reasonable to spend so much on processing and storage costs for Options Market Maker quotes in Listed Options, especially if such data would continue to be reported to the CAT and if “the SEC or a Participant can use the quote data as part of its surveillance or investigation patterns, albeit with the need to perform some additional computations.”⁷³ FIF supported the Proposal, but suggested that the Commission go further and eliminate Options Market Maker quotes in Listed Options from the CAT altogether.⁷⁴ FIF also requested that the Commission and the Participants “conduct” and make public “a cost-benefit analysis of maintaining Options Market Maker Quotes in CAT vs. removing them from CAT.”⁷⁵

Rule 608(b)(2) states that the Commission shall approve a proposed

amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.⁷⁶ When evaluating the estimated cost savings of approximately \$20 million annually (and potentially more if data volumes continue to increase as they have historically) in light of the reduced functionalities for Options Market Maker quotes in Listed Options,⁷⁷ the Proposal satisfies the approval standard set forth in Rule 608.⁷⁸

In reaching this conclusion, the Commission emphasizes several important considerations. The Proposal would preserve some of the functionality that would have otherwise been available to regulators with respect to Options Market Maker quotes in Listed Options, and the Commission continues to believe that such data has substantial regulatory value.⁷⁹

⁷⁶ 17 CFR 242.608(b)(2). See also 15 U.S.C. 78k–1 (authorizing the Commission, by rule or order, to authorize or require the self-regulatory organizations to act jointly with respect to matters as to which they share authority under the Exchange Act in planning, developing, operating, or regulating a facility of the national market system).

⁷⁷ See Amendment, *supra* note 13, at 81122–23. See also notes 53–57 and associated text *supra*.

⁷⁸ The Commission recognizes that there are additional measures beyond the specific amendments proposed by the Participants here that could further reduce CAT costs or could identify areas for potential additional cost savings, such as FIF’s suggestions that Options Market Maker quotes in Listed Options be eliminated from the CAT altogether and/or that the Commission and the Participants should conduct a separate “cost-benefit analysis of maintaining Options Market Maker Quotes in CAT vs. removing them from CAT.” See notes 74–75 and associated text *supra*. But, in our view, it is appropriate to proceed with the Participants’ Proposal at this time. Approval of proposed Section 3.4 of Appendix D advances FIF’s stated goal to “manage and reduce CAT operating costs,” FIF Letter I at 2, and does not foreclose the Commission’s or the Participants’ ability to consider additional cost savings opportunities in the future. Nor does the existence of such additional measures or potential analyses call into question the proposed amendments’ satisfaction of the approval standard set forth by Rule 608(b)(2) or otherwise warrant a departure from the policy choices proposed by the Participants.

⁷⁹ Although the Participants have represented that usage data “demonstrates that such data is very rarely accessed by regulators,” see Notice, *supra* note 9, at 26984, such usage data was obtained before the Participants represented to the Commission that CAT implementation was complete and does not reflect current usage patterns. Such data is therefore not dispositive evidence of the lack of regulatory need. See CAT

Continued

⁶¹ See Amendment, *supra* note 13, at 81122–23.

⁶² See Notice, *supra* note 9, at 26984.

⁶³ *Id.* at 26984–85.

⁶⁴ *Id.* at 26984.

⁶⁵ See Participant Letter, *supra* note 32, at 4.

⁶⁶ See Notice, *supra* note 9, at 26985.

⁶⁷ *Id.* at 26984.

⁶⁸ See Letter from Howard Meyerson, Managing Director, Financial Information Forum, to Secretary, Commission, dated May 7, 2024, available at <https://www.sec.gov/comments/4-698/4698-467591-1256394.pdf> (“FIF Letter I”); Letter from Ellen Greene, Managing Director, Equities and Options Market Structure, and Joseph Corcoran, Managing Director, Associate General Counsel, The Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated May 31, 2024, available at <https://www.sec.gov/comments/4-698/4698-479631-1372454.pdf> (“SIFMA Letter I”); Letter from Howard Meyerson, Managing Director, Financial Information Forum, to Secretary, Commission, dated October 25, 2024, available at <https://www.sec.gov/comments/4-698/4698-534415-1532782.pdf> (“FIF Letter II”); Letter from Ellen Greene, Managing Director, Equities and Options Market Structure, and Joseph Corcoran, Managing Director, Associate General Counsel, The Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated October 28, 2024, available at

<https://www.sec.gov/comments/4-698/4698-535155-1534962.pdf> (“SIFMA Letter II”). Nasdaq also commented in support of the proposed amendments, reiterating points made by the Participants in their filings and noting the support of SIFMA and FIF. See also Letter from Jeffrey S. Davis, Senior Vice President, Principal Deputy General Counsel, Nasdaq, Inc., to Vanessa A. Countryman, Secretary, Commission, dated July 1, 2024 (“Nasdaq Letter”), available at <https://www.sec.gov/comments/4-698/4698-487351-1391254.pdf>.

⁶⁹ SIFMA Letter I at 1–2; SIFMA Letter II at 1–2.

⁷⁰ SIFMA Letter I at 2–3.

⁷¹ *Id.* at 2 (citing CAT NMS Plan Approval Order, *supra* note 3, at 84750).

⁷² *Id.* For example, SIFMA explained that the Commission’s recent “tick size proposal has the potential to significantly expand the amount of quoting activity in the equities and listed options markets.” *Id.* at 2 n.7.

⁷³ *Id.* at 2–3.

⁷⁴ FIF Letter I at 2; FIF Letter II at 2.

⁷⁵ FIF Letter I at 2.

Specifically, under proposed Section 3.4 of Appendix D, regulators would still have direct access to unlinked Options Market Maker quotes in Listed Options by T+1 at 12:00 p.m. Eastern Time.⁸⁰ Regulators would also still be able to use two of the existing query tools—BDSQL and Direct Read—to access the relevant data, although access to this data through DIVER and certain MIRS interfaces would be eliminated.⁸¹

The Commission further understands that proposed Section 3.4 of Appendix D would also require the Plan Processor to provide regulators, on request, with the business and technical requirements needed to re-create data elements and/or enrichments that would otherwise be eliminated for Options Market Maker quotes in Listed Options, as well as the code currently used by the Plan Processor to derive those data elements and/or enrichments.⁸² It may be feasible for regulators to perform such ad hoc processing of Options Market Maker Quotes in Listed Options, if they have adequate staff possessing the necessary specialized skills for this work and access to the necessary technical tools. In part, this is because lifecycles for Options Market Maker quotes in Listed Options data are generally less complex compared to lifecycles that include other CAT events, in that Options Market Maker quotes in Listed Options lifecycles usually involve only a single broker-dealer, a single exchange, an exchange quote, and a single cancel or trade event.⁸³ At the same time, ad hoc processing would likely require technical assistance from the Plan Processor and would impose costs on the regulator. The magnitude of this cost depends on the complexity of revising the code for regulators' systems, the frequency of updates required to maintain the code, and the chosen amount and frequency of data processed. Finally, the CAT NMS Plan will continue to obligate Participants to "adopt policies and procedures, including standards, requiring CAT Data reported to the Central Repository [to] be timely, accurate, and complete, and to ensure the integrity of such CAT Data (e.g., that such CAT Data has not been altered and remains reliable)," ⁸⁴ and each Participant's rulebook obligates its members to record and report CAT data

in a manner that ensures its timeliness, accuracy, integrity and completeness.⁸⁵

B. Storage for Raw Unprocessed Data, Interim Operational Data, and/or Submission and Feedback Files Older Than 15 Days

The CAT NMS Plan requires CAT Data to be "directly available and searchable electronically without manual intervention for at least six years"⁸⁶ and within certain query tool response times.⁸⁷ These requirements apply not only to the final corrected data version that is delivered to regulators by T+5 at 8 a.m. Eastern Time, but also to raw unprocessed data and various types of interim operational data, as well as to copies of all submission and feedback files provided to CAT Reporters as part of the correction process.⁸⁸ Specifically, with respect to raw unprocessed data and interim operational copies of data created between T+1 and T+5, Section 6.2 of Appendix D of the CAT NMS Plan provides that, prior to 12:00 p.m. Eastern Time on T+1, raw unprocessed data that has been ingested by the Plan Processor must be available to Participants' regulatory staff and the SEC, and between 12:00 p.m. Eastern Time on T+1 and T+5, access to all iterations of processed data must be available to Participants' regulatory staff and the SEC.⁸⁹

The Participants distinguish between Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files in the Amendment, which would define Raw Unprocessed Data as "data that has been ingested by the Plan Processor and made available to regulators prior to 12:00 p.m. Eastern

Time on T+1."⁹⁰ Interim Operational Data, on the other hand, would be defined as "all processed, validated and unlinked data made available to regulators by T+1 at 12:00 p.m. ET and all iterations of processed data made available to regulators between T+1 and T+5, but excludes the final version of corrected data that is made available at T+5 at 8:00 a.m. ET."⁹¹ Currently, the Participants explained that such data is supplanted in all CAT query tools by the final version of corrected data that is made available to regulators at T+5 at 8:00 a.m. Eastern Time.⁹² The Participants stated, however, that such data remains available to regulators after T+5 "without manual intervention" via the use of CAT data management APIs.⁹³

To enable such access, Raw Unprocessed Data, Interim Operational Data, and submission and feedback files are stored in S3 Intelligent Tiers provided by the cloud service provider that currently hosts the CAT System, Amazon Web Services ("AWS").⁹⁴ Data files that are either new or that have been recently read by a regulatory user are stored in the S3 Frequent Access tier.⁹⁵ Files that have not been read by a regulatory user for 30 days are moved to the S3 Infrequent Access tier.⁹⁶ Files that have not been read by a regulatory user for 90 days are moved to the S3 Archive Instant Access tier.⁹⁷ Once a regulatory user accesses an older file, it is moved back into the S3 Frequent Access tier.⁹⁸

The Participants stated that regulatory users generally access the latest, corrected version of CAT data ⁹⁹ and

⁹⁰ See Amendment, *supra* note 13, at proposed Section 6.3.

⁹¹ *Id.* The Commission understands, from Staff discussions with the Participants, that Options Market Maker quotes in Listed Options would not qualify as Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files, and this Order does not approve application of proposed Section 6.3 of Appendix D to Options Market Maker quotes in Listed Options. See, e.g., *id.* (stating that "Interim Operational Data" does not include "processed data relating to Options Market Maker quotes in Listed Options made available to regulators by T+1 at 12:00 p.m. ET").

⁹² See Notice, *supra* note 9, at 26986.

⁹³ *Id.*

⁹⁴ See Participant Letter, *supra* note 32, at 3–4.

⁹⁵ See Amendment, *supra* note 13, at 81122 n.18.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Participant Letter, *supra* note 32, at 3.

⁹⁹ When a regulator queries CAT Data, the Participants explained that the CAT currently provides results to the user based on the latest, most current version of the data. Between T+1 and T+5, the CAT query tools will return the latest iteration of processed data available, and any interim data versions are ultimately supplanted in all CAT query tools by the final version of corrected data that is made available at T+5 at 8:00 a.m. ET. See Amendment, *supra* note 13, at 81123.

Q2 & Q3 2024 Quarterly Progress Report, available at https://catnmsplan.com/sites/default/files/2024-07/CAT_Q2-and-Q3-2024-QPR.pdf.

⁸⁰ See Amendment, *supra* note 13, at proposed Section 3.4.

⁸¹ *Id.*

⁸² See *id.*

⁸³ See, e.g., Part III.B *infra*.

⁸⁴ See CAT NMS Plan, *supra* note 3, at Section 6.5(d)(ii).

⁸⁵ See, e.g., Nasdaq General Equity and Options Rule 7, Section 11(a) ("Industry Members are required to record and report data to the Central Repository as required by this General 7 in a manner that ensures the timeliness, accuracy, integrity and completeness of such data."); Cboe Rule 7.30(a) ("Industry Members are required to record and report data to the Central Repository as required by this Section B in a manner that ensures the timeliness, accuracy, integrity and completeness of such data."); NYSE Rule 6893(a) ("Industry Members are required to record and report data to the Central Repository as required by this Rule Series in a manner that ensures the timeliness, accuracy, integrity and completeness of such data.").

⁸⁶ See CAT NMS Plan, *supra* note 3, at Section 6.5(b)(i) and Appendix D, Section 1.4.

⁸⁷ See, e.g., CAT NMS Plan, *supra* note 3, at Appendix D, Section 8.1 and 8.2. The Participants explained that the Commission had granted conditional exemptive relief from certain performance requirements related to the online targeted query tool. See Notice, *supra* note 9, at 26986; see also November 2023 Exemptive Relief Order, *supra* note 49.

⁸⁸ See Notice, *supra* note 9, at 26986.

⁸⁹ CAT NMS Plan, *supra* note 3, at Appendix D, Section 6.2.

therefore stated that Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files generally do not provide any regulatory value after the final corrected data is delivered by T+5 at 8 a.m. Eastern Time.¹⁰⁰ The Participants asserted that cost savings could be achieved by archiving Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files older than 15 days to a more cost-effective storage tier that is optimized for infrequent access.

Specifically, the Participants proposed to add new Section 6.3 to Appendix D of the CAT NMS Plan that would state that Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files older than 15 days may be retained in an archive storage tier that would not be directly available and searchable electronically without manual intervention and that would not be subject to any query tool performance requirements until it is restored to an accessible storage tier.¹⁰¹ The Participants stated that Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files not older than 15 days, as well as all final, corrected data, would remain accessible “without manual intervention” within required query tool response times.¹⁰²

Proposed Section 6.3 of Appendix D would also state that the Plan Processor would restore archived data to an accessible storage tier upon request to the CAT Help Desk by an authorized regulatory user from the Participants or a senior officer from the Commission.¹⁰³ The Participants explained that archived data would be restored generally within several hours or business days of a request to the CAT Help Desk that is maintained pursuant to Section 10.3 of Appendix D of the CAT NMS Plan, depending on the volume and size of the date range of the requested data restore. For example,

they stated that a request to restore a single day of data may take less than 24 hours, whereas a request to restore a year’s worth of data may take several days.¹⁰⁴ The Participants further represented that the Plan Processor would develop policies and procedures to ensure the confidentiality of any regulator requests to obtain data subject to proposed Section 6.3 of Appendix D.¹⁰⁵

Accordingly, the Participants stated that they believed that the anticipated savings associated with optimizing storage costs, which they estimated as approximately \$1 million in annual costs, outweighed the impact on regulatory access to this data.¹⁰⁶ The Participants reached their estimate by calculating the savings that would result from moving Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files from the S3 Frequent Access tier to the Glacier Deep Archive tier, “based on data volumes observed in the first half of 2024.”¹⁰⁷ The Participants stated that one-time implementation costs, which would “generally consist of Plan Processor labor costs associated with coding and software development, as well as any related cloud fees associated with the development, testing and load testing of the proposed changes,” were expected to be “minimal relative to overall cost savings” and explained that such costs “may vary based on various factors, including the details of any requirements in any final amendment approved by the Commission and any changes in labor costs.”¹⁰⁸ The Participants stated that “[o]ngoing

operational costs, other than cloud hosting costs” would not be affected by the proposed amendments.¹⁰⁹ They also stated that actual future savings could be more or less than their estimates due to changes in a number of variables on which their estimates were based, including “current CAT NMS Plan requirements; reporting by Participants, Industry Members, and market data providers; observed data rates and volumes; current storage and compute pricing discounts, compute reservations, and cost savings plans (*i.e.*, including savings attributable to the daily On-Demand Capacity Reservations and Compute Savings Plan); and associated cloud fees.”¹¹⁰ The Participants stated that they believed that “the cost savings estimates and assumptions [were] reasonable and provide[d] an adequate basis for the Commission to evaluate the costs and benefits” of their Proposal.¹¹¹

Both commenters supported this aspect of the Proposal.¹¹² SIFMA further urged the Commission to consider “whether its recordkeeping requirements are appropriate” and to “embark on a more comprehensive undertaking about what other data can be moved to more cost-effective storage solutions.”¹¹³ FIF suggested that, “[i]f the Operational Data does not provide any value to CAT Reporters¹¹⁴ or to regulators after T+5, there is no reason to store this data after T+5.”¹¹⁵ Conversely, if the Commission and the Participants issued a public report that “explains the regulatory value of maintaining this Operational Data,” FIF stated that it would “agree with the proposal . . . to move the Operational Data to a more cost-effective storage tier.”¹¹⁶ FIF further requested that the Commission and the Participants “publish an analysis as to whether this data could be stored in tiers within AWS S3, such as Glacier or Glacier Deep Archive, that could be more cost effective than the AWS S3 Intelligent Tier, as proposed in the Participant

¹⁰⁰ See Notice, *supra* note 9, 26986; see also Amendment, *supra* note 13, at 81122. According to the Participants, after four years of operation, the Plan Processor has not seen any regulatory usage of this interim operational data. See Notice, *supra* note 9, 26986; see also Amendment, *supra* note 13, at 81123.

¹⁰¹ See Amendment, *supra* note 13, at proposed Section 6.3. The Participants anticipated that “archived data would be restored to the S3 Frequent Access tier,” but cautioned that “[s]torage tiers are subject to change based on future technology developments and product offerings.” See *id.* at 81122 n.18.

¹⁰² See Notice, *supra* note 9, at 26986.

¹⁰³ See Amendment, *supra* note 13, at proposed Section 6.3. In addition, the Participants proposed to add references to proposed Section 6.3 of Appendix D to Section 6.5(d)(i) and Section 1.4 of Appendix D of the CAT NMS Plan. See *id.* at 81122.

¹⁰⁴ See Notice, *supra* note 9, at 26986. By contrast, the Participants stated that, when the Commission adopted the CAT NMS Plan, “[m]ost current data sources do not provide direct access to most regulators, and data requests can take as long as weeks or even months to process.” See *id.* (citing CAT NMS Plan Approval Order, *supra* note 3, at 84833 and Rule 613 Adopting Release, *supra* note 3, at 45729).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The Participants stated that their Proposal, as revised by the Amendment, would not delete the data subject to proposed Section 6.3 of Appendix D, but simply move it to a “more cost-effective” storage tier requiring some “manual intervention.” Upon restoration to an accessible storage tier, the Participants stated that the relevant data would be “available and searchable electronically . . . in the same manner as it is today.” See Amendment *supra* note 13, at 81123–24.

¹⁰⁷ See Amendment, *supra*, note 13, at 81123. The Participants further explained that the “affected data currently represents approximately 52% of the daily storage footprint in CAT. Specifically, raw unprocessed data (*i.e.*, as-submitted data) represents approximately 16% of the daily storage footprint, and interim operational copies (*i.e.*, T+1 12 p.m. ET, T+1 9 p.m. T, and associated DIVER copies) represent approximately 36% of the daily storage footprint.” See *id.* at 81123 n.27.

¹⁰⁸ *Id.* at 81123.

¹⁰⁹ *Id.*

¹¹⁰ See Participant Letter, *supra* note 32, at 2; see also Amendment, *supra* note 13, at 81122–23.

¹¹¹ See Amendment, *supra* note 13, at 81122–23.

¹¹² FIF Letter I at 3; SIFMA Letter I at 3. See also Nasdaq Letter (reiterating points made by the Participants in their filings and noting the support of SIFMA and FIF).

¹¹³ SIFMA Letter I at 3.

¹¹⁴ “CAT Reporter” means “each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c).” See CAT NMS Plan, *supra* note 3, at Section 1.1.

¹¹⁵ FIF Letter I at 3; FIF Letter II at 2.

¹¹⁶ FIF Letter I at 3.

filing.”¹¹⁷ In addition, FIF stated that “enhanced transparency regarding the operation of the CAT system is necessary and appropriate” and expressed concern that “there could be other requirements that the Commission is imposing on the . . . Participants that either do not provide regulatory value or are beyond the scope of CAT.”¹¹⁸ FIF requested that the Commission “provide clarification” as to why Industry Members and their customers should be “required to incur costs for storage of data that has no regulatory value.”¹¹⁹

The Commission does not agree that Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files have no regulatory value after final data is published at 8 a.m. Eastern Time on T+5. Although the Participants have represented that Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files has not yet been accessed by regulatory users,¹²⁰ the Participants have only very recently represented to the Commission that CAT implementation is complete.¹²¹ Current use is therefore not necessarily a reliable or dispositive reflection of the regulatory need for Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files. The Commission does agree, however, that the expected regulatory use cases involving this subset of data would likely not be time-sensitive, such that the Participants’ proposal to move Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files to a more cost-effective storage tier after 15 days reflects a reasonable approach.¹²² Accordingly, and pursuant

to Rule 608(b)(2) under the Exchange Act, the Commission finds that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act to approve the proposed amendments that relate to the storage of Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files.

C. Codification and Expansion of Exemptive Relief Permitting Deletion of Industry Test Data Older Than Three Months

According to the Participants, Industry Members and Participants submit data to the CAT pursuant to required and voluntary testing, feedback files related to such data, and output files that hold the detailed transactions, referred to herein as “Industry Test Data.”¹²³ Under Section 1.2 of Appendix D of the CAT NMS Plan, such Industry Test Data must be saved for three months.¹²⁴ Separate from this specific three-month retention requirement, Rule 17a–1 under the Exchange Act requires every national securities exchange and national securities association to keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity, and to keep all such documents for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Rule 17a–6

appropriate to proceed with the Participants’ Proposal at this time. Approval of proposed Section 6.3 of Appendix D achieves cost savings sought by SIFMA and FIF without foreclosing the Commission’s or the Participants’ ability to consider additional cost savings measures in the future. And the existence of these additional cost savings measures or potential analyses does not call into question the proposed amendments’ satisfaction of the approval standard set forth by Rule 608(b)(2) or otherwise warrant a departure from the policy choices proposed by the Participants.

¹²³ Separately, the Participants stated that CAT LLC, through the Plan Processor, also retains “[o]perational metrics associated with industry testing (including but not limited to testing results, firms who participated, and amount of data reported and linked)” for six years, in accordance with the CAT NMS Plan. See Notice, *supra* note 9, at 26988 n.30; see also CAT NMS Plan, *supra* note 3, at Appendix D, Section 1.2. The Participants explained that the Proposal would not affect such operational metrics. See Notice, *supra* note 9, at 26988 n.30.

¹²⁴ See Notice, *supra* note 9, at 26988.

under the Exchange Act.¹²⁵ Section 9.1 of the CAT NMS Plan, the general recordkeeping provision for the CAT NMS Plan, also states, in relevant part, that the Company shall maintain complete and accurate books and records of the Company in accordance with Rule 17a–1 under the Exchange Act.¹²⁶

The Participants explained that, on June 2, 2023, CAT LLC requested exemptive relief from Rule 17a–1 under the Exchange Act and certain provisions of the CAT NMS Plan relating to the retention of Industry Test Data beyond three months.¹²⁷ On November 27, 2023, the Commission granted the requested relief.¹²⁸ The Participants stated that their previous request for exemptive relief and the Industry Test Data Exemptive Relief Order apply only to Industry Test Data related to the CAT order and transaction system, not to the customer account and information system (“CAIS”).¹²⁹

The Participants therefore proposed to amend Section 1.2 of Appendix D of the CAT NMS Plan to provide that test data (whether related to the CAT order and transaction system or to the CAIS) may be deleted by the Plan Processor after three months.¹³⁰ Proposed Section 1.2 of Appendix D would continue to state that operational metrics associated with industry testing (including, but not limited to, testing results, firms who participated, and amount of data reported and linked) must be stored for the same duration as the CAT production data.¹³¹

The Participants explained that eliminating Industry Test Data older than three months as permitted by the Industry Test Data Exemptive Relief

¹¹⁷ *Id.* Contrary to FIF’s suggestion, the Commission understands that the Participants do, in fact, propose to store Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files older than 15 days in tiers like Glacier Deep Archive. See, e.g., note 107 and associated text *supra*.

¹¹⁸ FIF Letter I at 3–4.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Notice, *supra* note 9, at 26986.

¹²¹ See CAT Q2 & Q3 2024 Quarterly Progress Report, available at https://catnmsplan.com/sites/default/files/2024-07/CAT_Q2-and-Q3-2024-QPR.pdf.

¹²² 17 CFR 242.608(b)(2). The Commission recognizes that the amendments proposed by the Participants here are not the only measures that could potentially reduce the costs of storing CAT Data. As noted above, commenters made several additional suggestions, including that the Commission consider revisions to its recordkeeping requirements, that the Commission evaluate what other data might be moved to more cost-effective storage solutions, that the Commission eliminate storage of Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files after T+5, and that the Commission and the Participants issue a public report explaining the value of maintaining such data. See notes 113–119 and associated text *supra*. But, in our view, it is

¹²⁵ See 17 CFR 240.17a–1(a)–(b) and 17 CFR 240.17a–6; 15 U.S.C. 78q. See also Notice, *supra* note 9, at 26988. The Participants explained that the CAT is a facility of each of the Participants to the CAT NMS Plan. See Notice, *supra* note 9, at 26988.

¹²⁶ See *id.* at 26988–89.

¹²⁷ See Notice, *supra* note 9, at 26988; see also Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated June 2, 2023, <https://catnmsplan.com/sites/default/files/2023-06/06.02.23-Exemptive-Request-Test-Data-Retention.pdf>. As explained in the exemptive request, CAT LLC does not believe that Industry Test Data constitutes documents covered by Rule 17a–1 under the Exchange Act and adheres to its view that the specific three-month period for Industry Test Data supersedes the more general, longer retention periods in the CAT NMS Plan, but submitted the exemptive request to obtain regulatory clarity in light of Staff comments that the longer retention periods set forth in Rule 17a–1 under the Exchange Act and the CAT NMS Plan may apply to Industry Test Data.

¹²⁸ See Industry Test Data Exemptive Relief Order, *supra* note 8.

¹²⁹ See Notice, *supra* note 9, at 26988.

¹³⁰ *Id.* at 26989.

¹³¹ *Id.*

Order is expected to achieve approximately \$1 million per year in savings.¹³² According to the Participants, the proposed amendments would not generate additional cost savings beyond those achievable pursuant to the Industry Test Data Exemptive Relief Order,¹³³ although the Participants generally noted that actual future savings could be more or less than their estimates due to changes in a number of variables on which their estimates were based, including “current CAT NMS Plan requirements; reporting by Participants, Industry Members, and market data providers; observed data rates and volumes; current storage and compute pricing discounts, compute reservations, and cost savings plans (*i.e.*, including savings attributable to the daily On-Demand Capacity Reservations and Compute Savings Plan); and associated cloud fees.”¹³⁴ The Participants stated that one-time implementation costs, which would “generally consist of Plan Processor labor costs associated with coding and software development, as well as any related cloud fees associated with the development, testing and load testing of the proposed changes,” were expected to be “minimal relative to overall cost savings” and explained that such costs “may vary based on various factors, including the details of any requirements in any final amendment approved by the Commission and any changes in labor costs.”¹³⁵ The Participants stated that “[o]ngoing operational costs, other than cloud hosting costs” would not be affected by the proposed amendments.¹³⁶ The Participants stated that they believed that “the cost savings estimates and assumptions [were] reasonable and provide[d] an adequate basis for the Commission to evaluate the costs and benefits” of their Proposal.¹³⁷

Two commenters, SIFMA and FIF, supported this aspect of the Proposal.¹³⁸ FIF further stated that it supported “deletion of all test data after one week” and requested that the Commission and the Participants “publish a cost-benefit analysis of any mandate to retain test data beyond one week,” which analysis should “identify any use cases that would involve access to test data

beyond one week, including the regulatory purpose.”¹³⁹

The Commission understands from the Participants that the primary purpose of Industry Test Data is to facilitate CAT Reporter testing needs and not to facilitate regulatory use.¹⁴⁰ The Commission therefore agrees with the Participants and the commenters that, in light of the approximately \$1 million per year cost for retaining Industry Test Data beyond three months, the proposed approach to retention of Industry Test Data is reasonable. Accordingly, and pursuant to Rule 608(b)(2) under the Exchange Act, the Commission finds that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act to approve the provisions of the Proposal that relate to the retention of Industry Test Data.¹⁴¹

Although the Participants did not specifically also request exemptive relief from Rule 17a–1 under the Exchange Act with respect to Industry Test Data related to the CAIS,¹⁴² such relief is necessary in order to effectuate the Proposal, as Rule 17a–1 would otherwise require Industry Test Data related to the CAIS to be retained for a

¹³⁹ FIF Letter I at 5; FIF Letter II at 2.

¹⁴⁰ See, e.g., Industry Test Data Exemptive Relief Order, *supra* note 8, at 84027. The Commission recognizes that there are additional measures beyond those proposed by the Participants here that could further reduce the costs associated with retaining Industry Test Data, such as FIF’s suggestions that Industry Test Data be deleted after one week and/or that the Commission and that the Participants conduct a related cost-benefit analysis. But, in our view, it is appropriate to proceed with the Participants’ Proposal at this time. Approval of proposed Section 1.2 of Appendix D advances FIF’s stated goal to “manage and reduce CAT operating costs,” FIF Letter I at 2, and does not foreclose the Commission’s or the Participants’ ability to consider additional cost savings measures in the future. And the existence of these additional cost savings measures or potential analyses does not call into question the proposed amendments’ satisfaction of the approval standard set forth by Rule 608(b)(2) or otherwise warrant a departure from the policy choices proposed by the Participants.

¹⁴¹ 17 CFR 242.608(b)(2).

¹⁴² 17 CFR 240.17a–1; see also 15 U.S.C. 78q (requiring, among other things, the Participants and their members to make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act). As the Participants explain, the Commission has already granted such exemptive relief for Industry Test Data related to the order and transaction system. See note 129 and associated text *supra*; see also Industry Test Data Exemptive Relief Order, *supra* note 8.

longer time period. For the above-described reasons, and consistent with its action in the Industry Test Data Retention Exemptive Relief Order, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors under Section 36 of the Exchange Act,¹⁴³ as well as consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of, a national market system under Rule 608(e) under the Exchange Act,¹⁴⁴ to grant relief that exempts each Participant from the longer recordkeeping and data retention requirements for CAIS-related Industry Test Data that otherwise would apply as set forth in Rule 17a–1 under the Exchange Act.¹⁴⁵

D. Other Comments Received on the Proposal

Both commenters proposed that additional steps be taken to further manage and reduce CAT operating costs.¹⁴⁶ For instance, SIFMA expressed concern that the Commission, “the primary beneficiary of the CAT, . . . does not pay for it, and thus does not have a direct incentive to consider costs, or opportunities for cost savings, in connection with making decisions regarding its operation.”¹⁴⁷ SIFMA stated that the Commission’s “rejection” of provisions that would have permitted the Plan Processor to provide an interim CAT-Order-ID to regulatory users on an “as requested” basis, rather than on a daily basis—provisions that were initially included in the Proposal,¹⁴⁸ but withdrawn by the Participants¹⁴⁹—suggested that “costs and cost savings are not necessarily a Commission priority in connection with decision-making regarding the operation of the CAT.”¹⁵⁰

¹⁴³ 15 U.S.C. 78mm(a)(1).

¹⁴⁴ 17 CFR 242.608(e).

¹⁴⁵ 17 CFR 240.17a–1.

¹⁴⁶ See, e.g., FIF Letter I at 2; SIFMA Letter I at 1.

¹⁴⁷ SIFMA Letter II at 2. See also note 173 and associated text for a discussion of how investors benefit from CAT-enabled regulatory activities.

¹⁴⁸ See Notice, *supra* note 9, at proposed Appendix D, Section 6.1.

¹⁴⁹ See Amendment, *supra* note 13, at 81120, 81122.

¹⁵⁰ SIFMA Letter II at 2–3. SIFMA also noted that “the level of detail the Commission required the Participants to provide to justify other aspects of the proposed Cost Savings Amendments in Amendment No. 1, such as requiring the Participants to provide actual data on the proposed savings related to the processing, query, and storage requirements for options market maker quotes, goes well beyond what the Commission required the Participants to provide in their last set of CAT fee filings.” SIFMA Letter II at 3. SIFMA stated that

Continued

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Participant Letter, *supra* note 32, at 2; see also Amendment, *supra* note 13, at 81122–23.

¹³⁵ See Amendment, *supra* note 13, at 81123.

¹³⁶ *Id.*

¹³⁷ *Id.* at 81122–23.

¹³⁸ SIFMA Letter I at 4; FIF Letter I at 5. See also Nasdaq Letter (reiterating points made by the Participants in their filings and noting the support of SIFMA and FIF).

SIFMA therefore suggested that the Commission and the Participants should “assess their own CAT usage patterns and needs to identify further cost saving measures.”¹⁵¹ SIFMA further stated that the CAT “should be operated to meet the reasonable and legitimate needs of regulators, and not as a monolith to address any regulatory use case regardless of the costs.”¹⁵²

SIFMA stated that the “Commission’s action in connection with Amendment No. 1 to the proposed Cost Savings Amendment” demonstrated the need for the Participants and the Commission to “provide Industry Members with a more meaningful opportunity to contribute their experience and expertise to the CAT’s budget setting and cost savings processes.”¹⁵³ Specifically, SIFMA recommended that the Participants establish a separate working group that includes Industry Members to focus on ways the CAT System can be made more efficient from a cost perspective while still achieving its goals, rather than relying on the existing Cost Management Working Group, which is comprised solely of Participant members.¹⁵⁴ “Without more direct involvement by Industry Members in the CAT budgeting process,” SIFMA stated that “there is an insufficient structural framework and incentives to bring CAT costs under control.”¹⁵⁵

FIF expressed similar concerns.¹⁵⁶ Noting that the Participants have recently estimated “total CAT operating expenses of \$248,846,076 for 2025,” FIF stated that this “14.8% increase over the estimated CAT operating expenses for 2024” was “not sustainable over the

long-term.”¹⁵⁷ FIF stated that it was “imperative that the Commission take steps to manage CAT operating costs,” including approval of the Proposal and other recommendations made by FIF in their comment letters that were not included in the Proposal.¹⁵⁸ FIF further requested that the Commission “publish a report setting forth the factors giving rise to the significant estimated cost increase for 2025 and whether these factors will continue to apply year-over-year for the foreseeable future.”¹⁵⁹ FIF stated that the Commission “should not impose CAT reporting requirements that are beyond the scope of Commission Rule 613 and the CAT NMS Plan” and that “[p]roposed changes to current CAT processing or reporting requirements that could involve further significant increases in CAT operating costs should be subject to an appropriate cost-benefit analysis that is included as part of a CAT NMS Plan amendment.”¹⁶⁰

Contrary to the assertions of SIFMA, both the Commission and the Participants have demonstrated their commitment to reducing CAT costs where appropriate—and even where there is some amount of regulatory loss—as evidenced by the very existence of the cost savings measures proposed by the Participants and approved herein by the Commission.¹⁶¹ The Participants have already formed a Cost Management Working Group comprised of senior members of the Participants that works to find and address cost management needs,¹⁶² and the findings of this group are discussed with the Industry Members that sit on the CAT’s Advisory Committee.¹⁶³ There are also meaningful and reasonable constraints set on the CAT budgeting process, including a process that gives Industry

Members a chance to review and publicly comment on the CAT’s budget and that requires Commission review of CAT funding.¹⁶⁴ And the Commission agrees with FIF that any amendments to the requirements of Rule 613 and/or the CAT NMS Plan must be pursued either: (1) through a Commission-led rule-making process that includes public notice and comment and economic analysis; or (2) through the amendment process set forth under Rule 608, which would require the Participants to file with the Commission a proposed amendment to the CAT NMS Plan, subject that amendment to public notice and comment, and generally require approval by the Commission and a consideration of the impact of the amendment on efficiency, competition, and capital formation.¹⁶⁵

In determining whether any particular cost savings amendment meets the approval standard set forth in Rule 608(b)(2), the Commission evaluates and balances many factors, including the amount of costs savings as well as the potential downstream harms to investors and the U.S. financial markets that could result from less effective regulatory oversight by the SROs and the Commission. The Commission emphasizes that its approval of the specific cost savings amendments that the Participants have proposed for consideration in this proceeding does not foreclose future consideration of additional cost savings amendments and analyses, including the withdrawn interim CAT-Order-ID proposal and the other measures suggested by commenters.¹⁶⁶

III. Efficiency, Competition, and Capital Formation

A. Introduction

In determining whether to approve an amendment to the CAT NMS Plan and whether that amendment is in the public interest, Rule 613 requires the Commission to consider the impact of that amendment on efficiency, competition, and capital formation.¹⁶⁷

“[t]hese inconsistent actions by the Commission,” including its “failure . . . to offer data to support the regulatory value of the interim CAT-Order-ID,” suggested “that while the Commission is concerned about preserving what it perceives as the regulatory utility of the CAT, it does not necessarily give equal weight or consideration to the ever-increasing costs associated with operating it.” *Id.* at 3. The Commission does not agree that it has acted in a manner inconsistent with its obligations. In each of the proceedings discussed by the commenter, the Commission has sought from the Participants the information necessary to make the required findings in accordance with the rules and regulations that govern the Commission action at issue.

¹⁵¹ SIFMA Letter I at 2; SIFMA Letter II at 4.

¹⁵² SIFMA Letter I at 2; SIFMA Letter II at 4.

¹⁵³ SIFMA Letter I at 1; SIFMA Letter II at 3–4.

¹⁵⁴ SIFMA Letter I at 1; SIFMA Letter II at 3–4.

¹⁵⁵ SIFMA Letter I at 1; SIFMA Letter II at 4.

¹⁵⁶ Some of these concerns were also set forth in a previous comment letter to the Commission that was jointly submitted by SIFMA and FIF. See FIF Letter I, at 5 n.19; see also Letter from Joseph Corcoran, Managing Director, Associate General Counsel, and Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA, and Howard Meyerson, Managing Director, FIF, to Secretary, Commission, dated July 31, 2023, available at <https://www.sec.gov/comments/4-698/4698-238359-498762.pdf>.

¹⁵⁷ See Letter from Howard Meyerson, Managing Director, FIF, to Secretary, Commission, dated Dec. 2, 2024, at 2, available at <https://www.sec.gov/comments/4-698/4698-544735-1559702.pdf> (“FIF Letter III”).

¹⁵⁸ *Id.* In addition to the measures described above, FIF urged the Commission to “reevaluate the currently-mandated CAT processing timeframes, which FIF members consider to be a major contributor to the high CAT operating costs.” *Id.*; see also FIF Letter I at 5.

¹⁵⁹ FIF Letter III at 2.

¹⁶⁰ FIF Letter I at 5.

¹⁶¹ See also Nasdaq Letter at 2–3 (“Similar to SIFMA and FIF, Nasdaq believes that reducing CAT costs requires more work and exploration of other methods. The Cost Savings Amendment is the beginning of what Nasdaq expects will be a range of strategies to lessen the increasing costs. . . . Participants are proposing these changes as a first step in their efforts to reduce CAT costs while exploring further cost-saving measures.”).

¹⁶² See Securities Exchange Act Release No. 98290 (Sept. 6, 2023), 88 FR 62628, 62655 (Sept. 12, 2023) (“CAT Funding Model Approval Order”).

¹⁶³ See CAT NMS Plan, *supra* note 3, at Section 4.13.

¹⁶⁴ See, e.g., CAT Funding Model Approval Order, *supra* note 162, at 62652–57.

¹⁶⁵ See 17 CFR 242.608; see also 17 CFR 242.613(a)(5) (“No national market system plan filed pursuant to this section, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608. In determining whether to approve the national market system plan, or any amendment thereto, and whether the national market system plan is in the public interest under § 242.608(b)(2), the Commission shall consider the impact of the national market system plan or amendment, as applicable, on efficiency, competition, and capital formation.”).

¹⁶⁶ See also notes 78, 122, and 140 *supra*.

¹⁶⁷ 17 CFR 242.613(a)(5).

The Participants stated that their proposed amendments “will have a positive impact on competition, efficiency, and capital formation.”¹⁶⁸ The Commission has analyzed the potential impacts of the Proposal.

Based on its analysis, and after considering potential sources of imprecision in the Participants’ estimates, the Commission concludes that savings in operating costs will enhance the operational efficiency of CAT,¹⁶⁹ while the changes to CAT Data will lessen some regulatory efficiencies. These changes to regulatory efficiencies, however, are likely to be limited for regulatory activities using small samples of data but potentially more significant for certain time-sensitive regulatory activities using large amounts of data. Effects on market efficiency, competition, and capital formation, stemming from the impacts of the Proposal on regulatory and operational efficiencies, will likely be second-order and limited.

B. Baseline

In analyzing the impact of the Proposal on efficiency, competition and capital formation, the Commission considered the current CAT Data¹⁷⁰ as the baseline. Specifically, the baseline consists of the current properties, and the actual and potential regulatory usages of the CAT Data, in the absence of the Proposal. CAT Data was intended to make possible reconstruction of

market events,¹⁷¹ market analysis and research that inform policy decisions, regulatory activities such as market surveillance, examinations and investigations, and more efficient execution of numerous other regulatory functions.¹⁷² In the CAT NMS Plan Approval Order, the Commission explained how investors benefit from the CAT-enabled improvements to such regulatory activities.¹⁷³

The first provision of the Proposal focuses on Options Market Maker quotes in Listed Options. Along with their lifecycle linkages and associated derived fields, Options Market Maker quotes in Listed Options are currently accessible via an online targeted query tool, called DIVER. Alternatively, regulatory users with specialized knowledge of remote data processing and the structured query programming language (“SQL”) can use BDSQL to construct and run their own complex queries.¹⁷⁴

¹⁷¹ In market reconstructions, regulators aim to provide an accurate and factual accounting of what transpired during a market event. These market events often encompass activities in many securities across multiple trading venues. See CAT NMS Plan Approval Order, *supra* note 3, at 84805.

¹⁷² See CAT NMS Plan Approval Order, *supra* note 3, at 84833–84840.

¹⁷³ A discussion of the expected benefits and regulatory usage of the CAT NMS Plan is available in the CAT NMS Plan Approval Order. See CAT NMS Plan Approval Order, *supra* note 3, at 84816–84840.

¹⁷⁴ *Id.* at Section 6.10(c)(i)(B) (requiring the user-defined direct queries tool to provide authorized users with the ability to retrieve CAT Data via a query tool or language that allows users to query all available attributes and data sources). See also *supra* note 45 and associated text.

The Participants stated that, while the Options Market Maker quotes in Listed Options constitute the largest component of CAT Data,¹⁷⁵ only a small fraction of them end in an execution or allocation.¹⁷⁶ In addition, the Proposal stated that “the vast majority of Options Market Maker Quote lifecycles consist of just two events—the quote and its subsequent cancellation,”¹⁷⁷ which suggests that these quotes have simple lifecycles.

Figure 1 shows the backdrop of the evolution of Options Market Maker quotes in Listed Options, which is that the options market has experienced noticeable overall growth. As Figure 1 shows, the volumes in both the equity and the options markets (equity shares traded and options contracts traded, respectively) have markedly increased since early 2020. While volume growth has somewhat stagnated in the equity market since 2021, volume has continued to grow in the options market. Between 2016 and 2022, the volume of equity shares traded increased by 61 percent and options contracts traded increased by 153 percent.

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¹⁷⁵ The Participants state that these quotes comprise approximately 98% of all options exchange events and approximately 75% of all transaction volume stored in the CAT. They, however, do not specify the time period over which these estimates were obtained. See Notice, *supra* note 9, at 26984.

¹⁷⁶ See Notice, *supra* note 9, at 26984; see also Participant Letter, *supra* note 32, at 2.

¹⁷⁷ See Notice, *supra* note 9, at 26984.

¹⁶⁷ 17 CFR 242.613(a)(5).

¹⁶⁸ See Notice, *supra* note 9, at 26989.

¹⁶⁹ See *infra* note 188.

¹⁷⁰ See *supra* note 6 for a description of “CAT

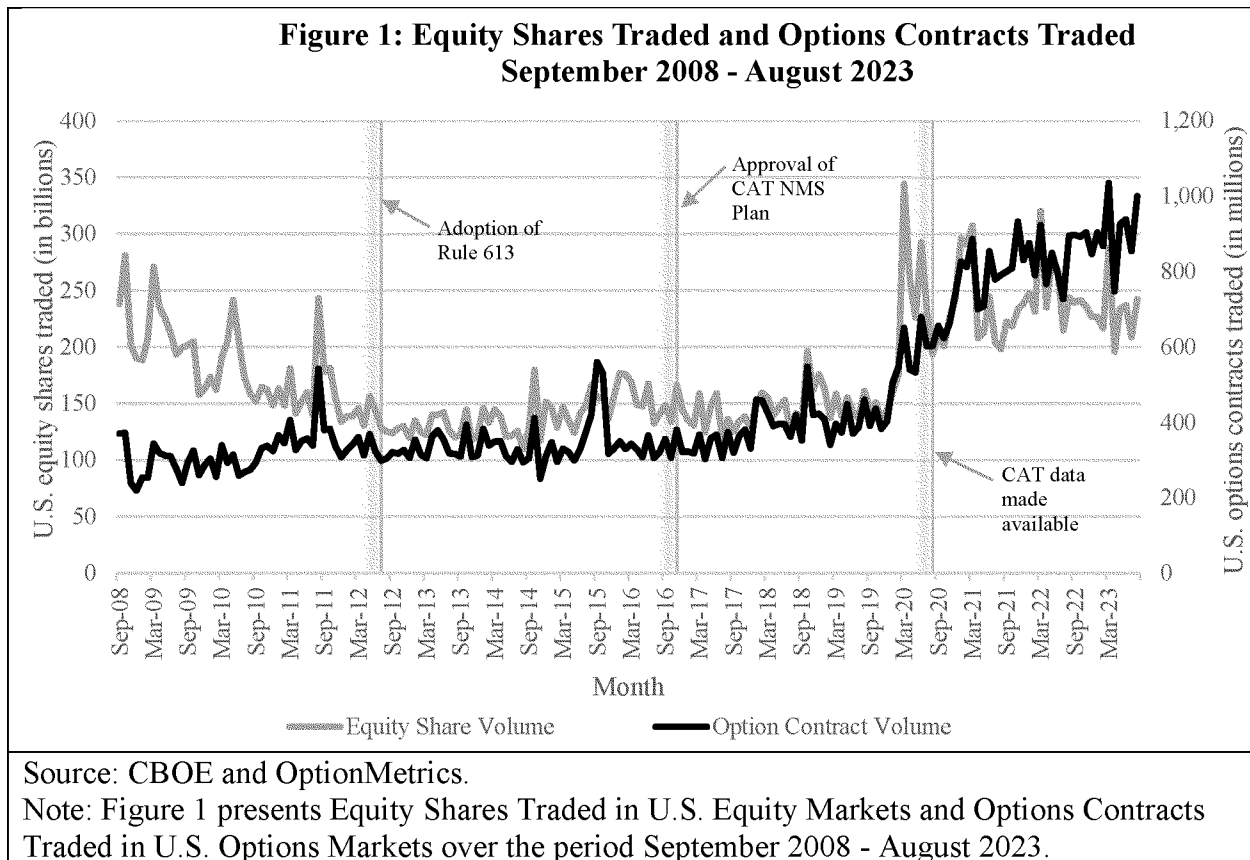
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Table 1 presents an analysis of CAT Data from the first quarter of 2024. It shows that, approximately 90 percent of

all options-related events and 80 percent of all events in CAT are Options Market Maker quotes in Listed Options,¹⁷⁸ which include both OQ and

OQC events.¹⁷⁹ OQ events account for approximately 72 percent of all options-related events and 63 percent of all events in CAT.

TABLE 1—THE SHARES OF OPTIONS QUOTE EVENTS AND OPTIONS MARKET MAKER QUOTES IN LISTED OPTIONS IN CAT
[January 2024–March 2024]

	Jan-24	Feb-24	Mar-24
Panel A (numbers in billions)			
All events in CAT (1) [= (2) + (9)]	8,164	7,811	7,892
All options-related events in CAT (2) [= (3) + (8)]	7,166	6,905	7,039
All options exchange events (3) [= (4) + (7)]	6,817	6,530	6,655
OMM ^a quotes in Listed Options (4) [= (5) + (6)]	6,528	6,225	6,340
Options quote (OQ) events (5)	5,287	4,884	4,896
Options quote cancel (OQC) events (6)	1,241	1,341	1,444
Other options exchange events (7)	289	305	315
Industry member options-related events (8)	349	376	384
All equities events in CAT (9)	998	906	853
Panel B (%)			
Options quote events as percent of all options exchange events [=100*(5)/(3)]	78	75	74
Options quote events as percent of all options-related events in CAT [=100*(5)/(2)]	74	71	70
Options quote events as percent of all events in CAT [=100*(5)/(1)]	65	63	62
Options Market Maker quotes in Listed Options as percent of all options exchange events [=100*(4)/(3)]	96	95	95
Options Market Maker quotes in Listed Options as percent of all options-related events in CAT [=100*(4)/(2)]	91	90	90
Options Market Maker quotes in Listed Options as percent of all events in CAT [=100*(4)/(1)]	80	80	80

Source: CAT Data.

¹⁷⁸ These estimates are similar to those presented in the Notice. See *supra* note 175.

¹⁷⁹ Lifecycles that include both OQ and OQC events can have more than two events. For example, lifecycles with both OQ and OQC events can also

have quote modifications and partial executions. See also *supra* note 30 and associated text.

Notes: (1) Other options exchange events include options order accepted, options order modified and options order canceled events, internal options route and options cancel route events, options trade events, and various other options exchange events. Industry member options-related events include industry member options events and industry member multi-leg events. (2) All equities events in CAT include all equities exchange events and industry member equities events. (3) All events in CAT include all options exchange events, all equities exchange events, and all industry member events.

^aOMM refers to Options Market Maker.

Further analysis of options trades associated with Options Market Maker quotes in Listed Options, in the options market data from Q1–2024,¹⁸⁰ showed that the number of option trades associated with Options Market Maker quotes in Listed Options as percent of CAT OQ events is small, 0.001 percent or less.¹⁸¹ The analysis, however, also shows that a substantial portion of all options trades, approximately 20 percent, is associated with Options Market Maker quotes.

An analysis of lifecycles of Options Market Maker quotes in selected Listed Options shows that at least for some options on some days these lifecycles can be more complex than suggested by the Participants.¹⁸² For these selected Options, 63 percent of the Options Market Maker quotes had a lifecycle with two events, while almost 10 percent had lifecycles that included five or more events.

The second provision of the Proposal involves Raw Unprocessed Data, Interim Operational Data and/or submission and feedback files data. These data are currently available without “manual intervention” for at least six years within certain query tools.¹⁸³ These data are currently stored within the Central Repository via AWS S3–FA storage tier for the first 30 days, in the S3–Infrequent Access tier for the next 60 days, and in the S3–Archive Instant Access tier thereafter.¹⁸⁴ Access to such data prior to the availability of final data can improve the timeliness of regulatory activities for those regulators who do not already have such data.¹⁸⁵

¹⁸⁰ In this analysis, both OQ events and option trade (OT) events are defined as one-sided events. Thus, each side of a trade is counted as a separate trade.

¹⁸¹ This supports the Participants’ statements, *see supra* note 176.

¹⁸² Focusing on one day, March 7, 2024, this analysis studied the Listed Options on one widely traded ETF. The number of CAT events per CAT lifecycle reflects the number of CAT events that occurred on March 7, 2024, for CAT lifecycles that had an options quote event also on March 7, 2024. On March 7, 2024, options with the underlying ETF used in this analysis had one of the highest volumes of options exchange CAT events across all underlying symbols. *See supra* note 177 and associated text for the Participant’s characterization of the lifecycles of the Options Market Maker quotes in Listed Options.

¹⁸³ *See supra* notes 86–87 and associated text.

¹⁸⁴ *See supra* note 94 and associated text.

¹⁸⁵ *See* CAT NMS Plan Approval Order, *supra* note 3, at 84831 for a discussion of the improvements to timeliness of access to such data.

The third provision of the Proposal relates to the retention of Industry Test Data.¹⁸⁶ Industry Members and Participants submit data to CAT pursuant to both required and voluntary testing; CAT retains the Industry Test Data in connection with such testing. Industry Test Data associated with CAIS is required to be retained for six years whereas CAT LLC was previously permitted to eliminate Industry Test Data related to the CAT order and transaction system after three months.¹⁸⁷ The Participants proposed that test data (whether related to the CAT order and transaction system or to the CAIS) may be deleted by the Plan Processor after three months.

C. Efficiency

The Commission analyzed three types of efficiency impacts from the Proposal: operational efficiency in terms of cost savings of operating the Central Repository;¹⁸⁸ regulatory efficiency in terms of the impact of changes in CAT Data on regulatory activities; and market efficiency in the form of second order impacts on the market.

As discussed further below, cost savings in operating the Central Repository represent an enhancement of the operational efficiency of CAT. The changes to CAT Data from the Proposal will lessen some regulatory efficiencies by delaying certain regulatory activities. While these inefficiencies could be relatively more significant for certain time-sensitive regulatory activities involving large amounts of data, in

In addition, based on Commission staff’s knowledge of CAT, these are the only data within CAT that identify error records and corrections.

¹⁸⁶ *See supra* section II.C, *supra* note 123 and associated text.

¹⁸⁷ In November 2023, the CAT LLC was granted exemptive relief from the requirement to retain Industry Test Data for six years and was permitted to eliminate such data after three months. The Participants stated that this exemptive relief applied only to Industry Test Data related to the CAT order and transaction system, not to CAIS. *See supra* section II.C, *supra* notes 127–128 and associated text.

¹⁸⁸ Economically, operational efficiency refers to the effective use of resources to generate a given output. In the case of CAT, the output refers to the CAT Data, which are generated for regulatory purposes. Even though the outputs, CAT Data, under the proposal are not the same as that in the absence of the proposal, the analysis of operational efficiency is simplified by focusing on the use of resources as measured by the cost savings, net of implementation costs; the efficiency effects of changes in CAT Data are discussed separately (as impacts on regulatory efficiency).

general, these inefficiencies are likely to be limited.¹⁸⁹ Effects on market efficiency, competition, and capital formation, which stem from the aforementioned impacts of the Proposal on regulatory and operational efficiencies, will likely be second-order and, hence, also limited.

1. Operational Efficiency

The Proposal will result in operational cost savings, net of implementation costs, of operating the Central Repository, which will reduce the CAT Fees borne by Participants, Industry Members, and investors (through pass-throughs). The Participants’ estimates of cost savings could be imprecise, however. The actual cost savings could differ from the projected cost savings for several reasons including: (1) assumptions used to generate estimates, (2) uncertainty in the future direction of a number of factors, (3) implementation costs, which are not included in the estimates, (4) some of the cost savings representing costs transferred to regulators, and (5) potential interactions of the Proposal with a recent regulatory change. These issues could mean that the Participants’ estimates are somewhat over-estimated or, alternatively, potentially considerably underestimated, depending upon the assumptions and methodologies used.

a. Estimated Cost Savings, Methodologies and Assumptions

The Proposal will result in meaningful cost savings even when considering some of the alternate methodologies and assumptions discussed below. The Participants estimate that the cost savings will be \$21 million in the first year, which is 11 percent of the total operating costs of CAT in 2023.¹⁹⁰ The Participants state

¹⁸⁹ The Participants characterized the impact of the Proposal as a whole, on regulatory functions, regulatory users or CAT Data, as “limited” or “minimal.” *See* Notice, *supra* note 9, at 26983–26986; *see also* Amendment, *supra* note 13, at 81121; Participant Letter, *supra* note 32, at 1.

¹⁹⁰ For 2023 total operating costs, *see* Consolidated Audit Trail, LLC, 2023 Financial and Operating Budget (Revised as of Nov. 7, 2023) available at <https://www.catnmsplan.com/sites/default/files/2023-11/11.07.23-CAT-2023-Financial-and-Operating-Budget.pdf>; *see also* Consolidated Audit Trail, LLC, 2023 Financial and Operating Budget, <https://www.catnmsplan.com/sites/default/>

Continued

that they believe their assumptions and estimates are reasonable.¹⁹¹ The Commission acknowledges the necessity of using simplifying assumptions to generate estimates and that such assumptions can affect the precision of the estimates. The Commission has considered the methodologies and assumptions and concludes that there are at least three issues that could affect the magnitude of the cost estimates—two relating to the volume of CAT Data affected and one relating to a processing cost assumption. However, the cost savings will be meaningful regardless of these issues.

The Participants' cost estimates¹⁹² are generated using current costs. Specifically, the Participants state that, among other things, cost savings estimates are based on "observed data rates and volumes; current discounts, reservations and cost savings plans; and associated cloud fees."¹⁹³ The Commission agrees that using current costs to generate cost savings estimates is reasonable and recognizes that the cost savings in the future could change depending on factors discussed in the next section.¹⁹⁴

The Participants' storage cost saving estimates are annual cost savings for the first year. However, the CAT NMS Plan requires the storage of six years of data, so the maximum annual cost savings would not be achieved in the first year.¹⁹⁵ Indeed, the Proposal will result in additional potential annual cost savings each year until the Proposal affects the annual storage of six years of data. Based on the current assumptions, the cost savings could eventually reach \$48 million per year for the provision on Options Market Maker quotes in

Listed Options.¹⁹⁶ Likewise, the storage cost savings from the provision on Raw Unprocessed, Interim Operational Data and/or submission and feedback files could reach \$6 million per year to account for a baseline of storing six years of data in an S3 storage tier.¹⁹⁷ These additional annual cost savings would not be expected in full until six years after the implementation of the Proposal.

The Participants' estimates may also not account for the one-time cost savings for affected historical data. The primary historical CAT Data affected by the Proposal are the Raw Unprocessed, Interim Operational Data and/or submission and feedback files.¹⁹⁸ All Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days will be moved to a cheaper storage tier, including historical data. However, the Participants describe the cost savings estimates as "annual,"¹⁹⁹ suggesting that they do not account for historical data. We estimate that including historical data could add up to \$4 million in one-time cost savings.²⁰⁰

The Participants, however, likely over-estimated the \$12 million estimate in annual processing cost savings from the provision on Options Market Maker quotes in Listed Options. To generate this estimate, the Participants apparently assumed that the per message linkage costs of options events were the same as those for equities

events,²⁰¹ but this is unlikely.²⁰² As the CAT Funding Model Approval Order discusses, the linkage processing of equities orders is generally more complex than the linkage processing of options orders.²⁰³ Further, Options Market Maker quotes in Listed Options have mostly simple lifecycles.²⁰⁴ However, the volume of the Options Market Maker quotes in Listed Options data suggests that they will still account for a large proportion of overall linkage processing costs.²⁰⁵ Therefore, while the cost savings could be less than \$12 million, they will likely still be large.

The Participants did not estimate any cost savings from the provision on CAIS test data but reiterated the \$1 million cost savings from the prior related exemptive relief.²⁰⁶ We expect these test data to have a small storage footprint. While the cost savings will be positive, they are unlikely to increase the approximate magnitude of the cost savings from the prior exemptive relief.

b. Future Magnitude of Cost Savings

The Participants recognize that the actual future cost savings could differ from the estimates because of uncertainty in several factors.²⁰⁷ These factors include the number of exchanges, Plan requirements, data rates and volumes, discounts, reservations and cost savings plans, and cloud fees.²⁰⁸ The Participants also state that future cost savings could be greater than

files/2024-01/01.17.24-CAT-Q4-2023-Budget-vs-Actual.pdf (last visited Oct. 23, 2024).

¹⁹¹ See Participant Letter, *supra* note 32, at 3.

¹⁹² See *supra* sections II.A, II.B, and II.C for additional discussions of these estimates.

¹⁹³ See Notice, *supra* note 9, at 26983, note 8. See also, Participant Letter, *supra* note 32, at 2; Amendment, *supra* note 13, at 81122.

¹⁹⁴ In addition, the cost savings estimates for the provision on Raw Unprocessed, Interim Operational Data and/or submission and feedback files do not include any Options Market Maker quotes on Listed Options data. This helps to ensure that this provision does not also count cost savings that would be attributed to the provision that would set forth the new processing, query, and storage requirements for Options Market Maker quotes in Listed Options (*i.e.*, Participants do not double count cost savings).

¹⁹⁵ None of the Notice, Participant Letter, or Amendment states directly whether the costs are estimated for one year or six years of data. While the Participants state that they assume current CAT requirements, they also state that the estimates for the Options Market Maker quotes in Listed Options provision are "in the first year." See Notice, *supra* note 9, at 26983–26985; see also Participant Letter, *supra* note 32, at 1–2 and 8.

¹⁹⁶ These estimates assume that the Participants' cost savings estimates are for one year of data, such that cost savings eventually reflect five additional years of data. The \$48 million estimate is six times the \$8 million estimate for the first year. This assumes constant message traffic and the Participants' 1:1:8 cost ratio across the S3 storage tiers. See *supra* note 56 and associated text; see also Notice, *supra* note 9, at 26983, note 8.

¹⁹⁷ The \$6 million estimate is six times the \$1 million annual estimate. This assumes constant message traffic and the Participants' 1:1:8 cost ratio across the S3 storage tiers. See *supra* note 132 and associated text; see also Notice, *supra* note 9, at 26983, note 8.

¹⁹⁸ While the CAIS test data provision will also affect historical data, those data are much smaller and have a much shorter history.

¹⁹⁹ See *e.g.*, Notice, *supra* note 9, at 26986.

²⁰⁰ If we assume the same annual storage footprint and add four additional years of data, we get an additional cost savings of \$4 million. However, the CAT NMS Plan was not fully implemented for the entire four years, and therefore the storage footprint of later years is larger than earlier years. A smaller storage footprint for this cost savings would result in a smaller cost savings estimate.

²⁰¹ The \$12 million estimate allocates \$27,000/day to linkages involving Options Market Maker quotes in Listed Options. When comparing this figure to others from the Participants, it seems to be in line with the relative volume of Options Market Maker quotes in Listed Options in CAT Data, indicating that this figure comes from an implied assumption of similar per message linkage costs. See Amendment, *supra* note 13, at 81123; see also Notice, *supra* note 9, at 26983–26984 and 26988.

²⁰² The Commission understood that complexity of the order lifecycles is a cost driver within the linkage processing. See CAT Funding Model Approval Order, *supra* note 162, at 62677.

²⁰³ See CAT Funding Model Approval Order, *supra* note 162, at 62678. The "Linker" costs involve looking across four days of data to link order messages across a lifecycle. See *id.*, at 62677. Certain order handling practices of Industry Members, such as the use of riskless principal transactions, involve relatively more complex linkages. See *id.*

²⁰⁴ This is consistent with the analysis presented above regarding complexities of lifecycles in the Options Market Maker quotes in Listed Options. See *supra* section III.B; see also *supra* note 177 and the associated text.

²⁰⁵ As the Participants stated, "there is not a linear relationship between volume and costs; rather, a combination of volume and processing complexity drive costs." See Notice, *supra* note 9, at 26984, note 14.

²⁰⁶ See Notice, *supra* note 9, at 26989.

²⁰⁷ See Notice, *supra* note 9, at 26983, note 8; see also Participant Letter, *supra* note 32, at 2–3.

²⁰⁸ See Notice, *supra* note 9, at 26983, note 8; see also Participant Letter, *supra* note 32, at 2.

the estimates as data volumes grow over time.²⁰⁹ The Participants produce cost savings estimates that apply only to the first year of implementation.²¹⁰ However, the cost savings estimated for the first year may not continue at the same level for at least two reasons: (1) changes in the costs of cloud computing, and (2) changes in the frequency of regulatory requests to have data restored.

Cost savings (and CAT operational costs) could decline as cloud computing evolves. The storage and computing services industries, technologically, are among the most rapidly evolving industries. In some estimates, the costs of host computer and storage services have steadily declined.²¹¹ Similar trends can be observed in the pricing of some of the cloud storage products.²¹² The Participants' estimated cost savings of \$21 million are based on the current cloud computing and storage costs.²¹³ Therefore, declines in cloud computing costs could result in smaller than expected future cost savings.

On the other hand, if message traffic keeps increasing, then, despite the rapid technological advancements, the future cost savings could be higher than those estimated for the first year.²¹⁴ Indeed, one new options exchange has started operations since the publication of the Notice, likely resulting in a higher

volume of Options Market Maker quotes in Listed Options.²¹⁵ In addition, one new equities exchange has been approved since the costs were estimated, potentially increasing the storage footprint of Raw Unprocessed Data, Interim Operational Data, and/or submission and feedback files.²¹⁶

Cost savings from the provision on Raw Unprocessed, Interim Operational Data and/or submission and feedback files will be reduced by any data requests by regulators to restore such data.²¹⁷ Participants state that retrieving data from Glacier Deep Archive storage is costly and the costs are a function of the size of the data being pulled in addition to the speed with which the request must be fulfilled.²¹⁸ This \$1 million savings is also based, in part, on an expectation of usage of Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days that matches the previous four years.²¹⁹ According to the Participants, these data were not used during the development of the CAT NMS Plan over the last four years.²²⁰

c. Implementation Costs

The Amendment states that "the one-time implementation costs are expected to be minimal relative to overall cost savings."²²¹ While the Participants do not estimate implementation costs, the Commission can compare anticipated

implementation activity to that of recent Commission final rules that include estimates for such activity. According to the Participants, "[o]ne-time implementation costs will generally consist of Plan Processor labor costs associated with coding and software development, as well as any related cloud feed associated with the development, testing and load testing of the proposed changes."²²² The Participants state that, "[o]ngoing operational costs, other than cloud hosting costs," will not be affected by the proposed amendments.²²³ The Commission agrees that the implementation costs seem minimal relative to overall cost savings.

The Proposal will result in costs to the Plan Processor with respect to developing policies and procedures, revising and testing coding changes, and revising user manuals and training materials. Policies and procedures will dictate how the Plan Processor responds to requests to restore the operational data and ensure confidentiality in the request.²²⁴ Implementing the Proposal will also require changes to programming code to change the processing of affected CAT Data. Finally, user manuals and training will have to be revised to ensure they reflect the CAT Data and access for regulators after the Proposal.

TABLE 2—IMPLEMENTATION COSTS FOR COMPARABLE COMPLIANCE ACTIONS

Implementation activity	Lowest estimate	Highest estimate
Developing Policies and Procedures ^a	\$49,000	\$53,000
Revising and Testing Code ^b	20,000	114,000

^a See *infra* note 225.

^b See *infra* note 226.

²⁰⁹ See Participant Letter, *supra* note 32, at 2.

²¹⁰ The Participants state that all costs and savings projections are estimates only and reflect the current state and costs of CAT operations. See the Proposal, *supra* note 4, at 2; see also Participant Letter, *supra* note 32, at 2–3.

²¹¹ See, for example, the Federal Reserve Bank of St. Louis publication of monthly aggregate cost data on host computers and servers, at <https://fred.stlouisfed.org/series/WPU11510116> (last visited Dec 5, 2024); the cost estimate for *Machinery and Equipment: Host Computers, Multiusers (Mainframes, Unix and PC Servers)* in August 2024 is 26 percent of that in December 2004. In contrast, the same publication estimated that the cost for all commodities for August 2024 is 170 percent of that in December 2004. From December 2004 until March 2021, the price of host computers and servers was on a downward trend. Then, from March 2021 to July 2022, these prices rose. Prices have since stayed close to or below June 22 level. Note that different indices use different methodologies and industry/product classifications and these estimates can be different from estimates by other agencies.

²¹² On November 1, 2008, for example, AWS Storage (standard) was priced at \$0.12 per GB per

month. In August of 2024, S3 (standard) was priced as "Over 500 TB/Month \$0.021 per GB" (a decline of 83 percent). New service tiers were also introduced, for example, in August of 2024, S3 Infrequent Access (long lived but infrequently accessed data that needs millisecond access) was priced as "All Storage/Month \$0.0125 per GB" (90 percent decline compared to the 2008 product), S3 Archive Instant Access as "All Storage/Month \$0.004 per GB," and S3 Glacier Deep Archive (long-term archiving, accessed once or twice in a year and can be restored within 12 hours) was priced as "All Storage/Month \$0.00099 per GB" (99 percent decline compared to the 2008 product). See AWS, New Tiered Pricing for Amazon S3 Storage, (Oct. 9, 2009) available at <https://aws.amazon.com/about-aws/whats-new/2008/10/09/new-tiered-pricing-for-amazon-s3-storage/>; see also AWS, Amazon S3 Pricing, available at <https://aws.amazon.com/s3/pricing/> (last visited Dec. 5, 2024).

²¹³ \$20 million of these savings are based on a 65 percent reduction in computer runtime for Options Exchange events, and an 80 percent reduction in storage footprint. See Participant Letter, *supra* note 32, at 3.

²¹⁴ This is also acknowledged by the Participants, who state that, "If data volumes continue to increase as they have historically, the associated costs avoided would similarly increase." See Amendment, *supra* note 13, at 81123.

²¹⁵ This exchange is MIAx Sapphire, LLC. See *supra* note 4.

²¹⁶ This exchange is 24X National Exchange LLC. See Securities Exchange Act Release No. 34–101777 (Nov. 27, 2024), 89 FR 97092 (Dec. 6, 2024).

²¹⁷ See Notice, *supra* note 9, at 26986, where the Participants state, "Upon request by the SEC or one of the Participants to the CAT Help Desk, archived data would be restored by the Plan Processor to an accessible storage tier, at which point it would be available and searchable electronically by regulatory users in the same manner it is today."

²¹⁸ See Notice, *supra* note 9, at 26986.

²¹⁹ See Notice, *supra* note 9, at 26986.

²²⁰ See *infra* note 253 and associated text.

²²¹ See Amendment, *supra* note 13, at 81123.

²²² *Id.*

²²³ See Amendment, *supra* note 13, at 81123.

²²⁴ See Notice, *supra* note 9, at 26986.

Table 2 shows ranges of implementation costs for implementation activities in recent Commission final rules. The Commission expects the Proposal to fall near the lower end of these ranges, and possibly below them. The estimates for developing policies and procedures in Table 2 apply to policies and procedures that codify business practices,²²⁵ which would be a bigger effort than the policies and procedures for fulfilling requests to restore data. Second, the Commission expects the coding changes necessary to implement the Proposal to involve fewer labor hours than the comparison rules for revising code in Table 2.²²⁶ Finally, while the recent Commission final rules surveyed did not separately itemize the costs of revising user manuals and training (and thus are not included in Table 2), the Commission expects that the costs will be lower than the costs of developing policies and procedures.

The Commission understands, from Staff discussions with the Participants,

²²⁵ See e.g., Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule with Respect to U.S. Treasury Securities, Release No. 34-99149 (Dec. 13, 2023), 89 FR 2714 (Jan. 16, 2024) (“Treasury Clearing Adopting Release”) at note 981 for the high estimate, rounded down from \$53,425; Covered Clearing Agency Resilience and Recovery and Orderly Wind-Down Plans, Release No. Securities Exchange Act Release No. 34-101446 (Oct. 25, 2024), 89 FR 91000 (Nov. 18, 2024) (“Covered Clearing Adopting Release”) at 183 for the low estimate.

²²⁶ Estimates for coding changes from recent Commission final rules vary based on programming staff labor from 50 hours for code revisions to calculate metrics to 300 hours for code revisions to accept new information in the CAT Central Repository. See Short Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34-98738 (Oct. 13, 2023), 88 FR 75100 (Nov. 1, 2023) (the “Short Position Reporting Adopting Release”) at 75144, note 475 for the high estimate. Among other changes, this release amended section 6.4(d)(ii) of the CAT NMS Plan (the “Bona Fide Market Maker Amendment”) requiring the 25 Plan Participants to update their compliance rules by July 2. See Short Position Reporting Adopting Release, section VI for a discussion of the Bona Fide Market Maker Amendment. Implementing the Bona Fide Market Maker Amendment will involve approximately 300 labor hours spread across programming, database administration, business and legal personnel. The Commission anticipates that coding changes to implement the Proposal involve a similar mix of labor as in the Bona Fide Market Maker Amendment but will need fewer hours. For the low estimate, rounded down from \$20,075, see Disclosure of Order Execution Information, Release No. 34-99679 (March 6, 2024), 89 FR 26428 (April 15, 2024) (“Order Disclosure Adopting Release”), at 26499 note 951. These costs reflect approximately 50 labor hours spread across programming and compliance personnel. While the amendments in the Commission’s recent Order Disclosure Adopting Release involve entities other than the Central Repository, the types of coding revisions may involve a similar effort. These numbers are rounded to the nearest thousand to reflect imprecision.

that moving data to Glacier Deep Archive is a service provided by the cloud provider and, thus, costs are unaffected by the Proposal. In addition, the proposed amendments will not involve any costs of building security for the Glacier Deep Archive because the Plan Processor has already built such security measures.

As for ongoing implementation costs, the Proposal could result in ongoing costs related to an increase in help desk demands to assist regulatory staff requesting assistances in linking Options Market Maker quotes in Listed Options lifecycles, and restoration of Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days.

d. Cost Transfers to Regulators

Regulators may undertake activities to mitigate the impact of the proposed amendments on regulatory activities and, as a result, incur costs. For regulatory activity that necessitates lifecycle information for Options Market Maker quotes in Listed Options, regulators could reduce the impact of the Proposal by revising lifecycle-producing code from the Plan Processor to apply it to their systems, maintaining such code over time, and processing data with that code.²²⁷ The cost of applying and maintaining the code as well as processing data with the code is a cost transfer from the Company to regulators. The magnitude of this cost depends on the complexity of revising the code for regulators’ systems, the frequency of updates required to maintain the code, and the chosen amount and frequency of data processed. In addition, regulators could incur staffing costs to mitigate the loss of data in DIVER and MIRS query tools²²⁸ and to request restorations of Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days. The costs incurred by regulators would reduce the cost savings of the proposed amendments. However, cost savings would still be meaningful after taking these transfers into consideration.

e. Interaction With Tick Size Adopting Release

One commenter stated that the rules and amendments proposed in the Tick Size Proposing Release²²⁹ (the

“Proposed Tick Size Rules”) had “the potential to significantly expand the amount of quoting activity in the . . . listed options markets,”²³⁰ implying that the costs of linking Options Market Maker quotes in Listed Options would increase following the implementation of the Proposed Tick Size Rules. The commenter did not provide an explanation as to why they expected the Proposed Tick Size Rules would increase Options Market Maker quotes in Listed Options, and while the Commission has considered this potential interaction, it finds the connection is unclear. Regardless, the cost savings in the Proposal will still be meaningful as to all Options Market Maker quotes in Listed Options.

2. Regulatory efficiency

Regulatory efficiency refers to the efficiency of regulatory activities conducted by SROs and/or the Commission necessary to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.²³¹ In analyzing how the Proposal will impact regulatory efficiency, the Commission assessed how the Proposal will impact regulatory activities.

The Commission identified regulatory inefficiencies resulting from the Proposal. Most of these regulatory inefficiencies are transitional.²³² The other regulatory inefficiencies will be permanent in nature and will occur each time certain regulatory use cases arise.²³³ The Commission concludes that the regulatory inefficiencies will have a limited overall impact.

a. Options Market Maker Quotes in Listed Options

The Participants state that the provision of the proposed amendments involving Options Market Maker quotes in Listed Options will have a “limited impact on the regulatory function of the CAT.” The Commission expects that this provision will delay potential regulatory activities involving lifecycle linkages for Options Market Maker quotes in Listed Options and reduce the

14, 2022), 87 FR 80266 (Dec. 29, 2022) (“Tick Size Proposing Release”).

²³⁰ See SIFMA Letter I, *supra* note 68, at 2, stating that “the [quote-to-trade ratio] is nearly 4 times greater than the ratio, described in the SEC’s approval order,” and citing to the tick size proposal in stating that “certain SEC market structure initiatives might only accelerate the increase.”

²³¹ See CAT NMS Plan Approval Order, *supra* note 3, at 84833–84840 for a discussion of the benefits from the types of regulatory activities that the CAT NMS Plan was intended to improve.

²³² See *infra* section III.C.2.a.(ii).

²³³ For example, each time a regulator has to create lifecycles for a set of Options Market Maker quotes. See *infra* section III.C.2.a.(i).

²²⁷ See *infra* section III.C.2.a.(i).

²²⁸ See *infra* section III.C.2.a.(ii) for a discussion of the impact of the provision that Options Market Maker quotes in Listed Options will no longer be available in DIVER.

²²⁹ See Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No. 34-96494 (Dec.

accessibility of Options Market Maker quotes in Listed Options.²³⁴ The Commission expects the mitigation mechanisms—e.g., the provision of code from the Plan Processor and the use of the quoteID field—to partially alleviate the delays created by the Proposal.²³⁵ The removal of Options Market Maker quotes from DIVER will result in certain regulatory inefficiencies; most of these inefficiencies, however, will dissipate in the long run.²³⁶

(i) Cessation of Processing of Options Market Maker Quotes by the Plan Processor

The loss of the linkage processing and derived fields specified in the Proposal could adversely affect investigations, examinations, or market analyses that rely on the lifecycle information in Options Market Maker data in CAT.²³⁷ When the Plan Processor ceases lifecycle processing on Options Market Maker quotes in Listed Options, CAT Data will no longer include a CAT-Lifecycle-ID. The absence of CAT-Lifecycle-IDs for Options Market Maker quotes will delay any regulatory activities involving order linkages for Options Market Maker quotes in Listed Options.²³⁸ Lack of lifecycle linkages would also preclude derived fields such as Derived Next Event Timestamp (and Type Code) from being used by regulators to make regulatory activities, such as order book reconstructions, easier and faster.

To mitigate the impact of this provision, regulators will have the option of requesting from the Plan Processor the code underlying the current linkage processing for Options Market Maker quotes in Listed Options for the purpose of creating the lifecycles

and derived fields themselves.²³⁹ While such code could be helpful, it may also need to be modified by regulators to run on their own systems. Further, the Plan Processor will not update this code over time, and thus, regulators will need to maintain it themselves.²⁴⁰ Also, the processing and maintenance of lifecycle linkages of Options Market Maker quotes in Listed Options will shift from a single entity (the Plan Processor) to multiple regulators. Such decentralization could result in duplicative efforts across regulators.

The Commission recognizes that potential delays depend on how complex the linkage processes are. A simpler linkage process will reduce the inefficiencies associated with decentralization and stale code. The Participants stated that “the vast majority of options market maker quote lifecycles consist of just two events,”²⁴¹ and that “[e]xecutions that result from Options Market Maker quotes will identify the quoteID of the quote that resulted in an execution,”²⁴² which suggests that these quotes have simple lifecycle processing.

While the majority of lifecycles of Options Market Maker quotes in Listed Options, with or without trades, may contain only two events, a substantial number of lifecycles could be more complex.²⁴³ The Proposal further states that a large portion of lifecycles of Options Market Maker quotes in Listed Options do not involve any execution or allocation.²⁴⁴ However, regulatory activities that analyze lifecycles or reconstruct order books are not restricted to lifecycles that contain trades.

Similarly, while having a quoteID on all options events in the lifecycle of an Options Market Maker quote in Listed Options can simplify the process of linking events,²⁴⁵ quote ID does not fully substitute for CAT-Lifecycle-ID in all instances. An analysis of the effectiveness of quoteID in linking trades to quotes, and linking lifecycles

more generally, found that quoteID is approximately 95 percent as effective as CAT-Lifecycle-ID is.²⁴⁶

Resulting delays from the implementation of the Proposal will vary across the impacted regulatory activities. Certain analyses using high volumes of data (e.g., the January 2021 volatility²⁴⁷) are more likely to face a large number of disparate complexities in linkage processing, which could take more time to address. Also, in these cases, the aforementioned challenges in using quoteID and Plan Processor code could be significant if such regulatory activities are time-sensitive. The implementation of the Proposal likely will have a limited impact for regulatory activities that focus on small samples,²⁴⁸ where the Plan Processor’s code and quoteID may be sufficient to avoid meaningful delays associated with linkage complexities.

(ii) Loss of Options Market Maker Quotes in Listed Options in Tools Such as DIVER and MIRS

The provision of the proposed amendments involving the Options Market Maker quotes in Listed Options will also eliminate Options Market Maker quotes in Listed Options from DIVER. The Participants state that, “[t]he regulatory groups of each of the Participants have indicated that they are able to conduct their regulatory programs accessing Options Market Maker Quotations via BDSQL and/or Direct Read, and each group supports the proposed modification.”²⁴⁹

The loss of Options Market Maker quotes in Listed Options from DIVER may delay regulatory activities, at least

²³⁴ The lifecycle linkages and derived fields will not be available as they will not be produced and while the unprocessed Options Market Maker quotes in Listed Options will remain in the CAT Data they will no longer be available in DIVER.

²³⁵ The field quoteID is the internal ID assigned to the order/quote by the exchange.

²³⁶ See *infra* notes 252251–253252, and associated text.

²³⁷ See, e.g., CAT NMS Plan Approval Order, *supra* note 3, at 84826–84827, 84831–84832, 84834 and 84839 for a discussion of the benefits of linking order data.

²³⁸ See CAT NMS Plan Approval Order, *supra* note 3, at 84834–84840 for examples of regulatory activities improved by having ready access to linkage information. Types of regulatory activities include analysis and reconstruction of market events, market analysis and research, and surveillance and investigations (SRO surveillance, SRO and Commission examinations, and SRO and Commission enforcement investigations). Regulatory activities involving Options Market Maker quotes in Listed Options can fall into any of these activities.

²³⁹ See *supra* note 82 and associated text. See also Notice, *supra* note 9, at 26984; Participant Letter, *supra* note 32, at 5–6.

²⁴⁰ See *supra* note 41. The Plan Processor technicians presumably have more expertise on particular changes to CAT Data affecting their linkage code than data users at SROs or the Commission.

²⁴¹ See Notice, *supra* note 9, at 26984.

²⁴² *Id.* In addition, the Participants stated that “[l]inkage validation is not necessary for Options Market Maker [q]uotes because quoteID is an effective replacement for tying quotes to trades.” See Participant Letter, *supra* note 32, at 4.

²⁴³ See section III.B, *supra* note 182 and associated text.

²⁴⁴ See Participant Letter, *supra* note 32, at 2.

²⁴⁵ See Participant Letter, *supra* note 32, at 4; see also Notice, *supra* note 9, at 26984.

²⁴⁶ For the purpose of this Order, using a day’s trading (the day of March 7, 2024), 2,706,647 options trade events linked to Options Market Maker quotes were analyzed. The analysis focused on whether the lifecycles (using CAT Lifecycle IDs) contained information sufficient for regulators to create the lifecycles themselves, absent the CAT Lifecycle ID. The analysis studied the linkages using a combination of Exchange ID, OSI Symbol ID, quoteID, Side, and Event Date and found that 142,578 (approximately 5 percent) trades did not contain information sufficient to link to the quote (if not using the CAT-Lifecycle-ID). For any remaining unlinked trades, other elements of the linkage processing currently used by the Plan Processor might offer additional means or methods for linking trades to quotes once the Proposal is implemented. Also, regulators may be able to obtain the information necessary to link trades to quotes by making information requests to the relevant Market Makers and/or exchanges. However, this would involve significant delays.

²⁴⁷ See Staff Report on Equity and Options Market Structure Conditions in Early 2021, (Oct. 14, 2021) available at <https://www.sec.gov/files/staff-report-equity-options-market-structure-conditions-early-2021.pdf>.

²⁴⁸ A small sample, for example, could involve trades on a particular day, in a specific option contract by a specific market maker.

²⁴⁹ See Participant Letter, *supra* note 32, at 5.

in the short-term. While use of DIVER does not require programming skills in remote data processing and/or knowledge of structured query programming language,²⁵⁰ regulatory users seeking to access Options Market Maker quotes in Listed Options will now have to do so through BDSQL and Direct Read, which do require such specialized skills and are therefore less user-friendly.²⁵¹ This may create some inefficiencies in the short term for regulatory activities involving Option Market Maker quotes.²⁵² Over a longer term, however, some regulatory users may become more familiar with BDSQL and Direct Read. Further, regulators could also adjust by creating internal tools for to replicate the same targeted queries they would otherwise run on DIVER. Once the code has been written out, BDSQL would likely be less time-consuming compared to DIVER, which can offset the delays. However, this could result in another inefficiency should multiple SROs and the Commission create code to replicate the commonly-used functionality formerly centralized within DIVER.

b. Raw Unprocessed, Interim Operational Data and/or Submission and Feedback Files

Based on the potential future use of Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days, as well as the Participants' statements on past use, the Commission expects the Proposal not to have a consequential negative impact on regulatory efficiency. Some future regulatory activities of SROs could depend on the use of the Raw Unprocessed, Interim Operational Data and/or submission and feedback files older than 15 days, and therefore may

be affected by a delay in access to data. It could, for example, be used by SROs to investigate patterns of errors in CAT Data submissions by their members.²⁵³ However, such regulatory activities are unlikely to be time-sensitive.

3. Market Efficiency

Market efficiency could be slightly negatively impacted by the Proposal with the impact coming from reductions in regulatory efficiency.²⁵⁴ Since the impact of the Proposal on regulatory efficiency is limited, the impact on market efficiency will be minimal. There could also be minor improvements in market efficiency due to a reduction in CAT fees.²⁵⁵

D. Competition

The Participants believe that the Proposal will have a positive impact on competition.²⁵⁶ The Commission expects that the Proposal is likely to result in slightly reduced CAT fees, which could dampen existing competitive advantages for some market participants relative to the baseline,²⁵⁷ but this is unlikely to have a meaningful effect on competition.²⁵⁸ To the extent that the Proposal results in a modest reduction in the deterrence effects of CAT and a potential increase in persistence of violative behaviors,²⁵⁹ there could be a resulting small adverse effect on competition in the market for trading services.²⁶⁰ None of these effects

on competition, however, is likely to be meaningfully large.

E. Capital Formation

The Participants state that the Proposal will have a positive impact on capital formation.²⁶¹ While they do not explain the mechanism, they state that the savings under the proposed amendments will "inure to the benefit of all participants in the markets for NMS Securities and OTC Equity Securities, including Participants, Industry Members, and most importantly, the investors."²⁶² The Commission does not expect that the cost savings will result in any meaningful positive impact on capital formation.²⁶³ In addition, any adverse impact on capital formation resulting from the regulatory inefficiencies created by the proposed amendments will also be small.²⁶⁴

IV. Conclusion

For the reasons discussed, the Commission, pursuant to Section 11A of the Exchange Act,²⁶⁵ and Rule 608(b)(2)²⁶⁶ thereunder, is approving the proposed changes to the CAT NMS Plan, as those changes are set forth in the Proposal. Section 11A of the Exchange Act authorizes the Commission, by rule or order, to authorize or require the self-regulatory organizations to act jointly with respect to matters as to which they share authority under the Exchange Act in planning, developing, operating, or regulating a facility of the national market system.²⁶⁷ Rule 608 of Regulation NMS authorizes two or more SROs, acting jointly, to file with the Commission proposed amendments to an effective NMS plan,²⁶⁸ and further provides that the Commission shall approve an amendment to an effective NMS plan if it finds that the amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly

violative behaviors could impact the market for trading services. *See supra* note 254 for a discussion of the effect of the Proposal on deterrence; *see also* CAT NMS Plan Approval Order, *supra* note 3, at 84885.

²⁶¹ *See* Notice, *supra* note 9, at 26989.

²⁶² *Id.*

²⁶³ *See supra* note 255 for why CAT fees, which are passed on to market participants, are unlikely to be meaningfully lowered on a per share basis under the Proposal.

²⁶⁴ Violative behavior could persist longer as a result of a decrease in timeliness of regulatory actions. However, the effect on regulatory actions is likely to be small. Therefore, the effect on capital formation is likely to be small.

²⁶⁵ 15 U.S.C. 78k-1.

²⁶⁶ 17 CFR 242.608(b)(2).

²⁶⁷ *See* 15 U.S.C. 78k-1(a)(3)(B).

²⁶⁸ *See* 17 CFR 242.608.

²⁵³ *See supra* note 120 and associated text. The Proposal could delay Designated Examining Authorities ("DEAs") examinations of CAT reporting errors by their members if these examinations require restoring data.

²⁵⁴ *See supra* sections III.C.2.a. and III.C.2.b. for the impact of the Amendment on regulatory efficiency. The impact on CAT data in terms of reduced accessibility and timeliness could lead to a modest reduction in the deterrence effects of CAT. *See* CAT NMS Plan Approval Order, *supra* note 3, at 84836, note 2266. The reduced timeliness could also allow violative behaviors to persist for slightly longer.

²⁵⁵ The CAT Funding Approval Order concludes that the expected magnitude of CAT Fees "are expected to be relatively small" based on a comparison of illustrative fees to other per share transaction costs. *See* CAT Funding Model Approval Order, *supra* note 162, at 62682. Therefore, a reduction in CAT fees would also be small when distributed on a per share basis.

²⁵⁶ *See* Notice, *supra* note 9, at 26989.

²⁵⁷ The CAT Funding Model establishes the framework under which CAT costs will be allocated among Participants and Industry Members, resulting in competitive advantages for some Participants and Industry Members over others. Such competitive advantages are dampened by a reduction in CAT costs as a result of the Proposal. *See* CAT Funding Model Approval Order, *supra* note 162, at 62684-62685.

²⁵⁸ *See supra* section III.C.3. for a discussion of why the reduction in fees will likely be small.

²⁵⁹ *See supra* note 254254.

²⁶⁰ A reduction in the deterrence effects of CAT and a potential increase in the persistence of

²⁵⁰ *See supra* note 174, and associated text.

²⁵¹ The Commission previously discussed the economic impact of how user-friendly CAT access tools would be. In discussing how the CAT NMS Plan would improve the accessibility of regulatory data by providing regulators with direct access to the consolidated CAT Data, the Commission stated that improving accessibility of regulatory data over the regulatory baseline requires ensuring that enough SRO and Commission staff members are able to use the [access] system supplied by the Central Repository when they need it. The Commission also discussed its belief that the ability to use the direct access system depends, among other things, on how user-friendly the system is. *See* Securities Exchange Act Release No. 34-77724 (April 27, 2016), 81 FR 30614 (May 17, 2016) at 30689.

²⁵² Some regulatory users might have to rely on regulatory users with programming skills to assist them in affected regulatory activities. This could increase the workload of regulatory users with programming skills and slow down other regulatory activities involving CAT. In addition, regulators would spend more time writing code to pull data from BDSQL than they expend to select from among the pre-defined criteria in DIVER.

markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.²⁶⁹

For the reasons set forth above, the Commission finds that the proposed changes to the CAT NMS Plan, as set forth in the Proposal, meet the required standard.

It is therefore ordered, pursuant to Section 11A of the Exchange Act,²⁷⁰ and Rule 608(b)(2)²⁷¹ thereunder, that such changes be, and hereby are, approved.

By the Commission.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-29912 Filed 12-17-24; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 18, 2025

ADDRESSES: Send all comments to, Office of Veterans Business Development, Amy Garcia, amy.garcia@sba.gov, Small Business Administration.

FOR FURTHER INFORMATION CONTACT: Amy Garcia, Veterans Business Analyst, Office of Veterans, amy.garcia@sba.gov 202-205-7526, or Curtis B. Rich, Agency Clearance Officer curtis.rich@sba.gov 202-205-7030.

SUPPLEMENTARY INFORMATION: This voluntary collection form enables the program office to assess both the quality of the Boots to Business courses and outcomes achieved by participants after attending Boots to Business. The data will be used for overall program management, continuous improvement initiatives, and reporting outcomes to better serve veteran entrepreneurs.

Information used for reporting will be done in the aggregate and will not include Personally Identifiable Information (PII).

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

PRA Number: 3245-0390.

Title: Boots to Business Post Course Surveys.

Description of Respondents: Boots to Business Program Participants.

Form Number: None.

Total Estimated Annual Responses: 10,000.

Total Estimated Annual Hour Burden: 27 hours.

Curtis B. Rich,
Agency Clearance Officer.

[FR Doc. 2024-29863 Filed 12-17-24; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF STATE

[Public Notice: 12604]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition and Storage—Determinations: “Christine Sun Kim: All Day All Night” Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary storage and display in the exhibition “Christine Sun Kim: All Day All Night” at the Whitney Museum of American Art, New York, New York; the Walker Art Center, Minneapolis, Minnesota; and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display and storage within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S.

Department of State (telephone: 202-632-6471; email: section2459@state.gov). The mailing address is U.S. Department of State, L/PD, 2200 C Street, NW (SA-5), Suite 5H03, Washington, DC 20522-0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,
Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2024-29970 Filed 12-17-24; 8:45 am]

BILLING CODE 4710-05-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36820]

Puerto Verde Industrial Railroad, LLC—Operation Exemption—Line in Maverick County, Tex.

Puerto Verde Industrial Railroad, LLC (PVIR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate approximately 2.43 miles of private railroad track located within the property of a former coal mine in Maverick County, Tex. (the Line). The former coal mine is owned by a corporate affiliate of PVIR, Farming Hydrasource, LLC (Farming Hydrasource), and is being converted into a rail-served industrial park.

According to the verified notice, Farming Hydrasource and PVIR will enter into a lease and operating agreement giving PVIR control of the Line. PVIR states that, once the exemption becomes effective, it will provide common carrier switching services and transloading for customers that locate to the industrial park.

PVIR states that no interchange commitments are being imposed on its operations. PVIR also certifies that its projected annual revenues will not exceed those that would qualify it as a Class III rail carrier and will not exceed \$5 million.

The earliest this transaction may be consummated is January 1, 2025, the effective date of the exemption. If the verified notice contains false or

²⁶⁹ See 17 CFR 242.608(b)(2).

²⁷⁰ 15 U.S.C. 78k-1.

²⁷¹ 17 CFR 242.608(b)(2).

misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 24, 2024 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36820, must be filed with the

Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on PVIR's representative, Justin J. Marks, Clark Hill, PLC, 1001 Pennsylvania Ave. NW, Suite 1300 South, Washington, DC 20004.

According to PVIR, this action is categorically excluded from environmental review under 49 CFR

1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: December 13, 2024.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2024-30082 Filed 12-17-24; 8:45 am]

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Part II

Department of Homeland Security

8 CFR Part 214

Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers; Final Rule

DEPARTMENT OF HOMELAND SECURITY**8 CFR Part 214**

[CIS No. 2766–24; DHS Docket No. USCIS–2023–0005]

RIN 1615–AC70

Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) is issuing this final rule to modernize and improve the efficiency of the H–1B program, add benefits and flexibilities, and improve integrity measures. These provisions mainly amend the regulations governing H–1B specialty occupation workers, although some of the provisions narrowly impact other nonimmigrant classifications, including: H–2, H–3, F–1, L–1, O, P, Q–1, R–1, E–3, and TN.

DATES: This final rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721–3000.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Executive Summary
 - A. Purpose of the Regulatory Action
 - B. Summary of the Major Provisions of the Regulatory Action
 - 1. Clarifying Requirements and Improving Program Efficiencies
 - 2. Providing Greater Benefits and Flexibilities
 - 3. Strengthening Program Integrity
 - C. Summary of Costs and Benefits
 - D. Summary of Changes from the Notice of Proposed Rulemaking
 - 1. Specialty Occupation Definition and Criteria
 - 2. Bar on Multiple Registrations Submitted by Related Entities
 - 3. Contracts
 - 4. Non-speculative or Bona Fide Employment
 - 5. Beneficiary-Owners
 - 6. Additional Changes
- II. Background
 - A. Legal Authority
 - B. The H–1B Program
 - C. The F–1 Program
 - D. NPRM and Final Rules
- III. Response to Public Comments on the Proposed Rule

- A. Summary of Public Comments on the Proposed Rule
- B. DHS/USCIS Statutory and Legal Issues
- C. General Comments
 - 1. General Support for the Rule
 - 2. General Opposition to the Rule
 - 3. Other General Comments on the Rule
- D. Modernization and Efficiencies
 - 1. General Comments on the Proposed Modernization and Efficiencies Provisions
 - 2. Specialty Occupation Definition and Criteria
 - i. General comments on the proposed changes to “specialty occupation”
 - ii. Amending the Definition of “Specialty Occupation”
 - iii. Amending the Criteria for “Specialty Occupation”
- 3. Amended Petitions
- 4. Deference
- 5. Evidence of Maintenance of Status
- 6. Eliminating the Itinerary Requirement for H programs
- 7. Validity Expires Before Adjudication
- E. Benefits and Flexibilities
 - 1. H–1B Cap Exemptions
 - 2. Automatic Extension of Authorized Employment Under 8 CFR 214.2(f)(5)(vi) (Cap-Gap)
 - 3. Other Comments on Benefits and Flexibilities
- F. Program Integrity
 - 1. Provisions to Ensure Bona Fide Job Offer for a Bona Fide Specialty Occupation Position
 - i. Contracts
 - ii. Bona Fide Employment
 - iii. LCA Properly Corresponds with the Petition
 - iv. Revising the Definition of U.S. Employer
 - v. Employer-Employee Relationship
 - vi. Bona Fide Job Offer
 - vii. Legal Presence and Amenable to Service of Process
 - 2. Beneficiary-Owners
 - 3. Site Visits
 - 4. Third-Party Placement (Codifying Policy Based on *Defensor v. Meissner* (5th Cir. 2000))
- 5. Other Comments on Program Integrity and Alternatives
- G. Request for Preliminary Public Input Related to Future Actions/Proposals
 - 1. Use or Lose
 - 2. Beneficiary Notification
- H. Other Comments on the Proposed Rule
- I. Out of Scope
- J. Statutory and Regulatory Requirements
 - 1. Administrative Procedure Act
 - 2. Comments on the Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)
- K. Severability
- IV. Statutory and Regulatory Requirements
 - A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)
 - 1. Summary of Changes from NPRM to Final Rule
 - 2. Background
 - 3. Costs, Transfers, and Benefits of the Final Rule
 - i. Specialty Occupation Definition and Criteria
 - ii. Amended Petitions
 - iii. Deference to Prior USCIS Determinations of Eligibility in Requests for Extensions of Petition Validity
 - iv. Evidence of Maintenance of Status
 - v. Eliminating the Itinerary Requirement for H Programs
 - vi. Validity Period Expires Before Adjudication
 - vii. H–1B Cap Exemptions
 - viii. Automatic Extension of Authorized Employment “Cap-Gap”
 - ix. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position
 - a. Contracts
 - b. Bona fide Employment
 - c. LCA Corresponds with the Petition
 - d. Revising the Definition of U.S. Employer
 - e. Employer-Employee Relationship
 - x. Beneficiary-Owners
 - xi. Site Visits
 - xii. Third-Party Placement (Codifying Policy Based on *Defensor v. Meissner* (5th Cir. 2000))
 - 4. Alternatives Considered
 - 5. Total Quantified Net Costs of the Final Regulatory Changes
- B. Regulatory Flexibility Act
- C. Final Regulatory Flexibility Act (FRFA)
 - 1. A statement of the need for, and objectives of, the rule
 - 2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments
 - 3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments
 - 4. A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available
 - 5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record
 - 6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected.
- D. Unfunded Mandates Reform Act of 1995 (UMRA)
- E. Congressional Review Act
- F. Executive Order 13132 (Federalism)
- G. Executive Order 12988 (Civil Justice Reform)

- H. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)
- I. National Environmental Policy Act (NEPA)
- J. Paperwork Reduction Act

Table of Abbreviations

AC21—American Competitiveness in the Twenty-first Century Act
 ACWIA—American Competitiveness and Workforce Improvement Act of 1998
 BLS—Bureau of Labor Statistics
 CEQ—Council on Environmental Quality
 CFR—Code of Federal Regulations
 CMSA—Consolidated Metropolitan Statistical Area
 COS—Change of Status
 CPI—U—Consumer Price Index for All Urban Consumers
 DHS—U.S. Department of Homeland Security
 DOL—U.S. Department of Labor
 DOS—U.S. Department of State
 FDNS—Fraud Detection and National Security
 FR—Federal Register
 FY—Fiscal Year
 HR—Human Resources
 HSA—Homeland Security Act of 2002
 ICE—Immigration and Customs Enforcement
 IMMACT 90—Immigration Act of 1990
 INA—Immigration and Nationality Act
 INS—legacy Immigration and Naturalization Service
 IRFA—Initial Regulatory Flexibility Analysis
 IRS—Internal Revenue Service
 LCA—Labor Condition Application
 MSA—Metropolitan Statistical Area
 AICS—North American Industry Classification System
 NEPA—National Environmental Policy Act
 NOID—Notice of Intent to Deny
 NPRM—Notice of Proposed Rulemaking
 OIRA—Office of Information and Regulatory Affairs
 OMB—Office of Management and Budget
 OP&S—Office of Policy and Strategy
 OPT—Optional Practical Training
 PM—Policy Memorandum
 PMSA—Primary Metropolitan Statistical Area
 PRA—Paperwork Reduction Act
 PRD—Policy Research Division
 Pub. L.—Public Law
 RFA—Regulatory Flexibility Act of 1980
 RFE—Request for Evidence
 RIA—Regulatory Impact Analysis
 RIN—Regulation Identifier Number
 SBA—Small Business Administration
 SEVP—Student and Exchange Visitor Program
 SOC—Standard Occupational Classification
 Stat.—U.S. Statutes at Large
 TLC—Temporary Labor Certification
 UMRA—Unfunded Mandates Reform Act
 U.S.C.—United States Code
 USCIS—U.S. Citizenship and Immigration Services

I. Executive Summary

DHS is amending its regulations by finalizing many of the provisions proposed in the “Modernizing H–1B Requirements, Providing Flexibility in

the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers,” notice of proposed rulemaking (NPRM), published in the **Federal Register** on October 23, 2023 (88 FR 72870). DHS previously finalized portions of the NPRM relating to H–1B registration in a separate final rule, “Improving the H–1B Registration Selection Process and Program Integrity,” published in the **Federal Register** on February 2, 2024 (89 FR 7456).

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the H–1B program by: (1) clarifying the requirements of the H–1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) strengthening program integrity measures.

B. Summary of the Major Provisions of the Regulatory Action

1. Clarifying Requirements and Improving Program Efficiencies

Through this rule, DHS is: (1) revising the regulatory definition and criteria for a position to be deemed a “specialty occupation”; (2) clarifying that “normally” does not mean “always” within the criteria for a specialty occupation; and (3) clarifying that the petitioner may accept a range of qualifying degree fields as sufficient to qualify for the position, but the required field(s) must be directly related to the job duties in order for the position to be deemed a specialty occupation. *See* new 8 CFR 214.2(h)(4)(ii) and (h)(4)(iii)(A). DHS is also updating the regulations governing when an amended or new petition must be filed due to a change in an H–1B worker’s place of employment to be consistent with current policy guidance. *See* new 8 CFR 214.2(h)(2)(i)(E).

Additionally, DHS is codifying its current deference policy to clarify that, when adjudicating a Form I–129, Petition for Nonimmigrant Worker, involving the same parties and the same underlying facts, adjudicators generally should defer to a prior USCIS determination on eligibility, unless a material error in the prior approval is discovered or other material change or information impacts the petitioner’s, beneficiary’s, or applicant’s eligibility. *See* new 8 CFR 214.1(c)(5). DHS is also updating the regulations to expressly require that evidence of the beneficiary’s maintenance of status must be included with a petition seeking an extension or amendment of stay. *See*

new 8 CFR 214.1(c)(6). This policy impacts all employment-based nonimmigrant classifications that use Form I–129, Petition for Nonimmigrant Worker. DHS is also eliminating the itinerary requirement, impacting all H classifications. *See* new 8 CFR 214.2(h)(2)(i)(B) and (F). Additionally, DHS is updating the regulations to allow petitioners to amend the initially requested validity periods (*i.e.*, dates of employment) in cases where the petition is deemed approvable after the requested end date for employment has passed. *See* new 8 CFR 214.2(h)(9)(ii)(D).

2. Providing Greater Benefits and Flexibilities

DHS is modernizing regulatory definitions to provide additional flexibilities for nonprofit and governmental research organizations and petitions for certain beneficiaries who are not directly employed by a qualifying organization. These changes better reflect modern organizational and staffing structures for both nonprofit and nongovernmental research organizations. Specifically, through this rulemaking, DHS is changing the definition of “nonprofit research organization” and “governmental research organization” by replacing the terms “primarily engaged” and “primary mission” with “fundamental activity” to permit nonprofit entities or governmental research organizations that conduct research as a fundamental activity, but are not primarily engaged in research or where research is not a primary mission, to meet the definition of a nonprofit research entity or governmental research organization for purposes of establishing exemption from the annual statutory limit on H–1B visas. Additionally, DHS is revising the regulations to recognize that certain beneficiaries may qualify for H–1B cap exemption when they are not directly employed by a qualifying organization, but still spend at least half of their time providing essential work that supports or advances a fundamental purpose, mission, objective, or function of the qualifying organization. *See* new 8 CFR 214.2(h)(8)(iii)(F)(2)(iv), (h)(8)(iii)(F)(4), (h)(19)(iii)(B)(4), and (h)(19)(iii)(C). DHS is also providing flexibility to students seeking to change their status to H–1B by automatically extending the duration of their F–1 status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), until April 1 of the relevant fiscal year to avoid disruptions in lawful status and employment authorization while a petition requesting a change of status to

H-1B is pending. *See* new 8 CFR 214.2(f)(5)(vi)(A).

3. Strengthening Program Integrity

DHS is strengthening the integrity of the H-1B program through this rulemaking by: (1) requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (2) codifying its authority to request contracts or similar evidence to determine if the position is bona fide; (3) ensuring that the LCA supports and properly corresponds to the petition; (4) revising the definition of “United States employer” by codifying current DHS policy that the petitioner have a bona fide job offer for the beneficiary to work within the United States as of the requested start date; and (5) adding a requirement that the petitioner have a legal presence and be amenable to service of process in the United States. *See* new 8 CFR 214.2(h)(4)(i)(B)(1), (h)(4)(ii), and (h)(4)(iv)(C) and (D).

DHS is also clarifying that certain owners of the petitioning entity may be eligible for H-1B status (“beneficiary-owners”), while setting reasonable parameters around H-1B eligibility when the beneficiary owns a controlling interest in the petitioning entity. For example, USCIS will limit the validity of the initial H-1B petition and first extension to 18 months each. *See* new 8 CFR 214.2(h)(9)(iii)(E).

DHS is also codifying USCIS’ authority to conduct site visits and clarifying that refusal to comply with site visits may result in denial or revocation of the petition. *See* new 8 CFR 214.2(h)(4)(i)(B)(2). Additionally, DHS is clarifying that if an H-1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party’s organization, the work to be performed by the beneficiary for the third party must be in a specialty occupation, and it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. *See* new 8 CFR 214.2(h)(4)(i)(B)(3).

C. Summary of Costs and Benefits

DHS analyzed two baselines for this final rule, the no action baselines and the without-policy baseline. The primary baseline for this final rule is the no action baseline. For the 10-year period of analysis of the final rule, DHS estimates the annualized net cost savings of this rulemaking will be \$333,835 annualized at a 2 percent discount rate. DHS also estimates that there will be annualized monetized

transfers of \$1.4 million from newly cap-exempt petitioners to USCIS and \$38.8 million from employers to F-1 workers, both annualized at a 2 percent discount rate.

D. Summary of Changes From the Notice of Proposed Rulemaking

Following careful consideration of public comments received, this final rule adopts many of the provisions proposed in the NPRM, with revisions as described below.

1. Specialty Occupation Definition and Criteria

In response to commenters’ concerns, DHS is modifying the definition of specialty occupation from the proposed definition. After carefully considering the comments, DHS is not finalizing the proposed regulatory text, “[t]he required specialized studies must be directly related to the position,” as this language may be misread to conclude that USCIS would only consider a beneficiary’s specialized studies in assessing whether the position is a specialty occupation. DHS is, however, retaining the “directly related” requirement in the definition of “specialty occupation” and related criteria, and is adding language clarifying that “directly related” means there is a logical connection between the degree or its equivalent, and the duties of the position.

The specialty occupation definition also clarifies that although the position may allow for a range of qualifying degree fields, each of the fields must be directly related to the duties of the position.

To address commenters’ concerns about the potential for adjudicators to inappropriately rely solely on degree titles, DHS is removing the references to “business administration” and “liberal arts.” These changes recognize that the title of the degree alone is not determinative and that degree titles may differ among schools and evolve over time.

DHS is also making some minor, non-substantive revisions to 8 CFR 214.2(h)(4)(iii)(A), which include: changing the word “are” to “is” in 8 CFR 214.2(h)(4)(iii)(A)(4); revising 8 CFR 214.2(h)(4)(iii)(A)(2) from “United States industry” to “industry in the United States”; and revising 8 CFR 214.2(h)(4)(iii)(A)(2) and (3) by adding “to perform the job duties for” rather than just the word “position.”

2. Bar on Multiple Registrations Submitted by Related Entities

DHS will not finalize the proposed change at 8 CFR 214.2(h)(2)(i)(G) to expressly state in the regulations that

related entities are prohibited from submitting multiple H-1B registrations for the same individual. On February 2, 2024, DHS published a final rule, “Improving the H-1B Registration Selection Process and Program Integrity,” 89 FR 7456 (Feb. 2, 2024), creating a beneficiary-centric selection process for registrations by employers and adding additional integrity measures related to the registration process to reduce the potential for fraud in the H-1B registration process. In that final rule, DHS states that it “intends to address and may finalize this proposed provision [expressly stating in the regulations that related entities are prohibited from submitting multiple registrations for the same individual] in a subsequent final rule,” but that “[m]ore time and data will help inform the utility of this proposed provision.” 89 FR 7456, 7469 (Feb. 2, 2024). Initial data from the FY 2025 H-1B registration process show a significant decrease in the total number of registrations submitted compared to FY 2024, including a decrease in the number of registrations submitted on behalf of beneficiaries with multiple registrations.¹ This initial data indicate that there were far fewer attempts to gain an unfair advantage than in prior years owing, in large measure, to the implementation of the beneficiary-centric selection process.² Under the beneficiary-centric selection process, individual beneficiaries do not benefit from an increased chance of selection if related entities each submit a registration on their behalf. As such, DHS has decided not to finalize the proposed change pertaining to multiple registrations submitted by related entities.

3. Contracts

In response to stakeholder comments, DHS is revising 8 CFR 214.2(h)(4)(iv)(C) to state that USCIS may request contracts or similar evidence “showing the bona fide nature of the beneficiary’s position,” rather than “showing the terms and conditions of the beneficiary’s work” as stated in the NPRM. This revision is intended to clarify that USCIS will review contracts or similar evidence to determine if the position is bona fide.

¹ USCIS, “H-1B Electronic Registration Process,” <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>.

² USCIS, “H-1B Electronic Registration Process,” <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>.

4. Non-Speculative or Bona Fide Employment

In response to a number of comments expressing concern with the term “non-speculative,” DHS is replacing “non-speculative” with “bona fide,” so that new 8 CFR 214.2(h)(4)(iii)(F) will state, in relevant part, “[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.” This is not intended to be a substantive change, but to clarify what DHS meant by “non-speculative.” This provision is also consistent with current policy guidance that an H-1B petitioner must establish that the purported employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.

DHS is also adding to this provision, “A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.” While this was previously noted in the preamble to the NPRM, DHS believes adding this clarification to the regulatory text will help allay commenters’ concerns and avoid future confusion.

5. Beneficiary-Owners

In response to commenters’ concerns about the term “controlling interest” in the regulatory text for beneficiary-owners, DHS is clarifying the term by defining it in the regulatory text, rather than only in the preamble. Specifically, DHS is adding to new 8 CFR 214.2(h)(4)(ii) and (h)(9)(iii)(E), that a controlling interest means that the beneficiary owns more than 50 percent of the petitioner or that the beneficiary has majority voting rights in the petitioner.

6. Additional Changes

Additionally, in 8 CFR 214.1(c)(1), DHS is revising the reference to the fee regulation from 8 CFR 103.7 to 8 CFR 106.2, to align with the updated regulatory changes made by the USCIS Fee Schedule Final Rule.³

II. Background

A. Legal Authority

The authority of the Secretary of Homeland Security to make these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, and the Homeland

Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.⁴ Further authority for these regulatory amendments is found in:

- Section 101(a)(15) of the INA, 8 U.S.C. 1101(a)(15), which establishes classifications for noncitizens who are coming temporarily to the United States as nonimmigrants, including the H-1B classification, *see* INA sec. 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b);
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants;
- Section 214(c) of the INA, 8 U.S.C. 1184(c), which, *inter alia*, authorizes the Secretary to prescribe how an employer may petition for nonimmigrant workers, including certain nonimmigrants described at sections 101(a)(15)(H), (L), (O), and (P), 8 U.S.C. 1101(a)(15)(H), (L), (O), and (P); the information that an employer must provide in the petition; and certain fees that are required for certain nonimmigrant petitions;
- Section 214(e) of the INA, 8 U.S.C. 1184(e), which provides for the admission of citizens of Canada or Mexico as TN nonimmigrants;
- Section 214(g) of the INA, 8 U.S.C. 1184(g), which, *inter alia*, prescribes the H-1B numerical limitations, various exceptions to those limitations, and the period of authorized admission for H-1B nonimmigrants;
- Section 214(i) of the INA, 8 U.S.C. 1184(i), which sets forth the definition and requirements of a “specialty occupation”;
- Section 235(d)(3) of the INA, 8 U.S.C. 1225(d)(3), which authorizes “any immigration officer” . . . “to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an

⁴ Although several provisions of the INA discussed in the NPRM refer exclusively to the “Attorney General,” such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. *See* 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen v. Preap*, 586 U.S. 392, 397 n.2 (2019).

alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of [the INA] and the administration of [DHS]”;

- Section 248 of the INA, 8 U.S.C. 1258, which authorizes a noncitizen to change from any nonimmigrant classification to any other nonimmigrant classification (subject to certain exceptions) if the noncitizen was lawfully admitted to the United States as a nonimmigrant and is continuing to maintain that status, and is not otherwise subject to the 3- or 10-year bar applicable to certain noncitizens who were unlawfully present in the United States;

- Section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), which recognizes the Secretary’s authority to extend employment authorization to noncitizens in the United States;

- Section 287(b) of the INA, 8 U.S.C. 1357(b), which authorizes the taking and consideration of evidence “concerning any matter which is material or relevant to the enforcement of the [INA] and the administration of [DHS]”;

- Section 402 of the HSA, 6 U.S.C. 202, which charges the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States” and “[e]stablishing national immigration enforcement policies and priorities”; *see also* HSA sec. 428, 6 U.S.C. 236; and

- Section 451(a)(3) and (b) of the HSA, 6 U.S.C. 271(a)(3) and (b), transferring to USCIS the authority to adjudicate petitions for nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities.

B. The H-1B Program

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor’s or higher degree in the specific specialty, or its equivalent. *See* INA secs. 101(a)(15)(H)(i)(b) and 214(i), 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1184(i). Through the Immigration Act of 1990, Public Law 101–649, Congress set the current annual cap for the H-1B visa category at 65,000,⁵ which limits the

³ *See* “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 89 FR 6194 (Jan. 31, 2024).

⁵ Up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 visa program under terms of the legislation implementing the U.S.-Chile

number of beneficiaries who may be issued an initial H-1B visa or otherwise provided initial H-1B status each fiscal year.⁶ Congress provided an exemption from the numerical limits in INA sec. 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), for 20,000 initial H-1B visas, or grants of initial H-1B status, each fiscal year for foreign nationals who have earned a master's or higher degree from a U.S. institution of higher education ("advanced degree exemption").⁷ Congress also set up exemptions to the annual H-1B cap for workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity, and workers who will be employed at a nonprofit or governmental research organization. These exemptions are not numerically capped. See INA sec. 214(g)(5)(A)-(B), 8 U.S.C. 1184(g)(5)(A)-(B).

C. The F-1 Program

Section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i), permits bona fide students to be temporarily admitted to the United States for the purpose of pursuing a full course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or accredited language training program. Principal applicants are categorized as F-1 nonimmigrants and their spouses and minor children may accompany or follow to join them as F-2 dependents.

In 1992, legacy Immigration and Naturalization Service (INS) amended its longstanding regulations relating to an employment program for students called Optional Practical Training (OPT) such that students in F-1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic

year in a college, university, conservatory, or seminary (which now must be certified by U.S. Immigration and Customs Enforcement's (ICE) Student and Exchange Visitor Program (SEVP)) are allowed up to 12 months of OPT to work for a U.S. employer in a job directly related to the student's major area of study.⁸ 8 CFR 214.2(f)(10). Employers of F-1 students under OPT often file petitions to change the students' status to H-1B so that they may continue working in their current or a similar job after completion of OPT. Many times, however, an F-1 student's OPT authorization would expire prior to the student being able to assume the employment specified in the approved H-1B petition, creating a gap in employment. In order to remedy this, in 2008, DHS created the "cap-gap" extension to temporarily extend the period of authorized stay and work authorization of certain F-1 students caught in the gap between the end of their OPT and the start date on their later-in-time approved, cap-subject H-1B petition.⁹ 8 CFR 214.2(f)(5)(vi)(A). The cap-gap extension provides a temporary bridge between F-1 and H-1B status, allowing students to remain in the United States between the end of their academic program and the beginning of the fiscal year, when the student's H-1B visa status commences. DHS subsequently amended the cap-gap provisions by extending the authorized period of stay and work authorization of any F-1 student who is the beneficiary of a timely filed cap-subject H-1B petition that has been granted by, or remains pending with, USCIS, until October 1 of the fiscal year for which H-1B visa classification has been requested.¹⁰ 8 CFR 214.2(f)(5)(vi)(A).

D. NPRM and Final Rules

On October 23, 2023, DHS published an NPRM, "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers," 88 FR 72870. In the NPRM, DHS stated that it may publish one or more final rules to codify the proposed provisions after carefully considering public comments. On February 2, 2024, DHS published,

"Improving the H-1B Registration Selection Process and Program Integrity," which finalized provisions of the NPRM related to the H-1B registration process.¹¹ Specifically, the final rule established a beneficiary centric selection process for H-1B registrations and new integrity measures, and provided start date flexibility for certain H-1B cap-subject petitions. That rule took effect on March 4, 2024, prior to the beginning of the registration period for the FY 2025 H-1B cap year. Through this subsequent rulemaking, DHS is finalizing many of the remaining provisions of the NPRM with the revisions described above and in the relevant sections below.

III. Response to Public Comments on the Proposed Rule

A. Summary of Public Comments on the Proposed Rule

In response to the proposed rule, DHS received 1,315 comments during the 60-day public comment period. Of these, 510 comments were related to the H-1B registration process and were analyzed and addressed in the final rule published on February 2, 2024. There were 970 comments related to the remaining provisions that DHS is finalizing through this rule. Some comments included a discussion of both the registration process and the provisions being finalized through this rulemaking. Of the 970 comments analyzed for this rule, 17 comments were duplicate submissions, 1 comment was not germane to the rule, and approximately 83 were letters submitted through mass mailing campaigns.

Commenters included individuals (including U.S. workers), companies, law firms, a federation of labor organizations, professional organizations, advocacy groups, nonprofit organizations, representatives from Congress and local governments, universities, and trade and business associations. Many commenters expressed support for the rule or offered suggestions for improvement. Of the commenters opposed to the rule, many commenters expressed opposition to a part of or all of the proposed rule. Some just expressed general opposition to the rule without suggestions for improvement. For many of the public comments, DHS could not ascertain whether the commenter supported or opposed the proposed rule.

DHS has reviewed and considered all of the public comments received in response to the proposed rule. In this final rule, DHS is responding to public

and U.S.-Singapore free trade agreements. See INA secs. 101(a)(15)(H)(i)(b1), 214(g)(8), 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1184(g)(8).

⁶ The 65,000 annual H-1B numerical limitation was increased for FYs 1999 through 2003. See INA sec. 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A), as amended by section 411 of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 105-277, div. C, tit. IV, 112 Stat. 2681, and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002). Subsequent to IMMACT 90, Congress also created several exemptions from the 65,000 numerical limitation. See INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5).

⁷ See INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). This rule also may refer to the 20,000 exemptions under section 214(g)(5)(C) from the H-1B regular cap as the "advanced degree exemption allocation," or "advanced degree exemption numerical limitation."

⁸ See "Pre-Completion Interval Training: F-1 Student Work Authorization," 57 FR 31954 (Jul. 20, 1992).

⁹ See "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 FR 18944 (Apr. 8, 2008).

¹⁰ See "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 FR 13040 (Mar. 11, 2016).

¹¹ See 89 FR 7456.

comments that are related to the provisions that DHS is finalizing through this final rule. DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by commenters.

B. DHS/USCIS Statutory and Legal Issues

Comment: A law firm wrote that the proposed rule reflects USCIS' commitment to seek opportunities within the bounds of the law to maximize flexibility for employers and beneficiaries. A joint submission by a professional association and an advocacy group commended USCIS for seeking to modernize the H-1B program by creating "opportunities for innovation and expansion" in alignment with the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). The commenters articulated the importance of these statutes and the congressional intent behind them as multiple countries (e.g., Canada, the United Kingdom (UK), Australia, and Germany) have implemented new immigration programs to attract high-skilled workers.

Response: DHS agrees with these commenters that this rule will, among other things, provide benefits and flexibilities for petitioners and beneficiaries.

Comment: Some commenters perceived certain aspects of the proposed rule to be unlawful or stated that the proposed provisions would undermine prevailing statutes or Executive orders (E.O.). For example, a professional association wrote that DHS's proposed revisions would "fundamentally alter immigration laws that exceed [its] authority." Specifically, the association said that the proposed revisions would "directly undermine INA sections 101(a)(15)(H) and 214(c)(1)(i) (sic) and 8 CFR 214.2(h)(4)(B) (sic) via changing the definition of who qualifies as an H-1B visa holder. . . ."

A business association asserted that certain proposed provisions in the NPRM are unlawful as written, including the proposed specialty occupation definition, non-speculative employment requirement, third-party placement provisions, site visit authorities, and USCIS' authority to review LCAs. The association further remarked that these provisions would hinder the objectives of E.O. 14410 to develop artificial intelligence (AI) capabilities in the United States. As such, the association urged DHS to issue supplemental notices to withdraw these

provisions or propose substantial changes to address their legal deficiencies, providing the public with the opportunity to comment on the revisions to the proposed rule. A trade association wrote that the proposed changes to visa qualifications and review processes would undermine E.O. objectives to "attract and retain talent in AI and other critical and emerging technologies in the United States economy" by jeopardizing the ability of H-1B nonimmigrants to renew their visas.

A trade association wrote that DHS has neglected the congressional purpose of the H-1B program and has exceeded its statutory authority. Citing various examples found in statute and case law related to split enforcement powers and agency jurisdiction, the association stated that DOL has a greater share of authority and enforcement powers in the H-1B program compared to DHS's statutory carve-out. For example, the commenter asserted that while Congress delegated to DOL the authority to set wages, conduct investigations and enforcement actions, and protect U.S. labor interests (e.g., through setting the prevailing wage and requiring the same conditions for H-1B workers and U.S. workers), DHS's authority, codified at 8 U.S.C. 1184(i), focuses on determining whether the petitioner seeks to employ a professional in a "specialty occupation." The association concluded that the authority to regulate the area of employment and definition of employer belongs to DOL, not DHS, and suggested that DHS constrain its regulatory scheme to the areas intended by Congress, applying DOL's definitions of key terms associated with the H-1B program. A professional association generally encouraged DHS to improve the legal integrity of H-1B regulations and advance policy goals that align with congressional intent.

Response: DHS disagrees with the commenters' assertions that the proposed changes that are being finalized in this rule are ultra vires. DHS will not issue a supplemental notice to withdraw the proposed changes, or propose substantial changes as commenters suggested. The changes being made by this final rule are within the broad authority delegated to DHS by statute. The changes enhance the integrity of the H-1B program and provide needed clarification to existing rules, policies, and practices so that petitioners have greater clarity, transparency, and predictability as to the requirements for the H-1B classification.

DHS's authority to regulate in the H-1B context is not limited, as some

commenters asserted, to INA section 214(i), 8 U.S.C. 1184(i). That section pertains solely to the definition of "specialty occupation." Rather, as explained in the proposed rule and in this final rule, DHS's authority is also derived from various provisions in the INA and HSA, including, but not limited to: INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); INA section 103(a), 8 U.S.C. 1103(a); INA section 214(a)(1), 8 U.S.C. 1184(a)(1); INA section 214(c), 8 U.S.C. 1184(c); INA section 214(g), 8 U.S.C. 1184(g); INA section 235(d)(3), 8 U.S.C. 1225(d)(3); INA section 287(b), 8 U.S.C. 1357(b); HSA section 112, 6 U.S.C. 112; HSA section 402, 6 U.S.C. 202; and HSA section 451(a)(3) and (b), 6 U.S.C. 271(a)(3) and (b). Collectively, these various provisions provide DHS with broad authority to promulgate regulations to administer and enforce the H-1B nonimmigrant classification.

DHS disagrees with some commenters' assertions that the proposed changes to the definition of specialty occupation are ultra vires because the statute does not contain the term "directly related." While commenters are correct that INA section 214(i), 8 U.S.C. 1184(i), does not use the term "directly related," the statute does refer to application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. DHS interprets the "specific specialty" requirement in INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in INA section 214(i)(1)(A), 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The "specific specialty" requirement is only met if the degree in a specific specialty or specialties, or equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA section 214(i)(1)(A). Because an occupation may involve application of multiple bodies of highly specialized knowledge, "specific specialty" is not limited to one degree field, or its equivalent, but may include multiple degree fields, or equivalents, that provide the body of highly specialized knowledge to be applied when performing the occupation. The requirement that each degree field, or its equivalent, be directly related to the position is the best interpretation of the statutory text

and consistent with existing USCIS practice.¹²

DHS disagrees with the assertion of some commenters that USCIS does not have authority to review the contents of an LCA. The authority provided to DOL under INA section 212(n), 8 U.S.C. 1182(n), does not deprive DHS of authority to administer and enforce the H-1B nonimmigrant classification. Congress provided DHS with broad authority to administer and enforce the H-1B nonimmigrant classification, in addition to the authority provided to DOL to administer and enforce requirements pertaining to LCAs. See *ITServe Alliance, Inc. v. U.S. Dep't of Homeland Sec.*, 71 F.4th 1028, 1037 (D.C. Cir. 2023) (the authorities provided to DOL under 8 U.S.C. 1182(n) "are not by their terms exclusive, so as to oust USCIS from its own authority over the H-1B petition process. And the INA strongly suggests that the agencies' respective authorities are complementary rather than exclusive. . . ."). As the U.S. Court of Appeals for the D.C. Circuit explained, INA section 103(a)(1), 8 U.S.C. 1103(a)(1), independently provides DHS with authority to administer and enforce the INA, including a petitioning employer's compliance with the terms of an LCA. *Id.*

Commenters' assertions that DHS does not have authority to regulate the area of employment and definition of employer are similarly misplaced. As explained in the preamble to the proposed rule and in this final rule, DHS's authority in the H-1B context is not solely derived from INA section 214(i), 8 U.S.C. 1184(i). That provision only addresses the definition of "specialty occupation." But the broad authority delegated or otherwise provided to DHS, which includes the authority to regulate the area of employment and definition of employer for purposes of provisions enforced by DHS, is provided in various other provisions, including, but not limited to: INA section 103(a), 8 U.S.C. 1103(a), which authorizes the Secretary to

administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority; INA section 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants; and INA section 214(c)(1), 8 U.S.C. 1184(c)(1), which authorizes the Secretary to prescribe how an employer may petition for an H-1B worker and to prescribe the form and information required in an H-1B petition. Commenters' assertion that DHS does not have the authority to regulate who may qualify as an H-1B employer because INA section 214(i), 8 U.S.C. 1184(i), does not include the term "employer," is contrary to the express reference to "employer" in INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and the authority delegated or otherwise provided to DHS therein.¹³

DHS disagrees with commenters' assertion that it lacks authority to conduct on-site inspections through the USCIS Fraud Detection and National Security Directorate (FDNS). In 2004, USCIS established FDNS in response to a congressional recommendation to establish an organization "responsible for developing, implementing, directing, and overseeing the joint USCIS-Immigration and Customs Enforcement (ICE) anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits."¹⁴

The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. Congress delegated to the Secretary of Homeland Security the authority to administer and enforce the immigration laws. INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The Secretary may confer this authority to any Department of Homeland Security (DHS) employee, including USCIS employees, to the extent permitted by law. INA sec. 103(a)(4), 8 U.S.C. 1103(a)(4); HSA sec. 102(b)(1), 6 U.S.C. 112(b)(1); 8 CFR 2.1.¹⁵ Moreover, under 6 U.S.C.

112(a)(3), all functions of officers, employees, and organizational units of [DHS] are vested in the Secretary. The Secretary of Homeland Security delegated to USCIS the authority to administer the immigration laws, including the authority to investigate civil and criminal violations involving applications or determinations for benefits.¹⁶ Following the dissolution of the INS and the creation of DHS on March 1, 2003, authority to "administer the immigration laws" was delegated to USCIS.¹⁷

USCIS was delegated the "authority to investigate alleged civil and criminal violations of the immigration laws, including, but not limited, to alleged fraud with respect to applications or determinations within the USCIS, and make recommendations for prosecutions, or other appropriate action when deemed advisable."¹⁸ USCIS also has the "authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357 and under 235(d) of the INA, 8 U.S.C. 1225(d)."¹⁹

USCIS and ICE were granted concurrent authority to investigate immigration benefit fraud.²⁰ Through

vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Also, because INA sec. 103(a)(4) refers to "Service", i.e. Legacy INS, see also 8 CFR 1.2 which defines Service as "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears."

¹⁶ Delegation to the Bureau of Citizenship and Immigration Services, Department of Homeland Security Delegation Number 0150.1, Issue Date: 06/05/2003. The Bureau of Citizenship and Immigration Services was the initial name for USCIS following the dissolution of the Immigration and Naturalization Service.

¹⁷ See Delegation 0150.1(II)(H) (June 5, 2003).

¹⁸ See Delegation 0150.1(II)(I) (June 5, 2003).

¹⁹ See Delegation 0150.1(II)(S) (June 5, 2003).

²⁰ In section (II)(I) of DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and in section 2(I) of DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, USCIS and ICE received concurrent authority to investigate fraud involving immigration benefits available under the INA. In their respective delegations, USCIS and ICE were further directed by the Secretary of Homeland Security to coordinate the concurrent responsibilities provided under these Delegations. A memorandum of agreement was undertaken to advance the coordination between USCIS and ICE, as authorized by these Delegations. The Secretary of Homeland Security has properly delegated authority to immigration officers, including immigration officers who work for FDNS.

¹² See, e.g., *Madkudu Inc. v. USCIS*, No. 5:20-cv-2653-SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 ("[I]f the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (e.g., an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . . , or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii)."), <https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf> (last visited Oct. 23, 2024).

¹³ Other H-1B related provisions in the statute also refer specifically to the petitioning employer, employment, or being employed as an H-1B worker. See, e.g., INA secs. 214(c)(9), (10), (12), and (g)(5) and (6); 8 U.S.C. 1184(c)(9), (10), (12), and (g)(5) and (6).

¹⁴ See Conference Report to accompany H.R. 4567 [Report 108-774], "Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005," p. 74 (Oct. 9, 2004), <https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf>.

¹⁵ Pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are

written agreement, ICE agreed to take the lead on criminal and other enforcement investigations and USCIS agreed to focus on detecting and combating fraud associated with adjudicating applications and petitions.²¹ The Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, granted the Secretary of Homeland Security the authority to administer and enforce provisions of the INA, as amended, INA sec. 101, 8 U.S.C. 1101 *et seq.* The Secretary, in Homeland Security Delegation No. 0150.1, delegated certain authorities to USCIS. FDNS's activities fall squarely within this delegation.

Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines “immigration officer” to include a broad range of DHS employees including immigration agents, immigration inspectors, immigration officers, immigration services officers, investigators, and investigative assistants. As duly appointed immigration officers, FDNS immigration officers may question noncitizens based on the authority delegated to them by the Secretary of Homeland Security. Furthermore, INA sec. 287(a)(1), 8 U.S.C. 1357(a)(1), provides any officer or employee of the Service with the authority (pursuant to DHS regulations) to, without warrant, “interrogate any alien or person believed to be an alien as to his right to be or remain in the United States.” *See also* 8 CFR 287.5. The regulation at 8 CFR 287.8(b) specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question an individual so long as they do not restrain the freedom of the individual. Further, the Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are “especially important pieces of evidence.”²² These investigations and resulting reports help ensure that adjudicative decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.

Lastly, DHS disagrees that this final rule is inconsistent with the Executive

Order on Artificial Intelligence.²³ That Executive order, among other things, directed DHS to “continue its rulemaking process to modernize the H–1B program and enhance its integrity and usage, including by experts in AI and other critical and emerging technologies. . . .” DHS satisfied this part of the Executive order through its continued work to complete and publish this final rule. As explained throughout this preamble, this final rule, along with the final rule published on February 2, 2024,²⁴ modernizes the H–1B program and enhances its integrity and use by, among other things, providing greater clarity, transparency, and predictability regarding eligibility for the H–1B classification. As explained further below, DHS disagrees that requiring a direct relationship between the required degree field(s), or their equivalents, and the duties of the position is inconsistent with E.O. 14110 or creates additional hurdles for foreign nationals seeking to work in AI or other science, technology, engineering, and math (STEM) fields. As stated previously, DHS is codifying and clarifying long-standing USCIS practice to provide greater clarity and predictability for employers and foreign nationals, including those seeking to work in AI or other STEM fields.

C. General Comments

1. General Support for the Rule

Comment: Several individual commenters expressed support for the proposed rule without rationale, with some expressing “strong” support. A couple of individual commenters thanked USCIS for modernizing the H–1B program. An individual commenter wrote that, “this is life changing,” and another commenter wrote that, “this is a great and substantial improvement.” Another commenter applauded various specific measures of the rule, including those pertaining to deference, evidence of job offers, oversight, and streamlining the H–1B process.

Response: DHS agrees that the provisions in this rule will modernize and improve the H–1B program.

Comment: Several commenters expressed general support for the proposed rule because of positive impacts on program operability, oversight, integrity, and government efficiency. Many commenters expressed support for the proposed rule, reasoning

that it would foster fairness in the H–1B program, reduce abuse and promote program integrity, and create a more efficient system. A few commenters expressed support for the proposed rule, reasoning it would improve program efficiency and reduce administrative burdens, and could result in smoother, more streamlined procedures that are easier to follow. A commenter wrote that the proposed rule is a “significant step towards creating a more inclusive and efficient immigration system.”

Response: DHS agrees with these commenters that the provisions in this rule will have positive impacts on program operability and integrity. Many of the provisions being finalized through this rule are intended to promote program integrity and create a more efficient system.

Comment: Several commenters, including a joint submission, expressed support for the proposed rule on the basis that it would have positive impacts on prospective beneficiaries. A commenter wrote that the proposed rule has the potential to provide highly skilled professionals with the chance to secure employment in and make meaningful contributions to the United States. A commenter said that it is crucial to protect nonimmigrant workers’ rights and ensure that they are treated fairly, and that this proposed rule is a “significant step in the right direction.” The commenter urged USCIS to fully implement the proposed rule. Another commenter expressed their agreement with the proposed changes, having seen their colleagues leave the United States every year due to losing their valid visa status. A commenter expressed support for the proposed rule, writing that providing greater flexibility for beneficiaries is a “much-needed change.” The commenter added making the visa renewal process easier could significantly reduce hurdles and uncertainties that foreign workers face.

Response: DHS agrees with these commenters that the provisions in this rule will have positive impacts on prospective beneficiaries and provide beneficiaries with greater flexibility. DHS’s intent is to make the H–1B process more efficient and fairer by reducing administrative hurdles and uncertainties through this rulemaking, such as codifying USCIS’ deference policy to make it clear that, if there has been no material change in the underlying facts, adjudicators generally should defer to a prior determination involving the same parties and underlying facts, and giving USCIS officers the discretion to issue RFEs to allow petitioners to request amended validity periods where the initial

²¹ Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, September 25, 2008; *see also* Memorandum of Agreement between USCIS and ICE Regarding the Referral of Immigration Benefit Fraud and Public Safety Cases (Dec. 15, 2020).

²² *Matter of P. Singh*, 27 I&N Dec. 598, 609 (BIA 2019) (“Detailed reports from on-site visits and field investigations are especially important pieces of evidence that may reveal the presence of fraud.”).

²³ E.O. 14110, “Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.”

²⁴ “Improving the H–1B Registration Selection Process and Program Integrity”, 89 FR 7456 (Feb. 2, 2024).

requested validity period expires before adjudication.

Comment: Many commenters, including a trade association, a company, and a joint submission, expressed support for the proposed rule, reasoning that it would strengthen the U.S. job market and economy. A trade association commented that streamlining the H-1B program requirements and improving program integrity would enable the United States to retain valuable international talent. A company said that they appreciate DHS's effort to improve the H-1B system, adding that a modern H-1B program that reflects today's economy would keep the United States attractive to global talent and ensure that U.S. employers can, "maintain a comprehensive workforce." An advocacy group wrote that the proposed provisions aimed at modernizing and streamlining the H-1B program would "strengthen the nation's capacity to attract and retain essential global talent" in artificial intelligence and other fields in emerging technology.

A commenter expressed strong support for the proposed rule, writing that it would "bolster the nation's competitive edge" and promote economic growth. A couple of other commenters similarly wrote that the proposed changes to the H-1B program would give the United States a global competitive advantage and attract the brightest minds from around the world. One of these commenters added that streamlining the visa process could benefit the U.S. economy and encourage innovation. Another commenter also expressed their support for the proposed rule for similar reasons, writing that the proposed changes to improve the H-1B program would create jobs and benefit not only U.S. employers but also professionals who want to contribute to the United States' success. A few commenters expressed support for the proposed rule on the basis that, under the current H-1B policies, many talented individuals are leaving the United States, and the proposed rule would prevent this from continuing. One of these commenters wrote that modernizing the H-1B program is essential for retaining top talent and allowing the United States to become "competitive once again on the global stage."

Response: DHS agrees with these commenters that clarifying the H-1B program requirements and improving program integrity will help enable the United States retain valuable international talent. Through the provisions in this rulemaking, DHS's goal is to keep the United States

attractive to global talent, benefit the U.S. economy, and encourage innovation.

2. General Opposition to the Rule

Comment: Several commenters, including an advocacy group, expressed opposition to the proposed rule on the basis that it would undermine the program's integrity and increase fraud. An individual commenter stated that the regulations do not satisfactorily address their perceived problems of the H-1B program.

Response: DHS disagrees with these commenters that the provisions in this rulemaking will undermine the H-1B program or increase fraud. DHS is finalizing several provisions that aim to increase program integrity, such as codifying its authority to request contracts, requiring that the petitioner establish it has an actual, bona fide position in a specialty occupation available for the beneficiary as of the requested start date, and codifying USCIS' authority to conduct site visits, to name a few.

Comment: Numerous commenters said the rule would negatively impact U.S. citizen workers by incentivizing the hiring of H-1B workers. In particular, commenters stated that the proposed rule would harm and undermine American workers, particularly those in the technology industry; does not adequately safeguard American workers and makes it easier for American companies to obtain foreign labor; would benefit large employers, while putting American job seekers at a disadvantage; and would incentivize employers to hire "cheaper foreign labor" and avoid taxes at the expense of U.S. citizens.

A commenter urged USCIS to make the H-1B program stricter, stating that the Federal Government should work towards improvements for U.S. citizens, rather than immigrant labor. A couple of commenters, including a professional association, wrote that American students that have graduated with specialty degrees are unable to gain employment.

Response: DHS disagrees that this rulemaking would undermine American workers or put American job seekers at a disadvantage. The existing H-1B statutory and regulatory requirements include protections for U.S. workers and this rulemaking does not remove or diminish any protections or place U.S. workers at a disadvantage in the job market. The goal of this rulemaking is to modernize and improve the integrity of the H-1B program. In fact, this final rule will improve H-1B integrity and build upon the existing protections for

U.S. workers by clarifying that the LCA must properly correspond to the H-1B petition, and codifying the authority of USCIS to conduct site visits and take adverse action against employers who are not complying with the terms of the H-1B petition approval or who refuse to comply with a site visit.

Comment: A few commenters noted that the proposed rule could make it more difficult for small and medium-sized consulting companies to navigate the H-1B process. More specifically, a few commenters, including a couple of trade associations and a law firm, stated that the U.S. information technology (IT) industry's ability to hire reliable foreign talent would be negatively affected, which would harm the competitiveness of American businesses, research facilities, medical institutions, and other important economic drivers. A few commenters, including a company, remarked that the proposed rule would make it difficult for IT consulting companies to utilize the H-1B visa, which would cause the economy to suffer. A business association articulated concerns among its members that various proposals would cause significant disruptions to their operations across industries. In addition, a commenter stated that the proposed rule would hamper companies' ability to serve their customers given labor shortages, inflation, and budgetary constraints.

Response: DHS disagrees with these commenters that the provisions in this rulemaking will make it more difficult for certain companies to navigate the H-1B process or cause disruptions for certain industries. Through this rulemaking, DHS is codifying many policies and practices that are already in place, such as requiring that the LCA properly correspond to the petition and when to file an amended petition. Through this rulemaking, DHS's intent is to clarify current policy and add transparency and greater predictability to the adjudication process.

3. Other General Comments on the Rule

Comment: An individual commenter, while expressing support for "the broad goal of modernization and program improvements," noted the importance of measures to prevent the exploitation of foreign workers and to ensure that they are provided fair wages and working conditions; prioritizing streamlining and efficiency in program administration, measures to protect and support international students, and data collection and analysis; and that DHS should actively engage with stakeholders to solicit input and feedback during the rulemaking process.

Response: While the commenter did not provide any specific feedback related to the provisions in the NPRM, DHS generally agrees with the considerations noted by the commenter. As stated previously, the purpose of this rulemaking is to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and strengthen integrity measures. The modernization provisions will enhance efficiencies, and the integrity measures are intended to prevent exploitation of foreign workers and protect the interests of U.S. workers. Further, by finalizing the provision to expand cap-gap protection, this rule supports international students. DHS has also engaged in extensive data collection and analysis in this rulemaking, as detailed in the NPRM, the previously published final rule “Improving the H-1B Registration Selection Process and Program Integrity,” and this final rule. In addition, DHS has engaged with stakeholders by requesting public comments in response to the NPRM.

D. Modernization and Efficiencies

1. General Comments on the Proposed Modernization and Efficiencies Provisions

Comment: Many commenters supported the proposed modernization provisions, including a joint submission by commenters who stated general support for DHS’s initiative to modernize the H-1B program. A couple of commenters regarded the modernization efforts as “commendable,” while another commenter said the modernization measures were “long overdue.” This commenter and another commenter reasoned that the modernization provisions would streamline administrative tasks and remove disruptions in the program. A commenter expressed support for the modernization provisions, stating that they would help prevent artificial manipulation of the job market.

Echoing support for the NPRM’s modernization efforts, a company noted that the United States’ outdated immigration laws must be updated to meet the needs of the economy. A different commenter applauded the modernization effort and urged its implementation in order to benefit U.S. economic competitiveness. A trade association similarly endorsed the H-1B modernization provisions as advancing the United States’ global leadership in specialized fields, such as STEM. Specifically, the association reasoned that the sustainability of U.S. leadership depends on semiconductor companies

having access to top domestic and global talent.

Some commenters offered mixed remarks on the modernization provisions. For example, a commenter urged policymakers to take immediate action to implement the modernization provisions while highlighting the importance of balancing between welcoming global talent and safeguarding the interests of U.S. citizen workers. Another commenter offered conditional support for the modernization provisions as long as there is no disruption to existing H-1B visa holders.

A few commenters expressed support for efficiency measures as part of the proposed rule. For example, a commenter expressed general approval of DHS’s plans to improve clarity and efficiency. Another commenter said that streamlining the eligibility requirements, improving program efficiency, and providing greater benefits and flexibilities for both employers and workers are crucial steps toward creating a more efficient and responsive immigration system. Another commenter described the importance of the H-1B visa program to the U.S. economy and of increased program efficiency, and noted technology, medicine, and research as particular industries that could benefit from the modernization provisions.

Response: DHS agrees that modernizing the H-1B program and increasing program efficiency are important and may help to streamline administrative tasks. As explained in the NPRM, the purpose of this rulemaking is to modernize and improve the H-1B regulations by: (1) clarifying the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) strengthening H-1B integrity measures.

2. Specialty Occupation Definition and Criteria

i. General Comments on the Proposed Changes to “Specialty Occupation”

Comment: Several commenters expressed support for the proposed changes to the specialty occupation requirements and standards. For example, a commenter said that the specialty occupation revisions are a “good step” for H-1B program modernization. Other commenters expressed general support for the specialty occupation requirements or specialized degree requirements for specialized work. Several commenters generally supported the proposed

specialty occupation requirements noting that they would help curb fraud and abuse by certain types of companies. A university stated it was hopeful that the proposed modifications to the specialty occupation requirements would reduce the number of Requests for Evidence (RFE) that it receives when filing H-1B petitions for faculty and staff. In addition, a professional association expressed support for DHS’s proposed changes to clarify the “specialty occupation” standard, codify existing practice, and align the regulations with the authorizing statute. The association said that the changes would avoid misapplication of the regulations in petitions involving new employment.

Response: DHS agrees that the specialty occupation revisions, as slightly modified from the NPRM to better reflect current practice, will be beneficial for H-1B program modernization and integrity. DHS also agrees that clarifying the specialty occupation standard and codifying existing practice may help reduce unnecessary RFEs, avoid misapplication of the regulations, better align the regulations with the authorizing statute, and provide H-1B petitioners with more certainty as to the applicable adjudication standards.

Comment: Several commenters expressed general opposition to the proposed specialty occupation changes. For example, a form letter campaign and another commenter generally stated that they did not support the proposed specialty occupation provisions, and other commenters suggested that DHS reconsider the specialty occupation requirements without providing further rationale. A few commenters requested that USCIS remove the definition of “specialty occupation” from the rule, reconsider its implementation, or modify the definition. A few other commenters stated that the “specialty occupation” definition should be broadened so that individuals are not limited to positions just within their field of study or degree.

Response: DHS declines to remove the definition of specialty occupation from the rule but is modifying the definition in response to comments received. These modifications include removing the references to general degree titles and defining the term “directly related.” DHS declines to broaden the definition of specialty occupation to specifically state that individuals are not limited to positions within their field of study, as such language conflates the issue of whether a position qualifies as a specialty occupation with the issue of whether the beneficiary is qualified to

perform the specialty occupation. Further, the proposed definition already states that a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position.

Comment: Several commenters questioned whether the changes to the specialty occupation definition and criteria are consistent with DHS's stated intent to codify existing practices. For instance, an advocacy group expressed concern that, while the Department views the updated regulations as a codification of existing practices, the new definition and criteria could, in practice, change the way petitions are adjudicated. The group said that the strict application of the regulatory text, which in its view does not reflect the broader analysis described in the preamble, could result in an overly narrow application of the provisions. The group proposed that the Department either abandon the proposed changes or amend the regulatory text to reflect the analysis described in the preamble by stating explicitly that USCIS will conduct fair evaluations of specialized coursework and training.

Numerous other commenters also expressed concerns with respect to how USCIS will consider work experience, skills, and demonstrated competencies to fulfill the specialty occupation degree requirements. These commenters indicated that the consideration of work experience and skills would better ensure that USCIS determinations reflect evolving workforce realities of employer demands for individuals to fill specialized roles which require professionals to adapt and develop new skills. Commenters also said that consideration of experience and skills would accommodate new and emerging technologies and be consistent with the dynamic nature of industries. The commenters said that experience should be a factor in determining specialty occupations, as experience equips individuals with hands-on skills, industry insights, and problem-solving abilities that are often not fully captured by academic qualifications alone. A couple of the commenters added that experience frequently links theoretical and practical competence, serving as a trustworthy gauge of a candidate's ability to meet the demands of their line of work. Likewise, a company expressed support for the updates and simplification of the specialty occupation definition, but also expressed concern that the proposed changes would lead to a perfunctory assessment of the relatedness of a

beneficiary's specialty to the position while neglecting the nuances of the educational backgrounds required for innovation in the technology sector. The company urged DHS to protect the individualized framework and improve it by enhancing clarity and preserving flexibility in the H-1B program, allowing for continual modernization in line with emerging technological developments.

Several commenters recommended DHS revise the regulatory text to clarify that USCIS will consider relevant coursework or courses of study alongside the degree field in its decision-making, consistent with established preexisting agency practices. A trade association recommended that DHS rescind the proposed changes or amend the regulatory text to better codify existing agency practices, for example, by expressly requiring adjudicators to consider the coursework underlying a particular degree as well as the petitioner's explanation as to why the degree is directly related to the relevant occupation. A company similarly encouraged DHS to revise its definition and criteria to focus on the courses completed in a degree program, and provided revised regulatory text to reflect this change.

Several commenters expressed general concern with the use of the terms "degrees" and "positions" in the specialty occupation definition and criteria, reasoning that the proposed language is misaligned with longstanding agency practices. For example, a Federal elected official, associations, and a joint submission, suggested alternative regulatory language, proposing that DHS use the term "course of study" instead of "degree" in the definition of "specialty occupation" at proposed 8 CFR 214.2(h)(4)(ii) and position criteria requirements at 8 CFR 214.2(h)(4)(iii)(1) through (4). These commenters also proposed that DHS substitute "job duties of the position" or "job duties" for references to "the position" in the specialty occupation definition at 8 CFR 214.2(h)(4)(ii) and position criteria requirements at 8 CFR 214.2(h)(4)(iii)(A)(1) through (4). Additionally, commenters claimed that DHS should use the terms "degrees" or "positions" in reference to the statutory standard, but the modernized regulations should reflect longstanding agency practices by omitting degree references (e.g., business administration) and incorporating references to courses of study and job duties. A Federal elected official wrote that while the proposed rule seeks to clarify existing agency practices for

specialty occupation adjudications, the use of the terms "degrees" and "positions" instead of "courses studied" and "duties of the position" fails to capture longstanding agency policy, creating unreasonable requirements for employers and professionals. The official warned that focusing on degree titles and positions would deviate from existing policy and preclude those who would otherwise qualify for H-1B classification. Another commenter expressed particular concern with the proposed rule's use of terms like "degrees" and "positions" and their view that the rule is misaligned with longstanding agency practices.

Additionally, commenters urged DHS to finalize the rule to better reflect longstanding agency practices by omitting references to particular types of degrees (e.g., business administration) and incorporating references to courses of study and job duties within the specialty occupation definition and criteria. A few commenters wrote that, although DHS explains that referring to the degree title was for "expediency" and the agency separately evaluates the beneficiary's actual course of study, the "binding" regulatory language fails to capture the realities of preexisting agency practices. A trade association expressed concern that the proposed regulations, as written, could significantly narrow the types of degrees that USCIS would accept for a given occupation, and that the rule fails to codify existing practices that manufacturers use to demonstrate compliance.

Response: DHS agrees that it is important to improve the H-1B program by enhancing clarity and preserving flexibility to align with emerging technological developments and industry requirements. With this rulemaking, DHS seeks to create a more flexible definition of specialty occupation that can be adapted to occupations in new and emerging fields, such as STEM and AI, by clarifying that a position may allow for a range of qualifying degree fields. DHS also agrees that it is important to acknowledge the realities of the workforce and the evolving demands of specialized roles, accommodate new and emerging technologies, and be consistent with the dynamic nature of industries. As proposed and finalized, the definition of specialty occupation will make it clear that DHS will consider a range of qualifying degree fields and multiple bodies of highly specialized knowledge when assessing whether a position is a specialty occupation, and that "normally" does not mean "always" within the context of the specialty

occupation criteria. 88 FR 72870, 72871 (Oct. 23, 2023); new 8 CFR 214.2(h)(4)(ii). The changes made to the definition of specialty occupation and its criteria are intended to codify existing practices and, as such, are not expected to create new restrictions on eligibility or lead to significant changes in adjudications.

In response to stakeholder feedback, DHS is making some revisions to this final rule compared to the NPRM to better reflect DHS's original intent when proposing the specialty occupation changes. For example, DHS is not finalizing the sentence, "The required specialized studies must be directly related to the position," as this sentence may have erroneously suggested that DHS would not look beyond the specialized studies or degree when assessing H-1B eligibility.²⁵ To address commenters' concerns about over-reliance on degree titles, DHS is removing the references to "business administration" and "liberal arts" in the final rule. DHS is also clarifying the level of connection needed to meet the "directly related" requirement by specifying in the final regulatory text that "directly related" means that there is a logical connection between the required degree, or its equivalent, and the duties of the position. Further, DHS is adding a reference to the "duties of the position" in the specialty occupation definition and "job duties" in the specialty occupation criteria in response to comments and to assure stakeholders that this practice has not changed.

DHS disagrees with comments claiming that the changes to the specialty occupation provisions are contrary to USCIS's stated commitment to utilize an individualized framework and allow adjudicators to discount a beneficiary's coursework, work experience, and specialized skills. DHS believes that these commenters have conflated the issue of whether a position qualifies as a specialty occupation with the issue of whether a beneficiary is qualified to perform the specialty occupation. The changes to the specialty

occupation provisions do not impact how USCIS evaluates and will continue to evaluate a beneficiary's qualifications. *See* 8 CFR 214.2(h)(4)(iii)(C) and (D). DHS confirms that USCIS will continue to consider work experience, skills, and courses of study in determining whether a beneficiary meets the qualifications for a specialty occupation position. As stated in the NPRM, USCIS will continue to separately evaluate whether a beneficiary's actual course of study is directly related to the duties of the position, rather than merely looking at the title of the degree. USCIS will continue to make individualized determinations in each case, and will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D). As such, DHS will not adopt the suggestions to abandon or further amend the regulatory definition of specialty occupation to specify that "specialized coursework and training will be fairly evaluated." Such amendments are unnecessary because of existing regulatory text pertaining to the beneficiary's qualifications and the other changes finalized in this rule.

Comment: Multiple commenters specifically discussed alternative training and certification programs as relevant to "specialty occupation" determinations. For example, a professional association recommended including alternative training programs, such as apprenticeships, in the specialty occupation determination, noting that this approach would better align H-1B rules with the growing importance of skills-based hiring. Citing a report, the professional association noted a trend towards "holistic, well-rounded" hiring practices beyond degree attainment. The association concluded that under a modernized U.S. immigration system, U.S. employers must be able to assess talent in ways that meet their needs, including by allowing them to employ nontraditional tactics, such as skills-based hiring and apprenticeship programs.

Several commenters, including an apprenticeship intermediary company, trade associations, a large company, and an advocacy group, expressed a common concern that a company's practice of hiring registered apprentices for entry-level positions could jeopardize its ability to obtain H-1B visas for related positions. The commenters wrote that ambiguity around current H-1B program

requirements has deterred companies from participating in or initiating apprenticeship programs. The commenters acknowledged the NPRM's efforts to address this concern, including by clarifying the meaning of "normally," but urged DHS to consider additional ways to support employers' efforts to explore apprenticeship programs. Some of the commenters asked DHS to clarify in the rule that the presence of an apprenticeship program in an occupation or the employment practices of a petitioner should not be taken as evidence that an occupation or employer does not normally require a degree in a specific specialty, or to establish explicit protections for companies that have engaged Registered Apprenticeship programs while also petitioning for H-1B beneficiaries.

Similarly, a few trade associations commended DHS for acknowledging the flexibility needed in making specialty occupation determinations, but added that DHS should do more to support skills-based hiring initiatives. The commenters asked that DHS recognize that an employer can implement a skills-based hiring program without undermining its ability to sponsor H-1B beneficiaries for the same or similar roles and encouraged DHS to consider ways to help employers distinguish skills-based hiring roles from degreed roles at all points in the employment ecosystem—from recruitment, onboarding, progression in career, and at the engagement level, stating that additional clarification will enable employers to broaden skills-based hiring initiatives while balancing the H-1B standards. One commenter also encouraged DHS to examine degree equivalency standards and consider new ways employees obtain needed skills outside the traditional 4-year degree paradigm, including employer certificate programs, apprenticeship programs, and college-level courses. A trade association suggested factoring in other ways that employers can upskill their workforces, such as certificate programs, reasoning that in not considering these factors, USCIS creates obstacles for employers who might otherwise expand skills-based employment practices.

Response: The revisions to the specialty occupation provisions are not intended to negatively impact skills-based hiring practices and alternative training programs. Conversely, several provisions, such as the new definition of "normally," which clarifies that "normally" does not mean "always," are intended to help support these programs and initiatives. As stated in the NPRM, DHS recognizes that as 21st

²⁵ While DHS is not finalizing this particular sentence, this does not indicate an intent to change current practice with respect to the "directly related" requirement. The "directly related" requirement will be finalized elsewhere in the specialty occupation definition and criteria, consistent with current practice and case law. *See, e.g., Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (holding that a position for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge).

century employers strive to generate better hiring outcomes, improving the match between required skills and job duties, employers have increasingly become more aware of a skills-first culture, led by the Federal Government's commitment to attract and hire individuals well-suited to available jobs. 88 FR 72870, 72871 (Oct. 23, 2023). There is already flexibility inherent in H-1B adjudications that allows employers to explore where skills-based hiring is sensible. By definition, a specialty occupation is one which requires attainment of a bachelor's or higher degree "or its equivalent." The allowance for the "equivalent" of a degree in a specific specialty recognizes that the requisite level of knowledge for a particular beneficiary may be gained through, among other things, additional coursework or training as suggested by the commenter. Further, the existing regulations at 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D)—which are not being changed in this final rule—already allow USCIS to examine degree equivalency standards and consider a worker's training, experience, and skills outside of the traditional 4-year degree paradigm. DHS believes the finalized regulatory text is sufficiently flexible to allow employers to explore where skills-based hiring, apprenticeships, and alternative training programs are sensible, and declines to make the suggested regulatory text changes to specifically reference apprenticeships and training programs.

Comment: A few commenters voiced concern that the proposed specialty occupation provisions conflict with the INA. A form letter campaign said that DHS should not adopt the proposed revisions to the definition and criteria for "specialty occupation," arguing that they conflict with the plain language of the statute and are based on a rescinded Executive order from the prior administration. A professional association and an individual commenter said they were disappointed to see DHS "recycle" the same language from the 2020 interim final rule (IFR) "Strengthening the H-1B Nonimmigrant Visa Classification Program," 85 FR 63918 (Oct. 8, 2020). Some commenters, including an advocacy group, said that these changes attempt to "revive" or "resurrect" invalidated guidance and rules from a prior administration. The advocacy group referenced an attorney's argument from a lawsuit against the 2020 IFR, which was later blocked by courts, and claimed that the NPRM copied the prior rule's restrictive

language which is inconsistent with the INA and current USCIS practice.

Response: DHS does not agree that the revisions to the definition and criteria for specialty occupation conflict with the plain language of the statute. As explained in the NPRM, the revised regulatory definition and standards for "specialty occupation" will better align the regulation with the statutory definition of that term. 88 FR 72870, 728714 (Oct. 23, 2023). For example, in determining whether a position is a specialty occupation, USCIS interprets the "specific specialty" requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The "specific specialty" requirement is only met if the degree in a specific specialty or specialties, or its equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A). Therefore, clarifying the definition of specialty occupation to state that "each . . . qualifying degree field is directly related to the duties of the position" more closely aligns the regulatory text with the statutory definition.²⁶

Nor does DHS agree that the changes to the definition of and criteria for "specialty occupation" are based on a rescinded Executive order or the 2020 IFR. While some of the changes finalized here are similar to changes attempted through the 2020 IFR, neither this rule nor the IFR relied on a rescinded Executive order as authority for the changes. Rather, the IFR, similar to this rule, explained that the changes to the definition and criteria for specialty occupation were based on the INA and longstanding agency practice.²⁷ Further, there are some notable changes in the specialty occupation provisions

finalized in this rule compared to those in the IFR, such as the addition and clarification of the word "normally" to the specialty occupation criteria and clarifying that a position may allow for a range of qualifying degree fields.

DHS also disagrees that the specialty occupation changes seek to "revive" invalidated guidance and rules." In June 2020, USCIS rescinded two policy memoranda that impacted certain computer occupations.²⁸ In February 2021, USCIS rescinded a 2017 policy memorandum relating to the December 22, 2000 guidance memo on H-1B computer-related positions.²⁹ These memoranda remain rescinded. In fact, the other changes to the specialty occupation provisions, including the clarification that "normally does not mean always," are consistent with USCIS' rescission of those prior policy memoranda.

Comment: A trade association, citing the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence³⁰ and Executive Order 13932, Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates,³¹ stated that several of the proposals relating to specialty occupation in the NPRM contradict executive branch policy directives to increase access to international talent by "modernizing and streamlining visa criteria, interviews, and reviews" and to give increasing preference and support to skills-based hiring. The association expressed concern that the proposed rule, including the specialty occupation definitions and requirements, would limit access to H-1B visas.

Response: DHS is cognizant of the goals of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and has taken a number of actions consistent with the executive order. These not only include publishing new web page content for noncitizen STEM professionals and entrepreneurs with guidance on both the nonimmigrant and immigrant options to work in the United

²⁶ See *Vision Builders, LLC v. USCIS*, No. 19-CV-3159, 2020 WL 5891546, at *4 (D.D.C. Oct. 5, 2020) (finding that USCIS logically read the regulatory criteria together with the statutory definition of specialty occupation "to find that the term 'degree' in the specialty-occupation criteria, 8 CFR 214.2(h)(4)(iii)(A), means one 'in a specific specialty that is directly related to the proffered position.'").

²⁷ "Strengthening the H-1B Nonimmigrant Visa Classification Program," 85 FR 63918, 63925 (Oct. 8, 2020) (noting that the requirement of a "direct relationship" between the required degree fields and duties of the position was "consistent with the statutory requirement that a degree be 'in the specific specialty' and has long been the position of DHS and its predecessor, Immigration and Naturalization Service (INS)").

²⁸ USCIS, Policy Memorandum PM-602-0114, Rescission of Policy Memoranda, https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf (June 17, 2020).

²⁹ USCIS, Policy Memorandum PM-602-0142.1, Rescission of 2017 Policy Memorandum PM-602-0142, https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf (Feb. 3, 2021).

³⁰ Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 FR 75191 (Oct. 30, 2023).

³¹ Executive Order 13932, Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates, 85 FR 39457 (June 26, 2020).

States, but also publishing updated policy guidance for the O–1A nonimmigrant classification for persons of extraordinary ability, the EB–1 extraordinary ability and outstanding professor or researcher immigrant classifications, EB–2 national interest waivers for advanced degree professionals or persons of exceptional ability, and the International Entrepreneur Parole.³² The changes to specialty occupation finalized in this rule will also further the goals of the Executive order to “attract and retain talent in AI and other critical and emerging technologies in the United States economy” by clarifying that “normally” does not mean “always” within the criteria for a specialty occupation; clarifying that a position may allow for a range of qualifying degree fields, although there must be a direct relationship between the required field(s) and the duties of the position; and clarifying that “directly related” means a logical connection between the required degree (or its equivalent) and the duties of the position. These changes better align the regulatory definition of specialty occupation with the statutory definition of that term, and provide greater certainty by codifying current policy and practice into the regulation. Beyond the changes to specialty occupation, other provisions in this final rule also support the goals of the executive order, including the provisions relating to cap-exemption and the provisions relating to beneficiary-owners. Therefore, DHS disagrees that the changes in this final rule contradict executive branch policy directives.

Comment: A few commenters expressed concerns about

administrative burdens resulting from the proposed changes to “specialty occupation.” For example, a form letter campaign said that the proposed revisions to the definition and criteria for “specialty occupation” add unnecessary burdens for employers. A couple of commenters wrote that the broad application of specialty occupation could lead adjudicators to overlook skills and experience, resulting in more RFEs. An advocacy group commented that the proposal could lead to unreasonable denials of H–1B visas and burdensome RFEs. A trade association agreed, adding that issuances of notices of intent to deny (NOIDs) would also increase administrative difficulties. Another commenter wrote that the proposed changes to “specialty occupation” would incentivize USCIS examiners to issue RFEs, creating burdens for employers.

Response: DHS disagrees that amending the definition of specialty occupation will add administrative burdens for employers. As discussed in the NPRM, these changes are largely a codification of existing policies and practice. 88 FR 72870, 72874 (Oct. 23, 2023). For example, it is the current practice of USCIS to require the petitioner to demonstrate that the required degree field(s) are directly related, as defined in this rule, to the duties of the position.³³ DHS does not expect that there will be an increase in RFEs or NOIDs as a result of codifying existing USCIS practices and providing clarification with respect to the definition of and criteria for a specialty occupation. It is also the current practice for USCIS to examine skills and experience in the course of determining a beneficiary’s qualifications, and nothing in this rule changes this current practice. USCIS does not anticipate that these clarifications will cause changes for petitioners or add an administrative burden. Rather, codifying current practices adds transparency to the adjudication process and should help to

prevent unnecessary evidence requests and delays.

Comment: Numerous commenters expressed concern about the potential negative economic impacts associated with the specialty occupation provisions. For instance, a joint submission reasoned that the proposed specialty occupation provisions could limit the available talent pool and negatively impact the innovation ecosystem by imposing more stringent degree requirements. Another commenter similarly wrote that letting the “specialty occupation” assessment be determined by the semantics of a degree specialization would hinder innovation, research, and business growth. The commenter said that the modern job market and education system have allowed for fluid specialties and learning opportunities, and the “disruptive rate of technological advancement” has changed the talent pool such that being an expert in one field leads one to become an expert in another.

Several commenters commented that the proposal could negatively impact industries’ access to talent in emerging STEM fields, as multi-disciplinary educational backgrounds are common in these settings. An advocacy group referenced an attorney’s argument that “the narrowing of eligibility” for specialty occupations would impact research positions in “burgeoning cross-disciplinary fields.” A professional association expressed concern with the “cross-cutting impact” of the proposed regulatory changes to 8 CFR 214.2(h)(4)(ii) and (iii), particularly on the science and technology sectors, which the commenter regarded as critical research areas for U.S. economic competitiveness and national security. A business association and a trade association commented that negative impacts to businesses’ hiring would also contravene the administration’s goals to strengthen the U.S. workforce and, in particular, to attract professionals in the AI field. Additionally, other commenters said the provision would not adequately deal with changes in technology, and could harm individuals in IT who contribute to the economy but have non-IT bachelor’s degrees.

Response: DHS disagrees that codifying existing USCIS practices by revising the regulatory definition and standards for a “specialty occupation” to better align with the statutory definition of that term will have a negative effect on the economy or will hinder innovation, research, or business growth. DHS also disagrees that this provision will have a negative effect on various industries in the technology and

³² See USCIS, Options for Noncitizen STEM Professionals to Work in the United States (last updated Aug. 27, 2024), <https://www.uscis.gov/working-in-the-united-states/options-for-noncitizen-stem-professionals-to-work-in-the-united-states>; USCIS, Options for Noncitizen Entrepreneurs to Work in the United States (last updated Aug. 27, 2024), <https://www.uscis.gov/working-in-the-united-states/options-for-noncitizen-entrepreneurs-to-work-in-the-united-states>; USCIS, Policy Alert, O–1 Nonimmigrant Status for Persons of Extraordinary Ability or Achievement (Jan. 21, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf>; USCIS, Policy Alert, Evaluating Eligibility for Extraordinary Ability and Outstanding Researcher Visa Classifications, Sept. 12, 2023, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230912-ExtraordinaryAbilityOutstandingProfessor.pdf>; USCIS, International Entrepreneur Rule (last updated Oct. 11, 2024), <https://www.uscis.gov/working-in-the-united-states/international-entrepreneur-rule>; USCIS Policy Alert, International Entrepreneur Parole, Mar. 10, 2023, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230310-InternationalEntrepreneurParole.pdf>.

³³ See, e.g., *Madkudu Inc. v. USCIS*, No. 5:20–cv–2653–SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 (“if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor’s degree in a specialized field directly related to the position (e.g., an associate’s degree, a bachelor’s degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . . , or a bachelor’s degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).”), <https://www.uscis.gov/sites/default/files/document/legaldocs/Madkudu-settlement-agreement.pdf> (last visited Oct. 23, 2024).

science sectors or limit these industries' access to talent trained in emerging STEM fields or possessing multidisciplinary educational backgrounds. In clarifying the specialty occupation definition and criteria, DHS aims to add transparency and predictability to the adjudication process, not to impose more stringent degree requirements or standards. Overall, the changes to the specialty occupation provisions as revised from the proposed regulatory language—including clarifying the word “normally,” and codifying current practice to allow for a range of qualifying degree fields—recognize that there is “flexibility inherent in H-1B adjudications”³⁴ to accommodate emerging technological developments.

Comment: Some commenters noted concerns across industries that the proposed changes to the specialty occupation definition and criteria would create uncertainty for H-1B professionals and their dependent family members, international students at U.S. higher education institutions, and employers both in academia and industry. The commenters cited DOL permanent labor certification (PERM) data from FYs 2019 to 2023 showing that a sizeable percentage of H-1B holders with employers sponsoring them for permanent residence hold jobs that USCIS has “confirmed are specialty occupations” where: (a) the minimum requirements are the type of knowledge obtained through completion of any engineering degree; or (b) they entail job duties for which a business administration degree is expected. Based on this data, the commenters concluded that these are among the beneficiaries that could be “excluded” under the proposed regulatory text, belying DHS’s suggestion that it is merely codifying current practice through the proposed rule. Similarly, an advocacy group referenced the same PERM application data and stated that over 20 percent of employers seeking a permanent labor certification accepted either a business, liberal arts, social studies, or any kind of engineering degree. The commenter noted that because this data excluded EB-1 and EB-2 National Interest Waivers, this was likely an undercount; and, as a result, the actual impact of the proposed change would be larger than implied by the figures referenced. Based on this data, the group concluded that the proposed change “would likely be a major deviation from current policy of USCIS.”

A union cited data from the 2021 National Survey of College Graduates

and analysis by the National Foundation for American Policy showing that a notable percentage of U.S.-born individuals and temporary visa holders working in computer, biology, and mechanical engineering occupations have a degree other than in computer science or electrical engineering, health or biological sciences, and mechanical engineering, respectively. The union further noted a trend in academic departments and research centers, and in industry alike, to establish a diverse, interdisciplinary staff team that allows for a broad range of expertise and skills to pursue research projects and grants that cross traditional fields. A commenter urged DHS to continue to consider the combination of education and experience, even if the degree is not in a directly related field. Referencing the same data and a news article described above, a commenter said it was concerned with the “directly related specific specialty” requirement.

Response: DHS disagrees that these changes to the specialty occupation provisions would negatively impact or create uncertainty for H-1B petitioners, beneficiaries (and their families), and prospective beneficiaries. As stated in the NPRM and in this final rule, the changes to the specialty occupation definition and criteria are intended to capture current USCIS practices. For instance, it is the current practice for USCIS to examine skills and experience in the course of determining a beneficiary’s qualifications and make individualized determinations in each case, and nothing in this rule changes this current practice.

With respect to the comments based upon DOL PERM data, DHS cannot speak specifically to the accuracy of the conclusions drawn by the commenters because the commenters did not provide the methodology used in examining the DOL PERM data. Further, DHS cautions against drawing broad conclusions about H-1B eligibility based on DOL PERM data, as such data are for immigrant-based classifications that have different eligibility criteria than H-1B specialty occupations and may be for different positions with different minimum requirements. For example, the commenters’ references to positions where “the minimum requirements are the type of knowledge obtained through completion of any engineering degree” and positions that “entail job duties for which a business administration degree is expected” are unclear and do not necessarily speak to the degree requirements for the beneficiary’s specialty occupation position nor support the commenters’ assertion that these beneficiaries would be “negatively

impacted” by the changes made in this final rule. Finally, DHS notes that the current practices codified by this rule were in place even during the period covered by the data reviewed by the commenters (FY2019–FY2023). There is no reason to think that codification of these practices would result in different adjudicative outcomes.

Regarding the commenter’s concern that data show that workers in various computer, engineering, and science fields have degrees outside of these fields, DHS notes that it is USCIS’ current practice to examine whether there is a direct relationship between the qualifying degree fields and the duties of the position when determining whether the position is a specialty occupation. This is separate from the determination of whether a beneficiary qualifies for the proffered position. As is currently the case, a beneficiary may qualify for the specialty occupation through a combination of education, training, and/or work experience. The changes to the specialty occupation provisions do not impact how USCIS evaluates and will continue to evaluate a beneficiary’s qualifications. See 8 CFR 214.2(h)(4)(iii)(C) and (D).

Comment: Some commenters argued that the NPRM failed to address reliance interests that would be impacted by the proposed changes to the specialty occupation definition. For example, one commenter said the failure to address reliance interests is arbitrary and capricious. A trade association said that the proposed language would result in arbitrary and capricious adjudications, cause uncertainty for employers and beneficiaries, and prevent employers from obtaining needed talent and cross-training employees. Other commenters added that the rule would upset the reliance interests of IT consulting companies in particular and disrupt their ability to fill domestic labor shortages and meet technology needs.

Response: The finalized specialty occupation definition and criteria, as slightly modified from the NPRM, codify existing USCIS adjudication practices. Since these provisions are consistent with current USCIS practices, DHS does not agree that they will upset serious reliance interests.

ii. Amending the Definition of “Specialty Occupation”

Comment: Several commenters provided general comments in support of the “directly related” requirement. For example, a union generally supported requiring a direct relationship between degrees and occupations, clarifying that general degrees are insufficient to support H-1B

³⁴ See 88 FR 72870, 72871 (Oct. 23, 2023).

petitions, and placing the burden on H-1B petitioners to demonstrate the relationship between degrees and occupations. A research organization wrote that the proposal that each qualifying degree be directly related to a proffered position is consistent with the INA and caselaw. A commenter expressed support for requiring a “direct relation” between a beneficiary’s education and the occupation. Similarly, a commenter said that requiring a “direct correlation” between the position and degree would ensure a “more precise match” of position duties to the skills of candidates. Another commenter generally stated that stricter scrutiny is required to ensure that beneficiaries are working in fields matching their skills. Another commenter generally suggested that the job that an H-1B worker is doing should be relevant to the degree obtained.

A commenter expressed support for the “directly related” requirement, reasoning that it is necessary to ensure that individuals with specialized skills, such as those with degrees in pharmaceutical sciences, could work in the United States. The commenter said that the current “high intake” of individuals with undergraduate degrees in engineering and master’s degrees in IT disadvantages these groups and that the proposed change would help address that disadvantage. Another commenter similarly stated that the “directly related” requirement would ensure that applicants with a degree that has a direct relationship to the position would have a chance to become employed, and that the requirement would regulate the job market and prevent applicants from trying to obtain an H-1B visa for work that is not related to their degree. A commenter expressed support for the “directly related” requirement, stating that it would ensure that foreign workers who intentionally choose to pursue a degree that is related to a specific occupation can fill employment gaps without disrupting the U.S. job market. The commenter added that the proposed requirement would further program integrity and ensure the H-1B program serves its statutory purpose.

Response: DHS agrees that requiring the degree field(s) to be directly related to the duties of the position is consistent with the INA and caselaw,³⁵ supports

program integrity, and continues to ensure that the H-1B program serves its statutory purpose by providing a regulatory definition of specialty occupation that is consistent with the existing standard. While these changes are not intended to benefit a particular occupation or industry, DHS believes they are generally beneficial for all petitioners and beneficiaries.

Comment: Numerous commenters expressed concern that the proposed changes would be too restrictive by ignoring that individuals may have work experience in addition to their degree, and make it difficult for individuals with experience to qualify for H-1B status. A few commenters added that the proposed changes could discourage potential H-1B candidates from contributing their knowledge outside their field of study, noting that a highly qualified individual may have acquired skills through job experience outside his/her field of study/degree.

Several commenters expressed concern that the addition of the “directly related” requirement could narrow the eligibility of potential beneficiaries. Specifically, a commenter said that the proposed requirement could result in individuals with experience in a given field being deemed ineligible while new college graduates with degrees in relevant fields to qualify for H-1B status. While commenting on the impact of the proposed specialty occupation regulations on highly experienced individuals, a commenter urged DHS to leave the regulations in their current form.

Several commenters suggested that USCIS also consider work experience. These included recommendations to consider work experience as an equivalent to the degree name, and allowing experience as an alternative to the field of study. A couple of commenters were concerned that the proposed requirements would not provide sufficient flexibility for individuals who have acquired skills while on the job. A trade association and a few other commenters said that the “directly related” requirement would not provide leeway for individuals who are highly educated but want to change sectors in the middle of their careers. A commenter said that it understood the rationale behind the proposed requirement but suggested that USCIS take care in implementing it, as some individuals “shine” in positions not related to their educational backgrounds. A trade

or a bachelor’s degree in a large subset of fields, can hardly be considered specialized.”).

association referenced an example of a position that required expertise in programming languages but did not always require a specific degree, which the commenter said would likely make the position ineligible for H-1B initial approval or renewal, resulting in the position being sent “offshore.” Similarly, another commenter said that the requirement would “stifle the diverse professional growth that fuels innovation,” potentially diverting global talent to other destinations, as career flexibility is “crucial.”

Response: Through this rulemaking, DHS is codifying existing USCIS practice requiring a direct relationship between the qualifying degree field(s) and the duties of the position. This is consistent with USCIS’ long-standing practice and interpretation that the “specific specialty” requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), relates back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A). DHS disagrees with the comments that these changes are overly restrictive and that they will negatively impact eligibility, whether for H-1B beneficiaries who are renewing their status or potential beneficiaries with specialized experience or skills, because the specialty occupation determination is separate from the determination of whether a beneficiary qualifies for the proffered position.

As discussed above, it is already current practice for USCIS to examine skills and experience in the course of determining a beneficiary’s qualifications, and nothing in this rule changes this current practice. USCIS will continue to make individualized determinations in each case. As explained in the NPRM, USCIS will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(4).

After carefully considering the comments, DHS is not finalizing the proposed regulatory text of “[t]he required specialized studies must be directly related to the position,” as this language could be misread as stating that USCIS would only consider a beneficiary’s specialized studies. The “directly related” requirement is, however, being retained in the definition of “specialty occupation” and in the criteria, as explained in more detail below.

Comment: Several commenters were concerned that the proposed rule might

³⁵ *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Caremax Inc. v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (“A position that requires applicants to have any bachelor’s degree,

render individuals currently eligible for H-1B classification ineligible under the new specialty occupation definition and requested clarification on when or to whom the new definition will apply. A group of Federal elected officials requested clarification on how the amended definition of specialty occupation will be implemented consistently with current practice to ensure that individuals who comply with current H-1B regulations can remain in compliance under the new definition. The commenters warned against changing the requirements on those already granted H-1B status, as such a change would create an unpredictable adjudication environment and could lead to foreign-born professionals having to leave the country and U.S. companies losing employees and talent. The commenters commended the codification of USCIS' deference policy, and urged DHS to clarify how it will apply its deference policy when adjudicating H-1B petitions moving forward, given the proposed rule's amended definition of specialty occupation. Alternatively, the commenters strongly recommended that, if the new specialty occupation definition does in fact represent a significant departure from current practice, any new H-1B eligibility requirements that result from the proposed rule's new amended definition of specialty occupation only apply to individuals whose initial H-1B petitions are filed after the proposed rule is finalized.

Multiple commenters, including a form letter campaign, suggested that DHS only apply the revised specialty occupation regulations to new petitions, or not apply the rule to current H-1B holders or extensions. Similarly, a few commenters articulated concerns about beneficiaries in the immigrant visa backlog who would no longer be able to continue their H-1B status, and others noted that it could displace individuals with H-1B status already in the United States. Several commenters expressed concern with the potential impact of the requirement on current H-1B beneficiaries who are already in the United States, in backlogs, and might experience denials as a result of not having a degree "directly related" to the position. Some commenters requested clarification about whether these individuals would be excluded from the application of the proposed requirement.

Response: The changes being finalized in this rule become effective 30 days after this final rule is published in the **Federal Register**. They will apply to any H-1B petition filed on or after

this date, whether it is a petition seeking an initial grant of H-1B status or extension of H-1B status. Commenters did not specify why they think the changes to the specialty occupation definition and criteria would result in current H-1B nonimmigrants being unable to continue their H-1B status or otherwise negatively impact current H-1B nonimmigrants. As stated previously, the changes to the specialty occupation provisions codify existing practices; they are not intended or expected to result in current H-1B nonimmigrants no longer being eligible for H-1B status based on employment that has already been found to be a specialty occupation. They also do not narrow or otherwise change the existing standards for how a beneficiary may qualify for the specialty occupation through a combination of education, training, and/or work experience. To the extent there is concern about any changes to eligibility because of the inclusion of "directly related" in the new regulatory text, the new language added in this final rule further clarifies that USCIS is not changing eligibility standards for assessing whether a position is a specialty occupation. Therefore, DHS does not believe it is necessary to apply this final rule only to H-1B petitions requesting an initial grant of H-1B status that are filed on or after the effective date of this rule.

In addition, the codification of the deference policy should allay some of the commenters' concerns. By codifying the deference policy, USCIS will continue to defer to prior determinations involving the same parties and underlying facts, except in case of material error, material change in circumstances or eligibility requirements, or new material information adversely impacting eligibility. As stated, H-1B eligibility requirements, including the requirement to qualify as a specialty occupation, will apply to any H-1B petition filed on or after the effective date of this rule. However, DHS emphasizes again that the revisions to the regulatory language for the definition and criteria for a specialty occupation do not represent a change in policy, but rather codify existing adjudication practices and are intended to provide greater clarity and predictability to petitioners and beneficiaries. A position previously determined to meet the definition of a specialty occupation generally should continue to do so and a beneficiary previously determined to be qualified for such an occupation generally should remain so qualified, absent material error or a change in material facts.

To the extent that commenters are worried that current H-1B beneficiaries who were not eligible for H-1B status in the first place would no longer be eligible for an extension of status under this final rule, this is not persuasive. USCIS is not, and has never been, required to approve a petition "where eligibility has not been demonstrated merely because of prior approvals that were erroneous."³⁶

Comment: Several commenters discussed the potential negative impact of the "directly related" requirement on hiring practices, stating that it would likely "aggravate" and extend the hiring process, or even eliminate the ability of companies to consider employees with "hands-on" experience. A joint submission stated that the "directly related" requirement would prevent employers from establishing that an emerging body of knowledge was acquired through a degree in the "specific specialty" or "its equivalent." The commenters stated that an interdisciplinary approach to hiring is often required to attain the necessary "highly specialized knowledge" associated with a position although that knowledge might not have a specific field of study associated with it. A trade association said that because most employers hire skilled workers based on their coursework and experience, it would be irrelevant to show a direct relationship between degree and job duties. Similarly, a commenter said that the requirement was illogical because there is no longer a relationship between degrees and job duties.

Some commenters discussed the impact on hiring practices in specific industries or fields, particularly in fields such as AI and IT. For instance, commenters stated that it is often "indispensable" to hire individuals with "complementary specialties" to "form diverse, interdisciplinary teams." The joint submission added that employers would face additional hurdles when conducting on-campus recruitment as a result of the "directly related" requirement. A trade association noted that the specialized expertise required when hiring for roles that integrate AI across various sectors challenged USCIS' assumptions regarding the "direct relevance" of degrees. Another commenter stated that employers have trended towards hiring individuals with degrees and skills from various backgrounds, specifically for the AI workforce, because they need employees with industry knowledge,

³⁶ *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); accord *Ochoa-Castillo v. Carroll*, 841 F. App'x 672, 674–75 (5th Cir. 2021).

not just with the traditionally associated academic background. Other commenters expressed concern that the proposed requirement would limit the ability of IT consulting firms to fill certain roles and sponsor foreign workers, particularly workers with work experience but degrees in various fields.

A trade association expressed concern with the potential impact of the proposed changes to the definition of “specialty occupation” on the higher education community. The commenter stated that the proposed definition could hinder the ability of higher education institutions to hire faculty in broad departments that might include many subspecialties. The commenter also said that the proposed change would negatively impact the pipeline for growth in fields of emerging technology, education, research, and the economy, and deter students from studying in the United States. Similarly, another commenter expressed concern that the proposed requirement could force academic institutions to narrow their hiring scope, potentially diminishing their ability to recruit talented employees. Another trade association said the proposed provision would hinder the ability of educational institutions to hire faculty because universities organize their programs by broad disciplines which have departments with subdisciplines, and, as such, typically hire faculty that have broad training within a discipline in addition to knowledge across several subdisciplines.

Response: As stated previously, DHS is codifying existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. As this is consistent with current USCIS practice, petitioners generally should not experience a major shift in hiring due to this rule. The specialty occupation changes are not intended to disadvantage any particular industry or occupation, nor any H–1B beneficiaries already authorized to work in a specialty occupation.

These provisions also should not hinder the ability of companies to consider employees with experience. USCIS analyzes whether the proffered position is a specialty occupation (including determining if there is a direct relationship between the required degree(s) and the duties of the position) separately from its analysis of a beneficiary’s qualifications. The final regulations will maintain the flexibility of the H–1B program to adapt to new and emerging technologies, education, and research fields, and allow companies to recruit talented workers.

As noted in the NPRM, when applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D). The changes to codify the “directly related” requirement do not, in any way, preclude petitioners from recruiting workers to form a diverse, interdisciplinary team.

Comment: Several commenters expressed concerns that the “directly related” requirement would require an exact match between degree and occupation titles. A commenter requested removing the “specifically related” term that requires a match between the job title and degree name. Similarly, a couple of commenters said that there is never a direct match between degree names and the skills required to perform the duties of a position. A company stated that the “directly related” section of the proposed rule assumes a level of uniformity in naming degree fields across colleges and universities that does not exist. Another commenter stated that it would be “highly subjective and dangerous” to include the requirement, as names of degrees are “archaic in nature” compared to current job titles because degree names do not evolve as fast as certain fields. The commenter said that this could result in the disqualification of certain individuals despite their possession of specialized knowledge. A professional association commented that the proposed definition would impose a faulty process of matching educational qualifications to occupations, reasoning that educational qualifications and occupations rarely have direct matches. The professional association stated that because colleges and universities have autonomy over naming and criteria, basing an evaluation on the name of a degree could minimize the qualifications of knowledgeable graduates. The commenter noted that these “matching exercises” between degrees and occupations would be arbitrary because they would not reflect the reality of skills required for positions. Other commenters stated that because the proposal would allow adjudicators to use their discretion to determine an exact match between job position and degree, many current H–1B workers might not meet the new criteria. A company added that adjudicators might look exclusively for a one-to-one match between the degree listed on a

diploma and the relevant occupation without considering a beneficiary’s underlying studies.

Response: There is no requirement for a direct, exact, or one-to-one match between the degree field(s) and job titles now, or with respect to this final rule. DHS acknowledges that degree field names may change over time and differ between universities and emphasizes that USCIS does not look merely at the name of the degree field. The changes to the definition of specialty occupation codify current practices and do not impose a new requirement for an “exact match” between degree field(s) and job titles or otherwise narrow eligibility for a specialty occupation.

DHS further reiterates that the requirement of a direct relationship between a degree in a specific specialty, or its equivalent, and the duties of the position should not be construed as requiring a singular field of study. As explained in the NPRM, these changes merely codify existing practices. 88 FR 72870, 72874 (Oct. 23, 2023). In some cases, the direct relationship between the degree field(s) that would qualify someone for the position and the duties of the position may not be apparent, and the petitioner may have to explain and provide documentation to meet its burden of demonstrating the relationship. As in the past, to establish a direct relationship, the petitioner would need to provide information regarding the course(s) of study associated with the qualifying degree field(s), or its equivalent, and the duties of the proffered position, and demonstrate the connection between the course of study and the duties and responsibilities of the position. Under new 8 CFR 214.2(h)(4)(ii), as amended, the petitioner will continue to have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty and the duties of the position. DHS is also adding regulatory text to clarify the level of connection needed to meet the “directly related” requirement.

Comment: A few commenters expressed concern with language in the NPRM which referred to “educational credentials by the title of the degree for expediency.” Referencing this language, which was contained in footnote 25 of the NPRM, a professional association and a law firm stated that USCIS’ explanation that the use of degree titles was a matter of “expediency” and that adjudicators would still evaluate the relationship between the course of study and the duties of the position was of “little comfort.” The commenter reasoned that the proposed rule does not reflect this clarification or direct

adjudicators to look at the relationship between the duties of the position and the course of study, which the commenter stated “includes the classes taken, skills and training acquired, and knowledge obtained.” An advocacy group similarly expressed concern that, despite the NPRM’s acknowledgment in footnote 25, the “binding regulation” fails to conform with current USCIS policy and include correct references to courses of study and job duties, instead referring to degree labels and names of positions. An advocacy group and company stated that USCIS’ proposal to disqualify positions that require a “general degree” based on the title of the position and degree program, without further consideration of job duties or course of study content, would be inconsistent with the agency’s acknowledgment in footnote 25 of the NPRM. Another advocacy group also referenced footnote 25 and suggested that the clarification be reflected in the regulatory language.

Response: DHS acknowledges the commenters’ concerns about referring to “the title of the degree for expediency.” In recognition that the title of a degree is not determinative, and to be responsive to these comments, DHS is not finalizing the phrase “such as business administration or liberal arts” from the proposed regulatory text. While this rule finalizes the regulatory text stating that, “A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position,” the deletion of the specific references to “business administration or liberal arts” signals that USCIS will continue to separately evaluate whether the beneficiary’s actual course of study is directly related to the duties of the position, and will not merely look to the title of the degree, consistent with current practice. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation, consistent with current practice and regulations. See 8 CFR 214.2(h)(4)(iii)(C)(4) and (5).

Comment: Multiple commenters stated that it would be difficult to show an “exact correspondence” between degree fields and occupations in emerging technical fields, such as AI and cybersecurity. Similarly, an advocacy group and a law firm said that focusing on degree titles alone would not account for all of the skills that are needed to work in new and emerging technology fields. The commenters said

that this could limit employers’ ability to fill positions and remain competitive in the global marketplace. A few commenters further stated that new occupations or areas of study might be created as a result of innovation that could lead to an unclear consensus on how to classify a role or determine what field of study a role might require.

Response: As with any industry, not every position in emerging fields will meet the definition of a specialty occupation. However, DHS believes that the specialty occupation provisions codified in this rule sufficiently accommodate emerging fields, including AI and cybersecurity. DHS understands that many occupations, including those in new and emerging fields, may not always have a singular degree requirement to meet the needs of the position. As stated in 8 CFR 214.2(h)(4)(ii), a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. The petitioner is not required to show an “exact correspondence” between degree field(s) and the occupation. As finalized in this rule, “directly related” means that there is a logical connection between the degree, or its equivalent, and the duties of the position. See new 8 CFR 214.2(h)(4)(ii). Furthermore, as stated above, DHS agrees that the title of a degree is not determinative. Rather than looking only to the title of the degree, USCIS will continue to separately evaluate whether the underlying course of study is directly related to the duties of the position. The regulatory text, as finalized, offers flexibility to the specialty occupation determination, including to occupations in emerging fields, while better aligning with the statutory requirements for a specialty occupation.

Comment: An advocacy group disputed the NPRM’s assertion that an engineering degree field’s title must exactly match the title of an engineering position for the two to be related. The commenter reasoned that companies hire individuals with STEM degrees based on the knowledge and skill sets gained through the STEM programs. A law firm stated that computer science and computer engineering courses are an essential component of every engineering field of study. As such, the commenter suggested that any engineering degree that included computer science or computer engineering courses be considered “directly related” to a software developer occupation.

Response: Regarding the commenter’s concern about employers accepting

engineering degrees, DHS is not suggesting that employers cannot accept any engineering degree for their positions. Rather, DHS is clarifying that a petition listing a requirement of any engineering degree in any field of engineering for a position such as a software developer would generally not satisfy the statutory requirement, as it is unlikely the petitioner could establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly relating to the duties and responsibilities of the software developer position. This is because an engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of seemingly unrelated fields. If an individual could qualify for a petitioner’s software developer position based on having a seemingly unrelated engineering degree, then it generally cannot be concluded that the position requires the application of a body of highly specialized knowledge and a degree in a specific specialty, because someone with an entirely or largely unrelated degree may qualify to perform the job.³⁷ Similarly, assertions that a position can be satisfied based on studies in any STEM degree field would generally indicate that the position does not require a “body of highly specialized knowledge” but, rather, general mathematical or analytical skills. In such scenarios, the requirements of INA sections 214(i)(1)(A) and (B), 8 U.S.C. 1184(i)(1)(A) and (B), would not be satisfied. The critical element is not the title of the position, but whether the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor’s or higher degree in the specific specialty, as the minimum for entry into the occupation as required by the INA.

Comment: Several commenters discussed the proposed “directly related” requirement’s relationship with the INA, stating that the requirement defies the INA because the INA does not include any mention of the degree being

³⁷ These examples refer to the educational credentials by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary’s actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4).

“directly related” to the position. An attorney stated that there were no ambiguities within the statutory definition of “specialty occupation” that has been in use since 1990 that necessitated the addition of a “direct relationship” element to the definition.

A few commenters stated that the proposed requirement did not “faithfully interpret” the INA. A couple of trade associations and a joint submission stated that the “directly related” requirement would not be in alignment with longstanding USCIS practices. An advocacy group stated that the requirement that a beneficiary’s degree be related to the position was not equivalent to the “long-established” interpretation of the INA, which the commenter said has been focused on adjudicating H–1B petitions based on skills and knowledge gained from courses of study and the job duties of the position, not the name of their degree, or the name of the position.

Another advocacy group referenced an attorney’s argument that expressed concern with the proposed definition of “specialty occupation,” reasoning that there was no requirement in INA sec. 214(i)(1) that specialized studies must be directly related to the position. The attorney added that while a lawyer would qualify as a specialty occupation under the proposed language, that INA section reads more broadly, and as such, a marketing analyst should also qualify despite the occupation requiring degrees in more diverse fields. Referencing the same argument, another commenter stated that no requirement under the INA matches the new definition of specialty occupation. An advocacy group and another commenter stated that requiring a degree to be in a “directly related specific specialty” was absent from the INA. Another professional association specifically stated that the “directly related specific specialty” standard rewrote the authorizing statute through regulation by calling for a precise match between the degree and the occupation that is not found in statute.

A joint submission expressed opposition to the NPRM’s use of the undefined terms “specialized studies” and “directly related,” stating that the “directly related” requirement would exceed the statutory authority provided in the definition of a “specialty occupation” in INA sec. 214(i)(1). Specifically, the commenters stated that Congress created the “body of highly specialized knowledge” requirement when defining the H–1B category, and when doing so, also limited the fields of study that comprise the “specific specialty” or its “equivalent.” The

commenters said that in practice, occupations that do not have degrees typically associated with them instead accept a variety of different fields of study that all provide the “highly specialized knowledge” required by the occupation.

A trade association and a law firm stated that the “directly related” requirement in the proposed definition of “specialty occupation” exceeds the statutory requirements of the INA. Specifically, the commenters stated that the INA definition provides a “substantially broader standard” by stating that the requirement of a degree in the specialty or “its equivalent” can form the basis of a specialty occupation. The commenters added that “equivalent” was interpreted by a district court in *Tapis Int’l v. INS*³⁸ to encompass “various combinations of academic and experience-based training” and that it “defies logic” to limit the degree requirement of “specialty occupation” to only positions where a specific degree is offered. Therefore, the commenters stated that *Tapis* precludes the “impermissible limitations” that USCIS seeks to impose through the “directly related” requirement in the NPRM and that the statutory language permits a position to qualify as a specialty occupation when it requires a non-specialized degree combined with specialized experience, training, or coursework that is “the equivalent” of a specialized degree. The commenters concluded that the “directly related” standard contradicts the “clear language of the statute” and is, thus, *ultra vires*, impermissible, and must be removed to ensure that the regulatory language remains consistent with INA sec. 214(i)(1). Similarly, several commenters referenced INA sec. 214(i)(1) and said that the phrase “or its equivalent” broadens the requirement for a bachelor’s degree to also encompass “not only skill, knowledge, work experience, or training . . . but also various combinations of academic and experience-based training,” and thus an occupation that requires a generalized degree but also specialized experience or training should be considered a specialty occupation. Similarly, a professional association and a law firm stated that the “directly related specific specialty” requirement contradicted the INA, reasoning that the INA does not specify that a degree must be directly related to a specific specialty. As such, the commenters stated that the proposed language “impermissibly narrows” the language of “specialty occupation” under INA

sec. 214(i)(1). Referencing *Tapis Int’l v. INS*, the commenters stated that the knowledge and skills obtained through the degree, not the title of the degree, is what is important in the consideration of a “specialty occupation,” but that the language of the proposed rule fails to consider the skills that beneficiaries gain through the attainment of a bachelor’s degree and industry experience. The professional association concluded that the proposed language would narrow the types of positions that can qualify as a specialty occupation, including positions currently held by H–1B workers, potentially nullifying the proposed deference provisions.

Response: DHS disagrees that the “directly related” requirement is inconsistent with or exceeds the statutory requirements of the INA. DHS further disagrees that this requirement would be inconsistent with longstanding USCIS practice. While INA section 214(i)(1) does not contain the exact phrase “directly related,” consonant with INA section 214(i)(1), USCIS has consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by INA section 214(i)(1), a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study or its equivalent. USCIS has long required there to be a close correlation between the required specialized studies and the position.

The “directly related” requirement does not mean that a specialty occupation position cannot accept degrees in a variety of different fields of study, provided that each field of study provides the “highly specialized knowledge” required by the occupation. While the statutory “the” and the regulatory “a” are both interpreted to denote a singular “specialty,” this should not be misconstrued with necessarily requiring a singular academic major or field of study. In cases where the petitioner lists multiple disparate fields of study as the minimum entry requirement for a position, the petitioner must establish how each field of study is in a “specific specialty” that is directly related to the duties and responsibilities of the

³⁸ 94 F. Supp. 2d 172, 175–76 (D. Mass. 2000).

particular position (*i.e.*, the applied body or bodies of highly specialized knowledge), consistent with the statutory definition.

Further, DHS disagrees that the “directly related” requirement conflicts with *Tapis Int’l v. INS*.³⁹ It appears the commenters have conflated the issue of a position’s qualification as a specialty occupation with the issue of a beneficiary’s qualification for the position. A beneficiary’s credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”).

Comment: Several commenters discussed USCIS’ consideration of specialized experience, skills, and training in addition to degree requirements with respect to the “directly related” requirement. Many commenters suggested that rather than focusing on degree titles alone, USCIS should evaluate potential beneficiaries on their overall education, including course of study, extracurricular, and skill development. A couple of commenters suggested that instead of requiring a “direct relationship” between the degree and position, USCIS should ensure that individuals have the required skill set for the job. Many commenters stated that the definition should be expanded to include consideration of direct work experience. Similarly, many commenters urged DHS to consider adding language that allows USCIS to consider coursework and “courses of study,” along with an employer’s explanation of how a degree is directly related to a position. Another commenter requested that USCIS clarify that “courses of study” are relevant rather than the degree field, and that “job duties” are relevant rather than the job title of the position. Other commenters urged USCIS to consider the candidate’s certifications as a better indicator of their skill level instead of relying on the degree obtained.

A law firm expressed concern that the proposed “direct relationship” requirement might cause adjudicating officers to exercise “unintended” discretion in their willingness to look at the totality of a beneficiary’s

educational studies. The commenter suggested that the Department could codify existing practice and eliminate future ambiguity by modifying the proposed definition of “specialty occupation” to include a provision at the end that states, “The relatedness of specialized studies may be established through an evaluation of the coursework (and applications of that coursework) that comprise the degree.”

Response: DHS is codifying existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. Codifying the “direct relationship” requirement does not impact existing current practices that already allow for consideration of a beneficiary’s coursework, experience, and skills, which is a separate issue pertaining to a beneficiary’s qualifications for a specialty occupation. As explained above, USCIS will continue to separately evaluate whether the beneficiary’s actual course of study is directly related to the duties of the position, rather than merely the title of the degree. USCIS also will continue to consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D).

That said, DHS recognizes that the proposed regulatory text may have been confusing in some regards and is making some changes to address these concerns. First, DHS will not finalize the sentence, “The required specialized studies must be directly related to the position,” as this particular sentence may have incorrectly suggested that USCIS would only look to the degree even when evaluating a beneficiary’s qualifications to perform the specialty occupation instead of considering a beneficiary’s experience, training, and other pertinent skills.⁴⁰ *See* new 8 CFR 214.2(h)(4)(ii). DHS is also deleting references to “business administration” and “liberal arts” so as to not suggest that degree titles are determinative in the specialty occupation assessment. *See id.* DHS is also incorporating language to refer to the “duties of the position” to allay commenters’ concerns about the importance of examining the job duties of the position in addition to the degree title. *Id.* Consistent with current practice, USCIS will continue to

separately evaluate whether the beneficiary’s actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will continue to consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(4). Further, DHS is amending the proposed sentence, “A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields is directly related to the position,” to state that “A position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position.” New 8 CFR 214.2(h)(4)(ii). This revision is intended to better codify longstanding USCIS practice of interpreting the degree requirement “in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position.”⁴¹ DHS is also adding regulatory text to clarify the level of connection needed to meet the “directly related” requirement.⁴²

Comment: Several commenters asked DHS to clarify the standard for “directly related,” or alternatively, recommended that USCIS remove the “directly related” requirement from the “specialty occupation” definition altogether. A joint submission expressed concern that the proposed regulatory text would change adjudications such that the agency would no longer focus on job duties and courses of study as required by statute. One commenter suggested that either the Department issue a supplemental notice withdrawing the “directly related” provision from the revised definition of “specialty occupation,” or, at a minimum, that it issue a supplemental notice that “cur[re]s the specific identified deficiencies” and provides the public with adequate time to submit additional comments. Similarly, a legal services provider stated that while it accepted the requirement that a degree be “related” to the position, the inclusion of “directly” as a qualifier might limit eligibility for H–1B petitions, introduce more subjectivity among adjudicators, and lead to a rise in RFEs and denials. As such, the

³⁹ In any event, USCIS is not bound to follow the published decisions of a district court, even in cases arising in the same judicial district. *See, e.g., Matter of Rosales Vargas*, 27 I&N Dec. 745, 749 n.7 (BIA 2020); *Matter of K-S-*, 20 I&N Dec. 715, 718–19 (BIA 1993).

⁴⁰ Not finalizing this sentence, however, does not indicate a change to deviate from current practice, and the “directly related” requirement will be finalized elsewhere in the specialty occupation definition and criteria, consistent with current practice and case law.

⁴¹ *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”).

⁴² *See id.*

commenter concluded that USCIS should remove “directly” from the definition, as maintaining the requirement that a degree be “related” would be sufficient.

Some commenters provided alternative language to better clarify the standard for “directly related.” A professional association suggested that if USCIS were to include a term to dictate the level at which a degree must be related to the duties of the position, it should use “rationally related” instead of “directly related.” The commenter reasoned that the flexibility provided in the term “rationally related” is needed to adapt to today’s environment where occupations for certain specialties require diverse sets of expertise. An attorney also said that the proposed rule does not precisely define “direct relationship.” Referencing the NPRM’s text on page 72875 describing how petitioners would establish a “direct relationship,” the commenter requested that DHS clarify what “connection” means in the text. Referencing the sentence “The ‘specific specialty’ requirement is only met if the degree . . . provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position” on page 72875 of the NPRM, a professional association suggested USCIS replace “degree” with “education” and remove the word “directly” from the sentence. The commenter stated that these suggestions would be more consistent with the statutory definition of “specialty occupation” found in INA secs. 101(a)(15)(H)(i)(b) and 214(i)(1).

Response: To provide clarity on the level of connection needed to meet the “directly related” requirement, DHS is adding regulatory text to state that, “[d]irectly related” means that there is a logical connection between the degree, or its equivalent, and the duties of the position.” New 8 CFR 214.2(h)(4)(ii).

Considering this explanation, DHS declines to remove the “directly related” requirement from the specialty occupation definition. Moreover, the requirement to show that there is a direct relationship between the required degree in a specific specialty and the duties of the position is not a new requirement. Rather it is consistent with USCIS’ long-standing practice. This requirement helps maintain program integrity and DHS believes that reducing this to a lower standard by removing the “directly related” standard altogether could open loopholes in the program.

Comment: Several commenters discussed the evidentiary requirements associated with the “directly related” requirement for petitioners. A company

said DHS should clarify how an employer can demonstrate the beneficiary would fill a specialty occupation. Another company urged DHS to clarify the types of evidence that could be used to establish how a degree relates to an occupation. A few commenters similarly stated that the final rule should detail what additional evidence—such as coursework, transcripts, explanations of job duties, records of practical training, and credentials—could be submitted to demonstrate that beneficiaries are sufficiently qualified to complete the duties of the position. A company stated that the proposed rule provides no specific detail or criteria related to the level of connection that would be sufficient to demonstrate a direct relationship between the required degree field(s) and the duties of the position. The commenter asked DHS a variety of questions about the information that petitioners would be required to provide related to core coursework, technical skills and proficiencies, electives, and other topics. Specifically, the commenter asked if the connection is established by showing foundational relevance of coursework to the occupation’s duties, or if it requires connecting a specific set of technical skills and proficiencies gained from coursework to those used in day-to-day responsibilities. The commenter further asked if is appropriate to show coursework in technical skills and proficiencies that are essential precursors to those used on the job, whether the connection is relevant only if it involves the core curriculum, or whether electives carry equal weight. The commenter also asked what percentage of the beneficiary’s coursework must have the requisite connection, and how much explanation is necessary to properly establish any of these potential dimensions of connection.

A commenter expressed concern that the proposed requirement would incentivize USCIS adjudicators to issue additional RFEs, thus increasing the burden on employers. An attorney expressed similar concern that the “direct relationship” requirement would make the H-1B program more burdensome and inefficient by creating an additional evidentiary element. The commenter stated that certain occupations are open to individuals with various degrees, but that the “direct relationship” requirement would require employers to both show that the beneficiary possesses a relevant degree and provide documentation of how each degree field relates to the

proposed job. The commenter said USCIS did not explain how this would increase efficiency or how employers could meet this requirement. An attorney said that instead of requiring petitioners to show a “direct relationship” between the degree and duties of the position, USCIS should accept attestations from employers that a beneficiary’s skill set was obtained through their education. The commenter reasoned that the proposed requirement would create an additional burden on employers and waste USCIS time by requiring adjudicators to verify the connection between the job duties and the degree attained. The commenter concluded that USCIS should keep the current policy in place or provide more flexibility to employers.

Response: As noted above, DHS is adding regulatory text to clarify that “directly related” means “a logical connection between the degree, or its equivalent, and the duties of the position.” The burden of proof remains on the petitioner to demonstrate, by a preponderance of the evidence, a logical connection between the qualifying degree field(s) and the duties of the position. As in the past, the petitioner would need to provide information regarding the course(s) of study associated with the required degree(s) (or its equivalent), and the duties of the proffered position, and demonstrate the connection between the course of study and the duties of the position. Relevant supporting evidence could include, but is not limited to, information about the established curriculum of courses leading to the specified degree(s), course descriptions or syllabi, and information explaining how such a curriculum and coursework is necessary to perform the duties of the position. DHS reiterates that each petition is reviewed on a case-by-case basis taking into consideration the totality of the evidence, and, therefore, DHS will not require any specific type of evidence or an exact percentage of coursework to establish the requisite connection.

Commenters also asked whether relevant evidence of whether a position is a specialty occupation could include transcripts listing the beneficiary’s coursework, records of the beneficiary’s practical training, professional certificates, and other credible evidence demonstrating the beneficiary’s technical skills and proficiencies. USCIS may consider such evidence relevant if the petitioner were able to demonstrate that the submitted evidence were representative of the typical coursework, skills, and/or proficiencies needed to attain the required degree(s). Generally, however,

these types of evidence are more relevant to the determination of the beneficiary's qualification for the offered position, which is a separate issue from whether the petitioner's offered position qualifies as a specialty occupation. Further, a general attestation from the employer that a beneficiary's skill set was obtained through their education, without any additional evidence, may be insufficient to establish that a beneficiary is qualified to perform the duties of the position.

Comment: Several other commenters expressed concern with the "directly related" requirement because it would effectively require a degree in a further "subspecialty" (such as chemical engineering) rather than a degree within a broader specialty field (such as engineering). The commenters stated that this change would not be supported by the INA, as the "directly related" requirement does not exist within the statutory text of the INA, as reaffirmed in *InspectionXpert Corp. v. Cuccinelli*, 2020 WL 1062821 (M.D.N.C. Mar. 5, 2020). In that case, the commenters stated, the court held that the INA defines "professions," which are the basis of the specialty occupation requirement, at the "categorical level" rather than the subspecialty level and "specifically includes" that "an engineering degree requirement meets the specialty occupation requirement." The commenters said that the proposed rule repeats the same error as the previous rule, specifically in its treatment of engineering degrees. As a result, the commenters concluded that the proposed rule conflicts with the INA. One of the commenters added that the proposed rule's "caution" that the "directly related" requirement is not construed as "requiring a singular field of study" did not align with *InspectionXpert Corp.*, as it "does not cure the error of imposing a subspecialty requirement in the first place."

A trade association and a law firm had significant concerns with the NPRM's discussion of engineering degrees, saying such language was "impermissibly narrow" and inconsistent with *InspectionXpert Corp.*'s holding "that the statute does not require specialty occupations to be subspecialties." These commenters urged USCIS to recognize "the long-standing practice of allowing employers to build a record to establish the specialized needs of their positions to qualify as specialty occupations, including those where the employer believes that the requirements of a particular position include a number of

engineering degrees or a non-specified engineering degree."

Response: With this final rule, DHS is adding language to the definition of "specialty occupation" clarifying that the required specialized studies must be directly related to the position. While commenters are correct that INA section 214(i), 8 U.S.C. 1184(i), does not use the term "directly related," the statute does refer to application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. DHS interprets the "specific specialty" requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The "specific specialty" requirement is only met if the degree in a specific specialty or specialties, or equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"); *Caremax Inc. v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) ("A position that requires applicants to have any bachelor's degree, or a bachelor's degree in a large subset of fields, can hardly be considered specialized."). Because an occupation may involve application of multiple bodies of highly specialized knowledge, "specific specialty" is not limited to one degree field, or its equivalent, but may include multiple degree fields, or equivalents, that provide the body of highly specialized knowledge to be applied when performing the occupation. The requirement that each degree field, or its equivalent, be directly related to the position is the best interpretation of the statutory text and consistent with existing USCIS practice.⁴³

⁴³ See, e.g., *Madkudu Inc. v. USCIS*, No. 5:20-cv-2653-SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4 ("if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (e.g., an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods . . . , or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii)."),

DHS does not agree with commenters that the requirement that the specialized studies must be directly related to the position is inconsistent with the district court's unpublished decision in *InspectionXpert v. Cuccinelli*.⁴⁴ In that case, the court found that USCIS' interpretation of the term "degree" in 8 CFR 214.2(h)(4)(iii)(A)(1) as "requiring a degree in one singular subspecialty" was not entitled to deference. Again, this final rule revises 8 CFR 214.2(h)(4)(iii)(A)(1) so that it no longer ambiguously refers to "a . . . degree" and codifies that a position may allow for a range of qualifying degree fields, which is consistent with the court's holding in *InspectionXpert*.⁴⁵ DHS acknowledges that the district court in *InspectionXpert* also held that "in contrast to a liberal arts degree, which the Service deemed 'an [in]appropriate degree in a profession' because of its 'broad[ness],' . . . an engineering degree requirement meets the specialty occupation degree requirement." ⁴⁶ DHS is not suggesting that engineering, or any of the various fields of engineering, are not specific specialties. Nor is DHS suggesting that employers could never establish that "any engineering degree" is sufficient to qualify for some positions. But DHS is revising the regulation to clarify that the petitioner must establish how each qualifying degree field provides a body of highly specialized knowledge that is directly related to the position. In some instances, such as the quality engineer position in *InspectionXpert*, it may be that any engineering degree provides the body of highly specialized knowledge needed to perform the job. But that does not mean that in all cases, accepting "any engineering degree" as sufficient to qualify for the position would provide a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). Where a petitioner will accept a range of qualifying degree fields, the petitioner must establish that each of those fields is directly related to the duties of the position. This final rule balances the District Court for the

<https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf> (last visited Oct. 23, 2024).

⁴⁴ 2020 WL 1062821 (M.D.N.C. Mar. 5, 2020), report and recommendation adopted, 2020 WL 3470341 (Mar. 31, 2020).

⁴⁵ *InspectionXpert*, 2020 WL 1062821, at *26 (noting "the Agency's longstanding construction, which recognizes that a position can qualify as a specialty occupation even if it permits a degree in more than one academic discipline"), report and recommendation adopted, 2020 WL 3470341 (Mar. 31, 2020).

⁴⁶ *Id.*

Middle District of North Carolina's unpublished decision in *InspectionXpert* with other court decisions, including those of the District Court for Northern District of California in *Caremax* and the First Circuit Court of Appeals in *Royal Siam*, to revise the criteria at 8 CFR 214.2(h)(4)(iii)(A) so that it reflects the best interpretation of the statute and provides greater clarity, transparency, and predictability for petitioners and USCIS officers.

Comment: A commenter stated that additional emphasis should be given in the final regulation for beneficiaries with degree minors (or other equivalents) in the subject matter to qualify for H-1B status, as allowed by the "Madkudu settlement." Specifically, the commenter expressed concern that the reference to the "Madkudu settlement" in footnote 18 was a negative remark from the settlement agreement. The commenter concluded that it appeared as if USCIS wanted to "bury the implications of Madkudu."

Response: DHS declines to codify an additional emphasis for degree minors. However, this does not mean that a minor cannot serve as further specialization for a general degree or in other circumstances. As stated in the *Madkudu Inc. v. USCIS* settlement agreement, if the record shows that the petitioner would consider someone as qualified for the position based on less than a bachelor's degree in a specialized field directly related to the position (e.g., an associate's degree, a bachelor's degree in a generalized field of study without a minor, major, concentration, or specialization in market research, marketing, or research methods, or a bachelor's degree in a field of study unrelated to the position), then the position would not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. 1184(i)(1) and 8 CFR 214.2(h)(4)(ii).⁴⁷ Conversely, if the petitioner identifies a general degree with an official major, minor, concentration, or specialization, and establishes how that general degree plus the major, minor, concentration, or specialization equates to a bachelor's degree in a specific specialty directly related to the duties and responsibilities of the position, the position may qualify as a specialty occupation. Further, DHS is finalizing regulatory text stating that, "a position is not a specialty occupation if attainment of a general degree, without further specialization, is

sufficient to qualify for the position." 8 CFR 214.2(h)(4)(ii). As this additional regulatory text is in line with the *Madkudu* settlement agreement,⁴⁸ DHS disagrees with the commenter's allegation that it is "burying the implications of Madkudu" or that further revisions are needed.

Comment: Numerous commenters discussed the "directly related" requirement's relationship with E.O. 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." A commenter stated that the "directly related" requirement was a "direct violation" of E.O. 14110, and suggested USCIS needed to instead expand the definition to achieve the goals of the E.O. A professional association expressed concern that while the E.O. calls for "modernizing immigration pathways for experts in AI," the proposed rule would potentially exclude experts from H-1B eligibility by focusing on the name of their degree and not the "sum total of their courses of study and experience." The commenter referenced an article stating that adjudicators could deny H-1B petitions where the degree does not match what adjudicators believe is required to perform the role, but that in "fast-evolving jobs like those in AI," the requirements to perform the role could change quickly. The professional association concluded by referencing examples of how these issues "have already been highlighted in previous litigation involving similar regulatory proposals." A Federal elected official also expressed concern that the requiring proof that a degree is "directly related" to the duties of a position created unnecessary hurdles for employers that contradicted trends in hiring across emerging technology fields, and thus, would contravene the directive of E.O. 14110. Another commenter added that this provision would deprive the economy of the AI, technology, and national security talent that E.O. 14110 aimed to attract.

An advocacy group stated that the proposed language violated E.O. 14110 by limiting what degrees and positions could qualify for specialty occupations, preventing individuals from working in the United States, and therefore making it less likely the United States could remain a top destination for the world's talent. The commenter stated that the proposed rule could have the "exact opposite effect" of E.O. 14110 by

allowing adjudicators to deny H-1B petition where the degree field does not "precisely match" what adjudicators believe is required to perform the role. The commenter added that currently USCIS often looks at actual coursework rather than the degree field, which would likely change if the proposed language took effect in its current form. Similarly, a trade association stated that the "directly related specific specialty" language ran counter to E.O. 14110 and would encourage adjudicators to deny H-1B petitions where the degree field does not match what they believe is required to perform the role.

A company stated that the proposed "directly related" requirement would not allow a path for skills or relevant coursework to supplement what the specific degree title might be missing. The commenter stated that this seems to run counter to E.O. 14110, as employees seeking to fill positions in emerging technology, and specifically AI, may not have a degree with a "directly related" name if they have completed extensive coursework that has resulted in the acquisition of highly specialized knowledge. A professional association and a joint submission expressed concern with the "directly related" degree requirement on the basis that it would make it "less likely, if not impossible" for E.O. 14110 to be satisfied. Both commenters also expressed opposition to the proposed rule's "cautioning" to employers about "requiring the type of quantitative and problem-solving skills developed in an engineering degree as unlikely to be 'directly related' to a qualifying H-1B position." The joint submission further stated that because "emerging technologies change much faster than degree programs" and the primary degrees typically required for core AI job duties are business administration, computer science, engineering, mathematics, and statistics, the proposed change might result in individuals who are hired to integrate AI into other fields not having degrees that adjudicators presume to be "directly related" to their offered position. As a result, the professional association and the joint submission said the "directly related" proposals in both the definition and criteria would make it difficult for DHS to achieve section 5.1 of E.O. 14110's goal of attracting and retaining foreign-born STEM experts working in emerging technologies. A company similarly stated that the Department's "insistence" on a "direct relationship" appeared to contradict the directives of section 5.1 of E.O. 14110. Another

⁴⁷ See *Madkudu Inc. v. USCIS*, No. 5:20-cv-2653-SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4, <https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf> (last visited Oct. 23, 2024).

⁴⁸ See *Madkudu Inc. v. USCIS*, No. 5:20-cv-2653-SVK (N.D. Cal. Aug. 20, 2021) Settlement Agreement at 4, <https://www.uscis.gov/sites/default/files/document/legal-docs/Madkudu-settlement-agreement.pdf> (last visited Oct. 23, 2024).

commenter expressed concern that adjudicators would deny H-1B petitions in situations where an individual's degree does not match what the adjudicators think are the requirements to perform the position. The company added that because emerging technologies might not yet have a degree program in existence, the "direct relationship" requirement might create uncertainty for employers in these fields when deciding whether to sponsor individuals for H-1B status.

Similarly, a law firm stated that the proposed language would make it more difficult for foreign nationals seeking to be employed in STEM fields to qualify for an H-1B visa. Specifically, the commenter said that it was a common industry standard for most occupations in STEM fields to consider specialized experience or training in addition to a generalized degree, which would not be permitted under the proposed rule. The commenter stated that this would undermine the administration's efforts to attract and retain foreign talent in STEM fields.

A law firm and another commenter referenced an attorney's argument that the "direct-relatedness requirement" requirement would force the company to "elevate form over substance" and inhibit their company's recruitment for multi-disciplinary teams, such as those in AI, resulting in a loss of productivity, creativity, and innovation. The commenters stated that this outcome would be "precisely opposite" of the administration's goals as stated in E.O. 14110 because they would restrict an immigration program that would attract global talent in the AI space. The commenters further stated that the provision was incompatible with the business model of the IT consulting industry and would negatively impact American businesses. Similarly, a professional association stated that the mandate of E.O. 14110 for DHS to update the H-1B program could be obstructed by the "direct relationship" requirement. The commenter concluded that such a requirement would impede not only the AI initiatives outlined in E.O. 14110 but also other initiatives needed to ensure "American competitiveness and security." A business association said that the proposed language would prevent employers from obtaining needed talent and cross-training employees and undermine the goal of attracting and retaining talent in AI and other emerging technologies.

Response: DHS disagrees that requiring a direct relationship between the required degree field(s) and the duties of the position would violate E.O.

14110 or create additional hurdles for foreign nationals seeking to work in the AI or STEM fields. As stated previously, and further clarified with additional regulatory text in this final rule, DHS is codifying and clarifying long-standing USCIS practice. Regarding the specific degrees, the examples in the NPRM referred to the educational credentials by the title of the degree for expediency. However, USCIS will continue to make individualized determinations in each case. Furthermore, this rule does not change current USCIS practice to examine skills and experience in the course of determining a beneficiary's qualifications. USCIS will continue to evaluate whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. *See* 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D).

Comment: Multiple commenters said that the regulatory text regarding a "general degree" would lead USCIS to not evaluate the actual coursework and other specializations that underlie degrees and instead exclude many degrees based solely on their titles, contradicting current USCIS practices. For instance, a multi-association submission stated that the proposed regulation fails "to accurately capture the contours of preexisting agency practices" and urged DHS to revise the regulatory text to ensure that adjudicators "examine the job duties of the position offered by the employer and the courses completed in a degree-granting program (U.S. baccalaureate or higher, or equivalent) to confirm that a specific body of knowledge is required to perform the job duties and that the beneficiary has attained that body of knowledge."

A law firm stated that due to specialized concentrations and relevant coursework, degrees like business administration that might appear as a "general degree" could contain highly specialized coursework that should be deemed directly related to a position. The commenter added that there should be explicit guidance recognizing that specialized knowledge for a specialty occupation is obtained from coursework, as shown in a transcript, and might not be obvious from the face of the degree itself. Specifically, the commenter suggested that DHS allow certain positions to accept and require that "highly specialized knowledge"

can be attained from general degrees through specialized coursework, so long as the knowledge is "directly relevant" to the specific job requirements. Similarly, a law firm suggested that petitioners be provided the opportunity to establish a relationship between the duties of the position and the beneficiary's course of studies or work experience. An advocacy group stated that implementing the proposed change without directly clarifying this relationship could establish a confusing legal standard.

Several commenters concluded that USCIS should allow for the demonstration of specialized knowledge through coursework, skills, experience, and other means. A union stated that if an occupation requires a generalized degree in addition to specialized experience or training it should still qualify as a specialty occupation. Similarly, an advocacy group referenced an attorney's argument, which stated that an occupation requiring "a generalized degree but specialized experience or training" should still qualify as a specialty occupation. An individual commenter additionally encouraged DHS to clarify the extent to which coursework can count toward equivalence to a degree in a specific specialty, reasoning, for example, that degrees in math, physics, chemistry, biology, or social sciences may involve courses found in computer science programs. The commenter said that these courses should be considered when determining whether a beneficiary meets the specialty occupation requirements.

A trade association stated that many degree programs do not allow for a specific specialization to be declared, and thus, demonstrate through coursework and other means their level of specialization. Another commenter suggested that USCIS consider accepting on-the-job training and clarify whether petitioners have to seek a combination of education and experience to meet the "general degree" requirement.

Response: DHS is finalizing the regulatory text to state that, "A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position." New 8 CFR 214.2(h)(4)(ii). In response to comments, DHS has decided not to finalize the references to "business administration" and "liberal arts" so as not to suggest that a degree's title is determinative. However, USCIS will continue to analyze the "specific specialty" requirement to determine if the proffered position is a specialty occupation. If the minimum entry

requirement for a position is a general degree without further specialization (such as a major, minor, concentration, or specialization) or an explanation of what type of degree is required, the “degree in the specific specialty (or its equivalent)” requirement of INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), would not be satisfied. The opposite is also true: if a position requires a general degree with specialization, the position may qualify as a specialty occupation.

DHS disagrees with the comments that codifying the regulatory text regarding a “general degree” would lead USCIS to ignore coursework and other means to demonstrate specialization and instead exclude degrees based solely on their titles. As with current practice, USCIS will not rely on a degree title and will continue to consider coursework in determining if a degree is a specialized degree and if the position is a specialty occupation. USCIS will also consider coursework to evaluate whether the beneficiary is qualified for the position, which is a separate determination from the specialty occupation determination.

Comment: A commenter stated that the “general degree” language could become problematic in situations where professionals in emerging technologies, such as AI, have general degrees that are not specialized in the emerging field. Similarly, a trade association suggested that the proposed exclusion of general degrees be adjusted to accommodate situations where a person’s general degree does in fact qualify them for a specialty occupation. The commenter stated that almost half of individuals with STEM degrees work in non-science and engineering occupations, and it is thus apparent that STEM expertise is prevalent across various job types. A different trade association suggested that USCIS include language in the final rule emphasizing that maximum flexibility should be applied in cases where the petitioner intends to employ an individual involved in AI or other emerging technologies.

A law firm stated that the definition of “specialty occupation” must account for the rise of interdisciplinary programs that are augmenting traditional degrees and fields of study. The commenter suggested that USCIS should recognize these programs are also “specialized.”

Response: DHS declines to create a carve out or regulatory language to “emphasize maximum flexibility” specifically for AI and emerging technologies. As stated previously, if the minimum entry requirement for a position is a general degree without further specialization or an explanation of what type of degree is required, the

“degree in the specific specialty (or its equivalent)” requirement of INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), would not be satisfied.

USCIS separately evaluates the beneficiary’s qualifications, including whether the beneficiary’s actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4). Therefore, if a petitioner can demonstrate that the beneficiary has specialized experience and training in the specific specialty, such as AI or STEM fields, then the petitioner may be able to demonstrate that the beneficiary qualifies for the proffered position.

Comment: A trade association said the “general degree” language would lead to inconsistent adjudications, higher rates of RFEs, and a potential increase in denials. The commenter suggested that USCIS clarify in the final rule that the revised language should not result in a narrowing of eligibility.

Response: Since this language merely codifies current practice and longstanding case law, DHS does not anticipate that the revised language will significantly impact or restrict who is eligible for an H–1B or result in an increase in RFEs or denials.

Comment: Numerous commenters discussed the inclusion of specific references to “business administration or liberal arts” degrees in the proposed definition of “specialty occupation.” Several commenters requested that USCIS remove references that identify particular types of degrees or courses of study. A law firm and a professional association stated that the final rule should not single out any degree type. Similarly, a university stated that because colleges and universities have autonomy in the naming of degree programs and their curricula, it would be problematic and unnecessary to name specific fields of study as too broad or general to qualify for a position in a specialty occupation.

Numerous commenters expressed concern with the classification of a business administration degree as a “general degree.” A few commenters suggested that DHS remove the reference to “business administration” in the proposed “general degree” requirement. An advocacy group expressed concern that the proposed language would disqualify individuals

with a Master of Business Administration (MBA) for “arbitrary and capricious” reasons.

Numerous commenters said that business degrees should not be considered “general” because they include specialized coursework and provide individuals with skills that are sought after by employers and required to perform job duties. A commenter requested that USCIS clarify that a degree in “business administration” could be sufficient for a specialty occupation, as companies need certain skills, such as business strategy, that can only be obtained through a business degree. A legal services provider recommended against a blanket stance on degree requirements in the proposed definition, citing the potential for “multi-faceted” positions that may call for a broad-based business administration degree rather than a more specialized degree. A university stated that the “general degree” language drew a “false equivalenc[y]” between liberal arts degrees and business administration degrees. The commenter said that while positions that require liberal arts degrees could be reasonably argued to seek a level of general intellectual skill, the same could not be said of positions that require a degree in business administration. The commenter added that the proposed rule includes “business specialties” within the list of “[bodies] of highly specialized knowledge in fields of human endeavor,” and, thus, it would be inconsistent to suggest that a degree in business administration was not sufficient to qualify for a specialty occupation.

A few commenters said that the exclusion of business degrees from the “specialty occupation” definition was misguided and based on outdated notions of business degrees being too generalized to qualify for H–1B classifications. A couple of these commenters suggested that USCIS allow employers to establish that a beneficiary’s qualifications meet the specialty occupation standards by maintaining a business degree with a formal concentration, specialized coursework, or professional experience. A professional association said that degrees such as business administration should not be excluded from the definition of a “specific specialty,” as business administration degrees are generally characterized by depth and complexity, which provide their graduates with relevant specialized knowledge and are highly sought-after by U.S. employers. The association expressed concern that the proposed language was not in conformity with

how employers view degrees when assessing applications.

Some commenters, including a joint submission, a law firm, and an advocacy group, stated that the characterization of business administration degrees as a “general degree” would be inconsistent with trends in MBA recruitment and employment. Referencing data, the commenters said that 94 percent of individuals with MBAs work in management or management-related occupations related to their degree. As such, the commenters stated that business administration is a specialized field of study, and thus, it is incorrect to consider business administration a “general degree.” A couple of these commenters added that the proposed language would cause economic harm by removing the ability for companies to hire these individuals and by discouraging foreign nationals from attending MBA programs in the United States.

Referencing the proposed rule’s example that a “general business degree for a marketing position would not satisfy the specialty requirement,” a company said that this example offers an incorrect assessment of how a business degree and the coursework entailed “directly relates” to a marketing position. The commenter further noted that employers typically view a business degree as a normal requirement for a marketing position, universities offer business degrees with core requirements that are directly related to marketing roles, and occupation guides reference marketing jobs as potential careers for individuals with business degrees.

A law firm stated that numerous district court decisions have held that a bachelor’s degree in business administration was a “general-purpose degree that did not satisfy the “specialty occupation” definition. However, the commenter stated that because an MBA is a graduate degree, MBA holders should not be required to document “further specialization.”

A joint submission suggested that DHS not codify the presumption against business administration degrees because the statutory definition covers the attainment of a “body of highly specialized knowledge” through a major, minor, concentration, or coursework, and as such, business administration degrees should be treated the same as other degree programs.

Response: In response to these comments, DHS has decided not to include the references to “business administration” and “liberal arts” in the final regulatory text regarding

generalized degrees. These changes recognize that degree titles may change over time and singling out specific degrees by their title alone may cause confusion.

DHS confirms that it does not consider a master’s degree in business administration (MBA) generally to be a general degree, and DHS does not equate a master’s degree in business with a general degree in business administration. When DHS referenced business administration and liberal arts degrees in the NPRM this was meant to reference a bachelor’s degree in business administration, not a master’s degree. Note, however, that even though DHS is not codifying “business administration” in the final regulatory text, this does not mean that DHS views an unspecified bachelor’s in business administration degree as a specialized degree. Instead, the decision not to codify “business administration” as an example of a general degree represents DHS’s acknowledgement that the title of the degree alone is not determinative and that titles may differ among schools and evolve over time. This is also reflected in the regulatory text and the inclusion of “without further specialization,” as that language is intended to reflect that some degrees that may otherwise be considered as a general degree could rise to the level of a specialized degree if the course of study includes a major, minor, concentration, or other specialization in a specialized field of study and the petitioner establishes how that general degree plus the major, minor, concentration, or specialization equates to a bachelor’s degree in a specific specialty, and how each identified specialization provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of the position.

Comment: A few commenters discussed the “general degree” requirement in relation to engineering degrees. Citing a case as indicating that engineering requires “a body of highly specialized knowledge,” a trade association concluded that general engineering degrees should be sufficient to support H–1B petitions. The commenter stated that Congress intended H–1B visas to be responsive and flexible to accommodate industry needs and that the proposal would be unduly restrictive.

A few commenters referenced the example in the proposed rule that “any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement.” Some commenters stated that this language was inconsistent with the INA, which

defines the term “profession” to include “engineers” at a “categorical level.” A law firm said that the U.S. Bureau of Labor Statistics Occupational Outlook Handbook (OOH) references an engineering degree as a degree in a related field for a software developer position. The commenter stated that although universities offer distinct engineering majors, and, thus, it would be unlikely for employers to consider an applicant with a general engineering degree for a software developer (or other specialized role), depending on the coursework and other knowledge attained by the applicants, an individual with a general engineering degree could meet the requirements of the position. The commenter concluded that possession of a general degree in engineering should not automatically be deemed insufficient for a specialty occupation.

A trade association suggested that USCIS issue guidance confirming that any engineering degree would support any engineering position in meeting the definition of “specialty occupation.” The commenter reasoned that this would reduce the monetary costs and time associated with RFEs. The commenter further stated that employers of engineers are aware of the requirements needed for the roles for which they are hiring, that these roles are specialty occupations, and that, without this guidance, employers would not be able to find the talent they require.

Response: USCIS regularly approves H–1B petitions for qualified beneficiaries who are to be employed as engineers. However, DHS declines to codify or otherwise state that any position requiring any engineering degree or what the commenter describes as “a general engineering degree” will generally qualify as a specialty occupation. In explaining in the NPRM that the requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement, DHS is not saying that engineering degrees are not acceptable for specialty occupations. Rather, DHS is explaining that the petitioner would have the burden to establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly relating to the duties and responsibilities of a software developer position. This is because the requirement of any engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of

seemingly unrelated fields. Conversely, if the petition requires an engineering degree with a specific specialty, such as a major, minor, concentration, or specialization, that is directly related to the duties of the position, the petitioner may be able to satisfy the statutory and regulatory requirement.

DHS acknowledges that INA section 214(i) includes “engineers” as one of the occupations listed as requiring the theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor. However, this does not mean that all positions that state that any engineering degree would be acceptable to qualify for the position means that the position is an engineer. DHS is not suggesting that engineering, or any of the various fields of engineering, are not specific specialties. Nor is DHS suggesting that employers could never establish that “any engineering degree” is sufficient to qualify for some positions. Rather, DHS acknowledges that an engineering degree is a specialized degree. However, just because an engineering degree is a specialized degree does not mean that it is always directly related to the position, which is a different issue. DHS is revising the regulation to clarify that the petitioner must establish how each qualifying degree field provides a body of highly specialized knowledge that is directly related to the position. In some instances, such as the quality engineer position in *InspectionXpert*, it may be that any engineering degree provides the body of highly specialized knowledge needed to perform the job. But that does not mean that in all cases, accepting “any engineering degree” as sufficient to qualify for the position would provide a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A). The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the INA.

Comment: Several commenters discussed the legal authority of naming specific degrees, such as business administration or liberal arts degrees, as insufficient for H-1B status. A law firm and trade association added that disfavoring specific degrees would contradict the administration’s National Security guidance, strategy, and E.O. 14110. A university stated that singling out business administration as a degree that is insufficient to qualify for a specialty occupation contradicts the

statutory definition of “specialty occupation” in section 214(i) of the INA and the purpose of the NPRM.

A law firm stated that specifically referencing business administration or liberal arts degrees by name as insufficient to qualify for a specialty occupation violates precedent case law. The commenter referenced *Residential Finance Corporation v. USCIS*, which held that degree field names could not control whether an individual qualifies for H-1B status, and that USCIS must consider the “highly specialized knowledge” obtained through the courses taken to earn the degree. A joint submission stated that none of the cases referred to throughout the NPRM to justify the inclusion of “business administration” in the “general degree” language serve as the precedent case for this assertion or explain its origin. A law firm and joint submission stated that the cases cited by USCIS can be traced to *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm’r 1968), but noted that both *Ling* and *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) preceded the development of the “specialty occupation” concept and that neither decision references the terms “H-1B” or “specialty occupation.” The commenters further stated that *Ling* does not state that a business administration degree is a “generalized degree,” but instead that the profession of business administration is a generalized field that must be analyzed by the “*Ling* test”—that the degree is a “realistic prerequisite” for entry into that field. The commenters concluded that a business administration degree could act as a “realistic prerequisite” for a position and, thus, that the proposed rule’s provision that a business administration degree could not support H-1B eligibility was not found in legal precedent.

Response: In response to commenters’ concerns, DHS is not finalizing the specific references to “business administration and liberal arts” in the regulatory text. The decision not to finalize this language recognizes the commenters’ concerns about not relying on a degree’s title, consistent with the District Court for the Southern District of Ohio’s observation in *Residential Finance Corporation v. USCIS* that “[t]he knowledge and not the title of the degree is what is important.”⁴⁹ However, the decision not to finalize the references to “business administration and liberal arts” should not be misinterpreted as indicating a change in USCIS’ longstanding practice not to recognize a bachelor’s degree in

business administration or liberal arts, without further specification, as a specialized degree.⁵⁰ Consistent with longstanding agency practice and legal precedent, although a general-purpose bachelor’s degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a conclusion that a particular position qualifies for classification as a specialty occupation. *See, e.g., Royal Siam Corp.*, 484 F.3d 139, 147 (1st Cir. 2007) (“The courts and the agency consistently have stated that, although a general-purpose bachelor’s degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa.”); *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1162–1164 (D. Minn. 1999) (the former INS did not depart from established policy or precedent when concluding that a general degree, such as a business administration degree, without more, does not constitute a degree in a specialized field); *Raj & Co. v. USCIS*, 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) (it is “well-settled in the case law and USCIS’s reasonable interpretations of the regulatory framework” that “a generalized bachelor[s] degree requirement is [in]sufficient to render a position sufficiently specialized to qualify for H-1B status.”); *Vision Builders, LLC v. USCIS*, No. 19–CV–3159, 2020 WL 5891546, at *6 (D.D.C. Oct. 5, 2020) (citing *Raj*).

Further, these cases are consistent with *Matter of Ling*, 13 I&N Dec. 35, 36 (Reg’l Comm’r 1968) (characterizing “business administration” as “a broad field”) and *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (recognizing a bachelor’s degree in business administration, without further specialization, as “a degree of generalized title.”). Although these cases predate the current specialty occupation framework enacted by the Immigration Act of 1990 (IMMACT), Public Law 101–649 (Nov. 29, 1990), they are relevant to the extent that they demonstrate the agency’s longstanding view that “business administration” is a generalized field, which has since been reaffirmed in numerous court cases as cited above.⁵¹

⁵⁰ Note, however, that USCIS generally recognizes a master’s or higher level of degree in business administration as a specialized degree.

⁵¹ With respect to *Matter of Michael Hertz Assocs.*, INS’ prior requirements for members of the professions that were in effect at the time of that

⁴⁹ 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012).

Comment: Multiple commenters suggested that USCIS remove the “general degree” requirement in its entirety from the proposed definition of “specialty occupation.” An advocacy group stated that the Department should abandon narrow regulatory language asserting that generalized degrees are insufficient to qualify for a specialty occupation.

A trade association suggested that the language within the “specialty occupation” definition that restricts qualifications to specific degrees or specialties be removed and updated with language that requires “general degrees” to be accompanied by documented experience. Similarly, an advocacy group suggested DHS add language codifying current practices, including requiring adjudicators to consider the underlying coursework of a degree along with an employer’s explanation of how a degree is directly related to a position. Another trade association expressed concern with the impact of the proposed “general degree” requirements on educational institutions. Specifically, the commenter said that USCIS’ proposal to exclude “general” programs from H–1B eligibility would devalue institutions’ degree programs and harm students who have diversified their studies through course selection and other opportunities. The commenter suggested that, alternatively, USCIS could codify existing practices that allows for generalized degrees in addition to specialized experience and training in order to qualify for specialty occupations.

Response: In response to commenters’ concerns, DHS is not finalizing the reference to the specific degrees of “business administration and liberal arts” in the regulatory text. However, DHS declines to adopt the other suggested revisions, such as removing the “general degree” regulatory text in its entirety.

Regarding the suggestions that the regulation allow USCIS to consider coursework or allow for generalized

degrees in addition to specialized experience and training in order to qualify for specialty occupations, DHS reiterates that the changes to the specialty occupation definition do not impact how USCIS evaluates a beneficiary’s qualifications for a specialty occupation. USCIS will continue to consider the underlying coursework of a degree, as well as specialized experience and training, along with the employer’s explanation of how a degree is directly related to a position.

Comment: Several commenters expressed support for allowing a broad range of degrees, but also expressed concern about the requirement to demonstrate that each of those qualifying degree fields must be directly related to the proffered position. An advocacy group recommended that the proposed provision require that the range of degrees supporting an H–1B position be directly related to the occupation through the coursework involved in obtaining the degree, rather than simply by the degree itself. A law firm agreed, stating that particular coursework within a business degree, for example, could provide the specialized knowledge sufficient to support an H–1B petition. A research organization likewise stated that particular coursework could be especially relevant to occupations within AI development because of the relevance to AI of disciplines outside of computer science such as physics, philosophy, and linguistics.

Response: In explaining that a range of qualifying degrees in multiple disparate fields of study may be listed as the minimum entry requirement for a position, DHS did not intend to discount coursework that may have been involved in obtaining the degree. DHS again reiterates that USCIS will continue to separately evaluate whether the beneficiary’s actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D). The petitioner has the burden of establishing how each field of study is in a specific specialty providing “a body of highly specialized knowledge” directly related to the duties and responsibilities of the particular position.

Comment: Several commenters stated that requiring petitioners to delineate

how multiple degrees may support a specialty occupation is overly burdensome. The commenters recommended that petitioners only be required to justify why the degree of a potential beneficiary in a particular case relates to the occupation at issue.

Response: In requiring that the petitioner demonstrate that the required specialized studies are directly related to the position, DHS is further clarifying the definition of specialty occupation to better align with the statutory definition of that term. As explained in the NPRM, a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position. 88 FR 72870, 72876 (Oct. 23, 2023).

Determining whether the position is a specialty occupation is a separate analysis from determining whether the beneficiary is qualified for the position. The petitioner is required to do both. To only require the petitioner to justify that the degree of the beneficiary relates to the occupation conflates these two requirements. DHS does not agree that it is overly burdensome for the petitioner to establish how each field of study is in a specific specialty providing “a body of highly specialized knowledge” directly relates to the duties and responsibilities of the particular position, as is current agency practice, and as required by the INA and the regulatory definition.

iii. Amending the Criteria for “Specialty Occupation”

Comment: A commenter voiced appreciation for clarifying the specialty occupation criteria, which will alleviate confusion among U.S. employers and their employees. A company expressed general support for several modifications to 8 CFR 214.2(h)(4)(iii)(A). Another company also expressed support for clarifying the four regulatory prongs found at 8 CFR 214.2(h)(4)(iii)(A), writing that the proposed text eliminates redundancy between the second and fourth prongs.

Response: DHS appreciates the feedback and agrees that these revisions will provide clarity on the criteria for “specialty occupation,” alleviate confusion for many petitioners, and eliminate redundancy between the second and fourth prongs.

Comment: A trade association said that stringent criteria for evaluating specialty occupations could result in increased documentary burdens for petitioners and employers. A law firm generally stated that the proposed

case mirrors the current definitions and standards for specialty occupation. See “Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,” 56 FR 31553, 31554 (July 11, 1991) (proposed rule) (proposing to change all references from “profession” to “specialty occupation,” but explaining that “the same standards” will apply and that “[t]he definition and standards for an alien in a specialty occupation mirror the Service’s current requirements for aliens who are members of the professions”); see also “Temporary Alien Workers Seeking H–1B, O, and P Classifications Under the Immigration and Nationality Act,” 57 FR 12179 (Apr. 9, 1992) (interim final rule) (finalized the current definition of “specialty occupation” at 8 CFR 214.2(h)(4)(ii)).

amendments to the specialty occupation criteria would reduce H-1B approval rates and negatively impact the biotechnology, information technology, space technology, and financial services sectors.

Response: Since DHS is codifying current practice through this provision, DHS does not anticipate that amending the criteria for specialty occupations will create additional documentary burdens for employers, reduce approval rates, or negatively impact particular industries or sectors. The revisions are intended to codify and clarify current practices and provide H-1B petitioners with more certainty as to the adjudication standards that apply to their petitions.

Comment: Several commenters expressed general support for the proposed definition of “normally.” A couple of law firms cited *Innova Sols., Inc. v. Baran*, in supporting the proposed definition of “normally.” An advocacy group commented that the proposed definition of “normally” would be an improvement and cited the previous definition of “normally” to mean “always” as a misinterpretation of the term that the proposal would guard against. A company agreed and stated that it has received numerous RFEs regarding H-1B petitions based on the misinterpretation of “normally” to mean “always.” A trade association supported the proposal as establishing a clear guideline for adjudicators, aligning the regulations with current agency practices and legal precedents, and ensuring a “more nuanced approach” for when the variety and complexity of the roles do not fit within a rigid framework for specific degrees. The trade association noted that change would be especially beneficial to higher education institutions.

Response: DHS agrees that the new definition of “normally” to clarify that “normally” does not mean “always”⁵² is an improvement that helps to ensure flexibility in adjudications. DHS also agrees that this change will help establish a clear guideline for adjudicators and align the regulations with current agency practices and legal precedents.

Comment: Several commenters expressed support for the change to clarify “normally,” particularly as employers increasingly look to consider skills-based hiring practices without running the risk that such practices would negatively impact their ability to obtain H-1B workers. For example,

while expressing support for the proposed definition of “normally,” a law firm expressed appreciation for USCIS’ responses to its questions around recruitment documentation in a recent public engagement and requested that those responses also be included in the proposed rule. As part of its responses, the commenter stated that USCIS recognized “that no one factor alone, such as formal recruitment documentation, is determinative as to whether or not a particular position qualifies as a specialty occupation.” A commenter from academia agreed and requested that the definition of “normally” specify that “[n]o one factor alone, such as formal recruitment documentation, is determinative as to whether a particular position qualifies as a specialty occupation.” Another law firm agreed and recommended several other changes to the proposed definition of “normally” to ensure that skills-based hiring initiatives and H-1B employment do not conflict.

Response: DHS agrees that the clarification of “normally” will allow petitioners to explore skills-based hiring programs and apprenticeship programs, where appropriate. As mentioned in the NPRM, DHS understands the importance of attracting and hiring individuals who possess certain skills. 88 FR 72870, 72871 (Oct. 23, 2023). The flexibility inherent in H-1B adjudications to identify job duties and particular positions where a bachelor’s or higher degree in a specific specialty, or its equivalent, is normally required allows employers to explore where skills-based hiring is sensible. Further, DHS recognizes that an employer that has adopted skills-based hiring initiatives may, depending on the particular facts, still be able to establish that the particular position in which the beneficiary will be employed is a specialty occupation. DHS also agrees that no one factor alone, such as formal recruitment documentation, is determinative of whether a particular position qualifies as a specialty occupation but declines to codify this or similar language. By defining “normally” in the regulations, DHS’s intent is to clarify that the petitioner does not have to establish that a bachelor’s degree in a specific specialty or its equivalent is always a minimum requirement for entry into the occupation in the United States. DHS believes that defining “normally” in the regulations is sufficient to provide H-1B petitioners with more certainty as to the adjudication standards that apply to their petitions.

Comment: A professional association and a law firm expressed support for the

proposed definition of “normally” but recommended, to improve clarity, that 8 CFR 214.2(h)(4)(iii)(A)(1) be amended to replace “normally” with “usually” or “typically.” The commenters cited a case as holding that “normally” and “typically” impose identical standards as used in regulations. A legal services provider requested that USCIS define “normally” to mean “more often than not,” writing that the agency could rely on “O*Net” data to demonstrate degree requirement rates for a position and improve clarity in the proposal.

Response: While DHS agrees that “normally” and “typically” impose identical standards as used in 8 CFR 214.2(h)(4)(iii)(A)(1), DHS declines to replace “normally” with “usually” or “typically” in this provision. As stated in the NPRM, for these purposes there is no significant difference between the synonyms “normal,” “usual,” “typical,” “common,” or “routine,” and DHS does not interpret these words to mean “always.” 88 FR 72870, 72876 (Oct. 23, 2023).

DHS further declines to define “normally” to mean “more often than not.” Such a change would essentially require the petitioner to demonstrate a specific percentage (more than 50%) of positions that require a bachelor’s degree and could potentially make it more difficult for petitioners to demonstrate eligibility under this criterion if the evidence they submit for this criterion, such as the OOH, does not specify a percentage. DHS also declines to wholly rely on O*NET data to demonstrate a degree requirement. While O*NET can be an informative source of general occupational information and data,⁵³ there are gaps in the data, particularly as O*NET data does not provide information on whether the degrees required must be in a specific specialty directly related to the occupation. O*NET data may also be lacking for new and emerging fields of technology, or occupations not covered in detail. DHS again emphasizes that no one factor alone, including O*NET, is determinative as to whether or not a particular position qualifies as a specialty occupation.

Comment: An advocacy group recommended that the term “normally” be removed from 8 CFR 214.2(h)(4)(iii)(A) so as to require that H-1B specialized positions always require a degree, citing the INA in support of their position. A research organization agreed, citing the definition of a specialty occupation in INA sec. 214(i)(1) and the 2020 IFR as

⁵² See *Innova Solutions, Inc. v. Baran*, 983 F.3d 428, 432 (9th Cir 2020) (“Normally does not mean always.”).

⁵³ DOL, ETA, O*NET, O*NET OnLine, <https://www.onetonline.org/> (last visited Dec. 9, 2024).

consistent with the commenter's interpretation. A union also stated that, for nursing in particular, only positions that always required a bachelor's degree should be eligible for H-1B classification. A commenter generally stated that stricter criteria for specialty occupation eligibility should be adopted and that many people who do not qualify for H-1B status are currently working on an H-1B visa.

Response: DHS declines to remove "normally" from new 8 CFR 214.2(h)(4)(iii)(A) so as to require that H-1B specialized positions always require a degree. DHS disagrees that this new definition is inconsistent with the INA and notes that the 2020 IFR was vacated. The inclusion of the word "normally" in the criteria for specialty occupations is not new. The specialty occupation criteria included "normally" prior to IMMACT90, which created the specialty occupation definition and did not change the criteria. Additionally, subsequent regulations implementing IMMACT90 did not change the criteria or remove the term "normally."⁵⁴ DHS also declines to add additional requirements or scrutiny for particular occupations or adopt a stricter criterion for specialty occupation eligibility.

Comment: A trade association commented that defining "normally" in terms of "usual, typical, common, or routine" would retain vagueness and lead to RFEs, NOIDs, and denials. The commenter stated that this would have especially negative impacts in STEM fields.

Response: DHS disagrees that defining "normally" will lead to more RFEs and denials, or negatively impact certain industries. Defining "normally" to mean "typical," "common," or "routine" is consistent with both USCIS' current practice and, by codifying this practice, DHS seeks to provide H-1B petitioners with more certainty as to what adjudication standards apply to their petitions.

Comment: A company commented that the proposal could lead to confusion and inconsistent adjudications because, the commenter reasoned, the criteria under paragraph (h)(4)(iii)(A) operate to refine the definition at 8 CFR 214.2(h)(4)(ii). The commenter recommended deleting the term "also" from paragraph (h)(4)(iii)(A) to reduce confusion as to what is required to satisfy the standard at paragraph (h)(4)(ii). A couple of trade

associations agreed that the proposed language for paragraph (h)(4)(iii)(A) would lead to an inconsistent application of regulatory standards with one trade association referring to the current "one of the following" standard as producing the same result and leading to confusion and administrative burdens. A trade association agreed and stated that the proposed standard would result in a "totality of the circumstances" test similar to one provided in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). A legal services provider also agreed and added that the proposal may effectively raise the standard for specialty occupations.

Response: DHS disagrees that the word "also" or the phrase "one of the following" in new 8 CFR 214.2(h)(4)(iii)(A) could lead to confusion and declines to make changes in response to these commenters. As explained in the NPRM, this language clarifies that meeting one of the regulatory criteria is a necessary part of—but not always sufficient for—demonstrating that a position qualifies as a specialty occupation. 88 FR 72870, 72876 (Oct. 23, 2023). In other words, to qualify as a specialty occupation, a position must meet one of the criteria at 8 CFR 214.2(h)(4)(iii)(A) and also must meet the definition of a specialty occupation as a whole. Furthermore, as pointed out in the NPRM, this is not new. 88 FR 72870, 72877 (Oct. 23, 2023). USCIS has a long-standing practice of reading and construing the criteria at 8 CFR 214.2(h)(4)(iii)(A) in harmony with and in addition to other controlling regulatory provisions and with the statute as a whole.⁵⁵ Therefore, DHS disagrees with the commenters that this change will somehow raise the standard or create a new standard for specialty occupation adjudications.

Comment: A professional association expressed particular concern about the proposed change at 8 CFR 214.2(h)(4)(iii)(A)(3), which would require that an H-1B employer normally require a "U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position." The commenter stated that this provision may not be in conformity

with how hiring managers view those particular degrees when assessing a candidate's application. The commenter added that, because U.S. employers must show that its hiring practices for H-1B beneficiaries and American workers are identical, "this restriction will impose artificial and unnecessary burdens on the hiring of both U.S. workers and H-1B beneficiaries." The commenter concluded that "USCIS should not seek to restrict educational requirements beyond what was intended in the INA and in a manner that is inconsistent with specific content ordinarily included in these degree programs." A company stated, without elaboration, that "USCIS should also consider the 'anti-discrimination impact' on companies when drafting job descriptions."

Response: In the NPRM, DHS proposed to add "U.S." to "baccalaureate" to clarify that a baccalaureate degree must be a U.S. degree or its foreign equivalent, and that a foreign baccalaureate is not necessarily an equivalent to a U.S. degree. 88 FR 72870, 72877 (Oct. 23, 2023). DHS believes that these commenters misunderstood the proposed changes to mean that an individual must have earned a degree in the United States to be eligible for H-1B nonimmigrant classification. That is not the case. This revision reflects longstanding practice and a consistent standard that will better align the regulation discussing the position requirement at 8 CFR 214.2(h)(4)(iii)(A) with the statutory requirement of "a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States" at INA section 214(i)(1)(B), 8 U.S.C. 1184(i)(1)(B), as well as the regulatory requirement that an H-1B beneficiary must have a U.S. baccalaureate degree, or its equivalent, at 8 CFR 214.2(h)(4)(iii)(C)(1). Therefore, DHS declines to make any changes in response to these comments and will finalize the regulatory language as proposed.

Comment: A few commenters discussed the proposed criterion's references to the DOL's OOH. An attorney suggested that any reference to the OOH should be removed from the provisions since it never was meant to establish minimum requirements and should never be used for any legal purpose. The commenter stated that the information in the OOH should also not be used to determine if an applicant is qualified to enter a specific job in an occupation. A company similarly expressed their concern with the proposed changes and agency usage of

⁵⁴ See DOJ, INS, "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 56 FR 61111-01 (Dec. 2, 1991); see also "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 FR 888 (Jan. 31, 2019).

⁵⁵ Numerous AAO non-precedent decisions spanning several decades have explained that the criteria at 8 CFR 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 CFR 214.2(h)(4)(ii), and that the regulatory criteria must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See, e.g., *In Re.*—, 2009 WL 4982420 (AAO Aug. 21, 2009); *In Re.*—, 2009 WL 4982607 (AAO Sept. 3, 2009); *In Re.* 15542, 2016 WL 929725 (AAO Feb. 22, 2016); *In Re.* 17442092, 2021 WL 4708199 (AAO Aug. 11, 2021); *In Re.* 21900502, 2022 WL 3211254 (AAO July 7, 2022).

the OOH to determine if a position qualifies as a specialty occupation. The company reasoned that the OOH only provides a general description and is not intended to be used to define a specialty position. The company recommended a more flexible approach and also cited the OOH's statement that it should never be used for any legal purposes. A law firm suggested that the agency make it clear that the OOH is not the exclusive source of minimum education requirements and that expert opinions by professors in the field of study and by veterans in the particular occupation should be included as "reliable and informative sources."

Response: There is no reference to the DOL's OOH in either the proposed or the final regulatory text. DHS referenced this resource in the preamble of the NPRM when discussing how it reviews the specialty occupation criteria, noting that it will continue its practice of consulting the OOH and other reliable and informative sources, such as information from the industry's professional association or licensing body, submitted by the petitioner. 88 FR 72870, 72877 (Oct. 23, 2023). The OOH is not determinative. Rather, it is an informative source, that may be used among others, to analyze a position's duties and whether a position qualifies as a specialty occupation.⁵⁶

Comment: A commenter expressed support for the addition of the "degree in a directly related specific specialty" language in 8 CFR 214.2(h)(4)(iii)(A)(3). The commenter reasoned that because H-1B visas are designed for individuals with specific specialty degrees, the requirement would ensure that H-1B visas are awarded to people who have chosen their degrees and studied for a specific occupation. The commenter further stated that USCIS should not be constrained in recognizing a position as a specialty occupation.

Conversely, several commenters discussed general concerns with the "directly related specific specialty" requirement in the specialty occupation criteria. A joint submission expressed opposition to the inclusion of a "directly related" requirement in the criteria for a "specialty occupation." The commenters stated that it opposed the language for the same reasons described in its comment on the

"directly related" requirement in the definition of "specialty occupation."

Response: Similar to the definition of "specialty occupation" that uses the term "directly related," the addition of the phrase about a "degree in a directly related specific specialty" within the criteria merely reinforces the existing requirements for a specialty occupation, in other words, that the position itself must require a directly related specialty degree, or its equivalent, to perform its duties. In determining whether a position involves a specialty occupation, USCIS currently interprets the "specific specialty" requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question. The "specific specialty" requirement is only met if the degree in a specific specialty or specialties, or its equivalent, provides a body of highly specialized knowledge directly related to the duties and responsibilities of the particular position as required by INA 214(i)(1)(A).

Comment: A couple of joint submissions and an advocacy group said that the proposed requirement of a "directly related specific specialty" degree would exclude those with relevant experience and coursework, restricting the pool of qualified candidates employers could consider. A joint submission from industry associations urged codifying existing practices that allow demonstrating how a degree or coursework relates to a position, in order to maintain U.S. leadership in emerging technologies and promote effective H-1B usage.

Response: Similar to the definition of "specialty occupation" that uses the term "directly related," 8 CFR 214.2(h)(4)(iii)(A) should not hinder the ability of companies to consider employees with experience. USCIS analyzes whether the proffered position is a specialty occupation (including determining if there is a direct relationship between the required degree(s) and the duties of the position) separately from its analysis of a beneficiary's qualifications. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D).

Comment: A professional association stated that the proposed changes to the criteria requiring a "degree in a directly

related specific specialty" would restrict eligibility for H-1B status in a manner that was inconsistent with both statute and Federal court precedent.

Specifically, the commenter referenced *Tapis Int'l v. INS*, *Residential Finance Corp. v. USCIS*, and *Raj & Co. v. USCIS*, which it said held that "the body of specialized knowledge acquired pursuant to the degree," and not the degree itself, qualifies an individual for a specialty occupation. The commenter stated that despite this precedent, the NPRM focuses exclusively on the degree title and not on the underlying body of knowledge. Citing *Residential Finance*, the commenter added that while there is no requirement that specialized studies be in a single academic discipline, the NPRM does not consider the "specialized course of study" necessary to perform the job duties of a position and whether it could be obtained through degrees in a variety of fields. The commenter said that instead, the NPRM relies on *Caremax Inc. v. Holder*, which it said did not establish the complexity of the position or provide evidence of the beneficiary's qualifying body of specialized knowledge.

Response: DHS disagrees that requiring a "degree in a directly related specific specialty" will restrict eligibility for H-1B beneficiaries or that this is inconsistent with the statute. This provision codifies existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position. Further, this aligns with the statute, which states that attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) is the minimum for entry into the occupation in the United States. See section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1).

DHS also disagrees that this provision is contrary to case law. While the NPRM referred to degrees by their titles, it also explained that it was referring to the educational credentials by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS also will consider whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4). It appears the commenter may have conflated the issue of a position's qualification as a specialty occupation with the issue of a

⁵⁶ See *Royal Siam Corp.*, 484 F.3d at 146 ("In its review of petitions for nonimmigrant work visas, [US]CIS frequently—and sensibly—consults the occupational descriptions collected in the Handbook. Subject only to caveats at the outer fringes, the choice of what reference materials to consult is quintessentially within an agency's discretion . . .").

beneficiary's qualification for the specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether the beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed.⁵⁷ DHS referenced *Caremax Inc. v. Holder* in the NPRM because it discusses whether the position is a specialty occupation,⁵⁸ rather than beneficiary qualifications.

Comment: Several commenters discussed suggested revisions to the language of the "directly related specific specialty" requirement, with some recommending that USCIS remove it from proposed 8 CFR 214.2(h)(4)(iii)(A)(1) through (4). A professional association suggested that the "directly related specific specialty" language be replaced throughout the criteria with "a body of specialized knowledge obtained pursuant to a U.S. baccalaureate or higher degree in a specific specialty, or its equivalent." The commenter reasoned that the language would be consistent with statute, affirm the importance of specialized courses of study, and eliminate the need to rely on the OOH.

Response: As previously stated, DHS is slightly revising its regulatory language in the definition of specialty occupation. The definition clarifies that a position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. The regulatory language also includes a definition of "directly related." DHS believes the regulatory language as revised in this final rule more clearly reflects and codifies current practice. As a result, DHS does not anticipate this provision will have a negative impact on any particular occupations and declines to make the suggested revisions to the regulatory text.

Comment: An advocacy group expressed their support for the need to

amend the criteria for a specialty occupation but also provided recommended changes to the criteria. Specifically, the advocacy group suggested the inclusion of an acknowledgment of "modern education which includes multidisciplinary majors and minors" where the criteria reference a "U.S. baccalaureate" degree. The group also suggested recognition of the value of industry experience by including industry experience in the specialty occupation consideration.

Response: DHS declines to make the suggested changes because the regulatory provisions as finalized sufficiently address the commenter's concerns. The criteria for determining whether a position qualifies as a specialty occupation allow for the equivalent of a U.S. baccalaureate or higher in a directly related specialty. The petitioner bears the burden to demonstrate equivalency. More importantly, it appears the commenter may be conflating beneficiary qualifications, enumerated at 8 CFR 214.2(h)(4)(iii)(C), with the standards for specialty occupation positions, enumerated at 8 CFR 214.2(h)(4)(iii)(A). When assessing a beneficiary's qualifications, USCIS also will consider, as applicable, whether the beneficiary has the education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. See 8 CFR 214.2(h)(4)(iii)(C)(4), (h)(4)(iii)(D).

Comment: A company highlighted the use of the word "are" and recommended changing it to "is" in 8 CFR 214.2(h)(4)(iii)(A)(4). The company also recommended changing the term "United States industry" to "industry in the United States" at 8 CFR 214.2(h)(4)(iii)(A)(2) for improved clarity.

Response: DHS agrees that the word "are" should be "is" in 8 CFR 214.2(h)(4)(iii)(A)(4), and will make this non-substantive revision in the final regulatory text. DHS also agrees that "industry in the United States" is clearer than "United States industry" and will make this non-substantive revision in the final regulatory text at 8 CFR 214.2(h)(4)(iii)(A)(2). Additionally, DHS is revising 8 CFR 214.2(h)(4)(iii)(A)(2) and (3) by adding "to perform the job duties" to qualify the requirements of the position and clarify that DHS looks not just at the title of the position, but at the position's duties.

Comment: In the criteria at 8 CFR 214.2(h)(4)(iii)(A)(2), a legal services provider disagreed with the proposal to

change the current wording "in parallel positions at similar organizations" to "in parallel positions at similar organizations *within the employer's industry in the United States.*" The commenter stated that this proposed change would narrow the focus more than is necessary or relevant. The commenter emphasized the importance of focusing on the specific duties of the position instead of the industry in which the petitioner operates, as this important distinction would make adjudications more efficient. The commenter cited an example where the agency determined that a small information technology company was not a "similar organization" to a 1,000-employee information technology company through numerous RFEs, negatively impacting all parties.

Response: DHS disagrees that the revisions to 8 CFR 214.2(h)(4)(iii)(A)(2) will narrow or otherwise limit the focus of this criterion. The regulatory text of 8 CFR 214.2(h)(4)(iii)(A)(2) prior to this final rule has always focused on the employer's industry; that version of the regulatory text specifically stated, "The degree requirement is common 'to the industry' in parallel positions among similar organizations." The change to add a reference to the employer's industry in the United States is a non-substantive change and is not expected to increase RFEs and denials.

Comment: A joint submission voiced specific concern about the inclusion of the word "staffed" in the third prong of the regulatory criterion, stating that, in the "overwhelming majority" of circumstances, where H-1B petitioning employers place their beneficiary employees at third party sites, they are—by the terms and definition of the proposed regulation itself—not staffing companies. The commenters said that they are instead corporate entities with which another entity has engaged for the delivery of professional/specialty occupation services. The commenters acknowledged that USCIS in the preamble expressed its intent to narrow the definition of "staffed" to apply only where a beneficiary employee would be employed at a third-party worksite "to fill a position in the third party's organization" but said that the wording of the proposed criterion does not sufficiently narrow the definition to achieve the professed intent.

Response: DHS declines to strike the language at 8 CFR 214.2(h)(4)(iii)(A)(3) relating to a beneficiary staffed to a third party. This language provides necessary guardrails to ensure that beneficiaries who provide staffing to a third party sufficiently meet the specialty occupation requirements. As clarified in

⁵⁷ Cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]").

⁵⁸ See *Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (explaining that a position for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge).

the NPRM, a beneficiary who is “staffed” to a third party becomes part of that third party’s organizational hierarchy by filling a position in that hierarchy, even when the beneficiary technically remains an employee of the petitioner. 88 FR 72870, 72908 (Oct. 23, 2023). By contrast, for example, a beneficiary would be providing services to a third-party where they were providing software development services to a third party as part of the petitioner’s team of software developers on a discrete project, or employed by a large accounting firm providing accounting services to various third-party clients. In these examples, USCIS would generally not consider the beneficiary to be “staffed” to the third-party because the third-party does not have employees within its organizational hierarchy performing those duties in the normal course of its business and does not have a regular, ongoing need for the work to be performed.

d. Equivalencies

Comment: Several commenters suggested DHS consider 3 years of experience as equivalent to 1 year in college, stating that experience should be considered valuable for a job. Some of the commenters wrote that under the current definition of “specialty occupation,” 12 years of work experience in an occupation equates to a bachelor’s degree in that occupation but expressed that the proposed rule is ambiguous as to whether this standard would still apply.

Another commenter recommended “a more flexible analysis” to consider whether a noncitizen is qualified for a specialty occupation. A commenter said that the current 8 CFR 214.2(h)(4)(iii)(D)(5) is “overly restrictive” in requiring 3 years of work experience to substitute for every 1 year of college-level training lacking. The commenter said a more flexible analysis would recognize the reality that some individuals, despite not possessing a degree in the specific specialty and not having 12 years of experience, may be able to perform a specialty occupation at the same level as someone who has the normally required a 4-year degree and would take into account the rigor of the noncitizen’s past work experience.

Response: DHS did not propose changing 8 CFR 214.2(h)(4)(iii)(D) or any other provisions with respect to how USCIS determines whether the beneficiary possesses the equivalent to the required degree and any suggestions to change this standard are beyond the scope of this rule. For purposes of determining equivalency to a

baccalaureate degree in the specialty under 8 CFR 214.2(h)(4)(iii)(D), USCIS will continue to require 3 years of specialized training and/or work experience to be demonstrated for each year of college-level training the noncitizen lacks.

Comment: A commenter suggested that USCIS allow individuals with a degree and 5 or more years of work experience to qualify for a specialty occupation, noting that many of these individuals face long waits for immigrant visas. Another commenter suggested that USCIS consider individuals that have 10 or more years of experience as a computer programmer or software engineer as eligible under the “specialty occupation” definition. Other commenters suggested carve outs for individuals, such as allowing an individual with a master’s degree in telecom networks to qualify for software engineering roles inside networking companies, or establishing a different definition of “specialty occupation” for new H–1B petitions for individuals who have spent years working while waiting for an immigrant visa to become available.

Response: DHS declines to create specific clauses or carve-outs (such as those with 5 or 10 years of experience or with a master’s degree, or for individuals waiting for an immigrant visa to become available) for beneficiaries to qualify for a specialty occupation. As with current practice, USCIS will continue to make individualized determinations of whether a beneficiary is qualified to perform the specialty occupation offered by the employer.

Comment: A commenter said that “the proposed changes relative to the college degree requirement” are important and that USCIS should explicitly describe the meaning and requirements of these provisions as it relates to foreign equivalent degrees.

Response: 8 CFR 214.2(h)(4)(iii)(A), enumerating standards for a specialty occupation, adds “U.S.” to baccalaureate, which clarifies that a baccalaureate degree must be a U.S. degree or its foreign equivalent and that a foreign baccalaureate is not necessarily equivalent to a U.S. baccalaureate. Furthermore, existing 8 CFR 214.2(h)(4)(iii)(C), enumerating beneficiary qualification criteria, indicates in part that the individual may “[h]old a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.” DHS believes these provisions sufficiently

clarify that a position must require a U.S. baccalaureate or its equivalent, which may include a foreign degree that is equivalent to the required U.S. degree, and that a beneficiary may qualify based on possession of a foreign degree determined to be equivalent to a U.S. baccalaureate degree.

Comment: A nonprofit legal organization suggested that DHS incorporate an “objective threshold” into the definition of a “specialty occupation” that 75 percent of U.S. workers in that occupation must have a college degree. The commenter suggested that if an occupation did not meet this threshold, it should not be considered a specialty occupation.

Response: DHS declines to add a threshold to the definition of a “specialty occupation” that a certain percentage of U.S. workers in the occupation must have a college degree. There is no statutory requirement for such threshold. DHS also notes that the commenter did not provide supporting data or rationale to explain how it came to a 75% threshold. Establishing a threshold of U.S. workers in an occupation with a college degree is not necessary to meet the statutory definition of “specialty occupation.” The regulatory provisions as finalized in this rule sufficiently outline requirements to meet the specialty occupation definition.

Comment: A research organization suggested that DHS further strengthen the definition of “specialty occupation” by requiring that a noncitizen have at least a bachelor’s degree that meets the statutory requirement from a single education institution, rather than having multiple, lesser degrees that USCIS might cumulatively consider to be equivalent to the required bachelor’s degree. The commenter reasoned that this would conform more closely to the requirement in the statute and ensure that H–1B workers with qualifying levels of education are more likely to access the program, benefiting employers and the economy. Similarly, an advocacy group proposed that DHS include a provision in the final rule requiring a single source degree, as opposed to the current practice of allowing a combination of lesser degrees to qualify as “equivalent to a U.S. bachelor’s degree.”

A commenter advocated requiring that H–1B beneficiaries earn degrees in the United States as a way to promote development at U.S. educational institutions and social integration of H–1B beneficiaries. Another commenter endorsed the idea that H–1B recipients should have obtained their degrees in the United States, which the commenter

said would incentivize international students to pursue their education within the United States, promoting growth for American educational institutions and facilitating integration into American society, as well as “guarantee[ing]” that the H-1B program benefits individuals who are well-acquainted with the American academic and professional environments.

Response: DHS declines to require a single source degree, *i.e.*, requiring that a beneficiary must possess a bachelor’s degree from a single educational institution. DHS also declines to require a beneficiary to possess a degree obtained in the United States. The commenters have not explained how such requirements would be more consistent with the statute, given that INA sec. 214(i)(1), 8 U.S.C. 1184(i)(1), expressly allows for a bachelor’s or higher degree in the specific specialty “or its equivalent,” and INA sec. 214(i)(2), 8 U.S.C. 1184(i)(2), expressly allows for “experience in the specific specialty equivalent in the completion of such degree, and [] recognition of expertise in the specialty through progressively responsible positions relating to the specialty” in lieu of completion of the degree described in INA sec. 214(i)(1), 8 U.S.C. 1184(i)(1).

e. Applicability of Proposed Changes to Specialty Occupation to Specific Industries or Fields

Comment: Several commenters offered recommendations to further restrict specialty occupation requirements with respect to certain industries. For example, a commenter supported the proposed changes but said that “specialty occupation” needs to be stricter, particularly for technology occupations. An individual commenter said that software developer positions must require a graduate degree in computer science or computer applications/information systems. This commenter said that making education requirements stringent would make international students more attractive to the United States and provide them a greater opportunity to find employment. A couple of commenters requested that DHS exclude IT positions from the specialty occupation classification and Schedule A, with one commenter reasoning that it is challenging for U.S. citizens to obtain an IT job.

Response: DHS declines to revise the provisions to make the specialty occupation criteria more restrictive in general. The purpose of the revisions to the definition and criteria of specialty occupation are to codify current practice and better align the regulatory definition with the statutory definition.

DHS will not adopt the suggestions to require a graduate degree for certain IT positions. There is no statutory support for such a requirement, as the statutory definition of “specialty occupation” is based on a minimum requirement of “a bachelor’s or higher degree in the specific specialty (or its equivalent).” Section 214(i) of the INA, 8 U.S.C. 1184(i). DHS will not adopt the suggestion to exclude IT positions from qualifying as specialty occupations as there is no statutory support for such a broad exclusion.

Comment: A commenter recommended DHS consider providing “dedicated resources for noncitizens specializing in AI and other strategic fields, such as a ‘concierge service’ or fast-track process,” in order to inform adjudicators about the particularities of AI jobs, employers, and degree programs and reduce processing delays.

Response: DHS declines to create a “concierge service” or “fast-track process” for noncitizens specializing in any given field. USCIS officers are trained to adjudicate petitions for all industries. Additionally, DHS believes it would be unfair to prioritize any specific field over others. Petitions for individuals in AI and other “strategic fields” will continue to be processed through standard adjudication channels.

Comment: Several commenters opposed the “directly related” language, citing negative impacts on start-ups and beneficiary-owners. For instance, an advocacy group expressed concern that the proposed language could impact startups because many startups exist in “new and burgeoning fields” that do not have “directly related” degrees. The commenter said that the proposed definition change would cause talent, research, and development activities to leave the United States. A joint submission expressed concern that the “directly related” requirement would require beneficiary-owners to prove that their “majority of the time” duties are “directly related” to their specific specialties and that this change would lead to beneficiary-owners encountering more RFEs and increasing the likelihood of denial for founders. Another joint submission expressed opposition to the codification of the “directly related specific specialty” requirement within the specialty occupation criteria, reasoning that beneficiary-owners who have degrees in a technical field but whose role evolves into an executive role might not be able to qualify for specialty occupation visa categories under the new criterion. This joint submission said there might be a potential for disagreements among adjudicators over duties considered to

be “directly related” to owning or directing a start-up and requested additional guidance be provided through regulation or the USCIS Policy Manual to facilitate consistent decision-making by adjudicators.

Response: The changes to the specialty occupation definition are not intended to disadvantage start-ups and beneficiary-owners. DHS believes that specialty occupation provisions codified in this rule sufficiently accommodate start-ups and beneficiary-owners. DHS understands that, as in many positions, many beneficiary-owners and those in start-up companies may seek positions in new or emerging fields for which there may not be a singular degree requirement to meet the needs of the position. As stated in new 8 CFR 214.2(h)(4)(ii), a position may allow for a range of qualifying degree fields. The petitioner must demonstrate how each of those degree fields is directly related to the duties of the position. The petitioner is not required to show an “exact correspondence” between degree field(s) and the occupation; as finalized in this rule, “directly related” means there is a logical connection between the degree, or its equivalent, and the duties of the position.

For beneficiary-owners, it is true that, while the beneficiary may perform duties directly related to owning and directing the petitioner’s business, the beneficiary must perform specialty occupation duties authorized under the petition a majority of the time. *See* new 8 CFR 214.2(h)(4)(ii). The burden is on the petitioner to demonstrate that the qualifying degree field(s) is or are directly related to those specialty occupation duties of the position. Codifying this requirement affords petitioners with greater clarity on the documentation necessary to include with their petitions, thereby reducing the likelihood of RFEs. DHS believes the regulatory text as finalized accommodates start-ups and beneficiary-owners while aligning with the statutory requirements for a specialty occupation.

Comment: A couple of commenters expressed the need to consider physicians in the specialty occupation requirements. For example, a professional association wrote that H-1B physicians deserve the specialty occupation designation, as they require education and training that “far exceeds an undergraduate degree.” The commenter cautioned USCIS to ensure that the “directly related” requirement is not interpreted in a way that would disadvantage physicians, who graduate with a general Doctor of Medicine (MD) or a Doctor of Osteopathic Medicine

(DO) degree and then specialize during their residency. The commenter added that physicians meet the education requirements of the proposed rule and the statutory “highly specialized knowledge” requirement, and as such, deserve the specialty occupation designation. Additionally, the association reasoned, that physicians undergo years of residency to expand their knowledge in a specialized area of medicine. The association cautioned the Department against construing “specialty occupation” too narrowly in a way that would disqualify physicians, who are critical to filling U.S. workforce gaps. A joint submission, echoing the statements on the educational and experiential qualifications of physicians, recommended that DHS clarify in the final rule that the amended requirements do not disadvantage or change physicians’ specialty occupation status.

Response: DHS confirms that the regulatory text regarding “a general degree” does not refer to a Doctor of Medicine or a Doctor of Osteopathic Medicine and should not impact higher-level degrees. While specialty occupation determinations are made on a case-by-case basis, the regulatory text regarding “a general degree” generally applies to four-year bachelor-level degrees, because higher-level degrees require more specialization than those at a bachelor’s level.

Comment: A professional association urged the Department to accept as precedent that pilots are not a “specialty occupation.” The association expressed concern that U.S. air carriers have increasingly misused H–1B, E–3, and H–1B1 visas to fill pilot positions, raising concerns about wage distortion in the U.S. pilot labor market. Thus, the association said that adopting the interpretation that this profession does not qualify as a “specialty occupation,” would facilitate the consistent application of the standard across agencies, serve the Department’s interests in fidelity to the statutory and regulatory standard, allow for fair program administration, and reduce administrative burdens from meritless petition filings. The professional association also urged DHS to limit the proposed specialty occupation regulations to petitions for new employment only, citing the “critical fairness and reliance interests” that would be at stake for existing pilot visa holders, their employers, and crewmembers should DHS disrupt prior eligibility determinations. Specifically, the commenter suggested that the changes should not be used to revoke or reconsider the eligibility of existing H–

1B, E–3, or H–1B1 pilot visa holders, or deny petitions or applications for existing pilot visa holders to continue their current employment, make changes to their previous employment with their current employer, obtain concurrent employment, or change employers. Conversely, a commenter suggested that the H–1B program should permit professional certifications outside of a bachelor’s degree, including certifications for commercially rated pilots. The commenter reasoned that there are trained, experienced pilots in other countries who could address the U.S. shortage of commercially rated pilots in rural regions for charter and agricultural applications.

Response: DHS declines to create separate criteria for particular industries or occupations, or to declare through this rulemaking that certain occupations are or are not specialty occupations. The revisions to the definition and criteria for specialty occupations are not intended to disadvantage or advantage any particular groups.

f. Other Comments on Specialty Occupation

Comment: A commenter said it was unclear how the changes to the specialty occupation definition would add protections for U.S. workers, as employers demonstrate there are no U.S. workers with relevant skills in the LCA.

Response: DHS did not state that changing the definition of specialty occupation would add protections for U.S. workers, but DHS believes that better aligning the regulatory definition and standards for a “specialty occupation” with the statutory definition will improve program integrity by providing added clarity on which positions meet eligibility requirements. DHS also highlights that matters of H–1B program integrity are directly addressed and enhanced by other provisions of this rule, including provisions on the bona fide job offer requirement, non-speculative employment, and site visits. Furthermore, DHS notes, while deferring to Department of Labor (DOL) authority, that the LCA process generally does not include a showing that there are no qualified U.S. workers for the position. Nor does the LCA process serve as a guardrail to ensuring that a position qualifies as a specialty occupation and is not determinative of such qualification.⁵⁹

⁵⁹ See, e.g., *Xpress Grp., Inc. v. Cuccinelli*, 2022 WL 433482, at *5 (W.D.N.C. Feb. 10, 2022) (“DOL certification of a LCA is not determinative as to whether the position is in fact a ‘specialty occupation.’ Rather, the specialty occupation determination is made by USCIS in accordance

Comment: A joint submission suggested adding “a comparable evidence criterion” (similar to the concept for EB–1 outstanding researchers) so that, if none of the listed regulatory criteria clearly apply to the evidence the petitioner intends to submit, the petitioner could submit comparable evidence to establish that the offered job is a specialty occupation. The commenter stated that that this alternative would allow petitioners to submit alternate, but qualitatively comparable, evidence where evidence does not fit neatly into the enumerated list. The commenters emphasized the importance of this recommendation by highlighting the proposed change in 8 CFR 214.2(h)(4)(iii)(A)(3), where petitioners are limited to showing evidence of an established recruiting or hiring practice. Similarly, an advocacy group expressed their support for the need to amend the criteria for a specialty occupation to give due consideration to research or publications.

Response: As part of qualifying as a specialty occupation, the position must meet one of the criteria enumerated at 8 CFR 214.2(h)(4)(iii)(A)(1) through (4). DHS declines to add regulatory language stating that the petitioner may submit “comparable evidence” to establish that a position qualifies as a specialty occupation in lieu of meeting one of the criteria, and also declines to amend the criteria to consider research or publications. Meeting one of the enumerated criteria is necessary to ensure the position satisfies the definition of a specialty occupation.⁶⁰ Additionally, DHS notes that a beneficiary’s research or publications are likely applicable in determining beneficiary qualifications to perform the occupation, rather than determining whether a position qualifies as a specialty occupation. Petitioners may submit any evidence to demonstrate that the position satisfies one of the criteria at 8 CFR 214.2(h)(4)(iii)(A)(1) through (4). As noted by a commenter, and as acknowledged in the NPRM, petitioners might not be able to demonstrate eligibility under 8 CFR 214.2(h)(4)(iii)(A)(3) when seeking to fill a position for the first time. However, as stated in the NPRM, first-time hirings are not precluded from qualifying under one of the other criteria listed at 8 CFR 214.2(h)(4)(iii)(A). DHS believes the criteria finalized in this rule, in

with section 214(i)(1) of the INA. . . .” (citation omitted).

⁶⁰ While meeting one of the criteria stated in 8 CFR 214.2(h)(4)(iii)(A) is necessary, it is not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation.

conjunction with the revised definition of specialty occupation, afford petitioners sufficient flexibility while adhering to statutory requirements.

3. Amended Petitions

Comment: Several commenters, including a trade association and a company, expressed support for DHS's clarification related to amended petitions. The trade association said that it would enhance processing efficiency and an individual commenter said it would reduce administrative uncertainties and complexities. The company said that stakeholders would benefit from the clarity provided by codifying and consolidating several sources of guidance and practices, and that the simplification would alleviate administrative burdens by reducing the frequency of RFEs and NOIDs.

Response: DHS agrees that codifying and consolidating requirements on when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment will offer clarity and reduce uncertainty. Existing requirements on the need to file an amended or new H-1B petition due to a change in work location appear in various sources, including DHS regulations, a precedent decision interpreting the existing DHS regulation, USCIS policy guidance, DOL regulations, and DOL guidance. DHS agrees that codifying and consolidating existing requirements for amended or new petitions will better serve petitioners in complying with these requirements. DHS also agrees that the clear standard reflected in this provision may mitigate the need for RFEs and NOIDs, particularly on H-1B petitions filed subsequent to the change in work location. DHS agrees that providing a clear, codified standard will further alleviate administrative burdens for employers when contemplating a new work location that may impact H-1B eligibility.

Comment: A few commenters, including trade associations and a joint submission, expressed opposition to requiring an amended or new petition when a worker's place of employment is changed. The commenters elaborated that it would add an unnecessary burden for both the petitioner and USCIS, thus impeding the goals of increasing efficiency, filling labor shortages, and creating opportunities for innovation and expansion of the economy.

Response: This rule does not create new filing requirements for petitioners. New 8 CFR 214.2(h)(2)(i)(E)(2) codifies current USCIS practice as articulated in its policy memorandum "USCIS Final

Guidance on when to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," which implemented a precedent decision, *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015).⁶¹ DHS generally recognizes the additional procedures and cost incurred by employers in filing amended petitions. However, these are existing requirements, and DHS is not increasing petitioners' filing burdens through this provision. Providing clearer regulations on when a new work location requires the filing of an amended H-1B petition, in line with existing requirements, reduces uncertainty on whether the "material change" threshold requiring an amended filing has been met. With this clearer standard, employers can better plan accordingly to ensure they and their employees remain in compliance, thereby potentially preventing further administrative burdens.

Comment: A few trade associations and a business association recommended clarifying that a change in geographic worksite or end-client does not constitute a "material change" that necessitates an amended petition. Another trade association stated that the regulatory definition of a "material change" should be limited to the matters delegated to DHS by Congress in the INA. According to the commenter, such delegated powers limit the definition of a "material change" to the factors in section 1184(i), which do not include the term "area of employment." The trade association also indicated that DHS has a different view of the meaning of "area of employment" from that of DOL.

Response: DHS disagrees with the comment that a change in geographic location requiring a new LCA does not constitute a "material change." As noted in the NPRM and as held in *Matter of Simeio Solutions*, a change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA may affect eligibility for H-1B status, and is therefore a material change for purposes of 8 CFR 214.2(h)(2)(i)(E) and (h)(11)(i)(A). For example, the geographic location of employment may impact the prevailing wage for the occupational classification, as the new employment location may be in a Metropolitan Statistical Area (MSA) with higher wage requirements. Per DOL regulations at 20 CFR 655.731, an employer seeking to employ an H-1B worker in a specialty occupation must

attest on the LCA that it will pay the H-1B worker the higher of either the prevailing wage for the occupational classification or the actual wage paid by the employer to similarly situated employees in the geographic area of intended employment. H-1B petitions for a specialty occupation worker must include a certified LCA from DOL, and failure to comply with DOL's LCA requirements may impact eligibility for H-1B status.

DHS also disagrees with the assertion that a material change should be limited to the factors delineated in section 214(i) of the INA, 8 U.S.C. 1184(i). The Secretary of Homeland Security's authority for these regulatory amendments is found in various sections of the INA, 8 U.S.C. 1101 *et seq.*, and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* Notably, section 103(a) of the INA, 8 U.S.C. 1103(a), authorizes the Secretary to administer and enforce the immigration and nationality laws and delegates to the Secretary the authority to establish such regulations as the Secretary deems necessary for carrying out these duties. Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), establishes the H-1B nonimmigrant classification, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants, and section 214(c) of the INA, 8 U.S.C. 1184(c), authorizes the Secretary to prescribe how an importing employer may petition for H-1B nonimmigrant workers and the information that an importing employer must provide in the petition. Section 214(i) of the INA, 8 U.S.C. 1184(i), however, merely sets forth the definition and requirements of a "specialty occupation." Meeting the statutory definition and requirements of a specialty occupation is only one component of establishing H-1B eligibility. Limiting the definition of material change to factors in section 1184(i) of the INA would significantly hinder USCIS' ability to administer and enforce the INA, including adherence to the terms of an approved H-1B petition.⁶²

DHS further disagrees with the claim that DHS's view does not align with DOL's definition of "area of intended employment." DHS directly cited DOL's definition of "area of intended employment" in the NPRM. 88 FR

⁶¹ The D.C. Circuit Court of Appeals rejected a challenge to the lawfulness of *Matter of Simeio Solutions* in *ITServe All., Inc. v. DHS*, 71 F.4th 1028 (D.C. Cir. 2023).

⁶² See *ITServe All., Inc. v. DHS*, 71 F.4th 1028, 1037 (D.C. Cir. 2023) ("[P]olicing compliance with the terms of an LCA plainly constitutes 'administration and enforcement' of the INA, which section 1103(a)(1) independently authorizes.").

72870, 72878 n.40 (Oct. 23, 2023). DOL regulations govern the determination of whether a new work location is in a different area of intended employment as that included on the LCA. DHS is not deviating from DOL's definition or creating a new definition of this term. Under new 8 CFR 214.2(h)(2)(i)(E)(2), USCIS will require the petitioner to submit an amended or new H-1B petition if a new work location requires a new LCA, as determined by DOL's definition of "area of intended employment."

Comment: A few commenters recommended alternative procedures for notifying USCIS of a change to an H-1B worker's job location. A trade association recommended that USCIS obtain a copy of the LCA from the Department of Labor, or in the alternative, implement a mechanism for notification of a change of employment location similar to Form AR-11, Alien's Change of Address Card, without requiring petitioners file a formal amended petition. One commenter, while expressing opposition to this provision, suggested that if USCIS will require an amended petition in the case of a new work location requiring a new LCA, it should only require submission of Form I-129 with limited evidentiary requirements. This commenter further suggested there should be presumptive and automatic approval of the location change and that USCIS issue an RFE if questions on H-1B eligibility arise. While discussing situations in which there is no material change in job duties and requirements after a job location change, a joint submission proposed that USCIS defer to the prior adjudicator's finding that the specialty occupation requirements were satisfied, thereby presuming continued eligibility for H-1B status. The submission proposed that, in these scenarios, a petitioning employer would provide advance notification to USCIS of a new work location via a "new, simplified online form" and would include proof of a newly certified LCA and certain attestations related to the employment. Upon filing of this form with USCIS, the employee could begin working at the new location, "consistent with H-1B portability provisions." Under this proposal, USCIS would review the form to determine whether the LCA properly corresponds with the new location, the wage requirements would be satisfied, and the job duties remain the same, and an adjudicator could issue a RFE or NOID if questions of continuing H-1B eligibility arise. If the petitioner would be deemed by USCIS to have satisfied these requirements, the beneficiary

would be considered to have maintained nonimmigrant status and continue to be employed with authorization. If the request is denied, then USCIS would require a new Form I-129, with fees, to be filed within the 60-day grace period.

Response: DHS declines to adopt these recommendations at this time. DHS did not propose in the NPRM to adopt new procedures or methods of evidence submission to notify USCIS of material changes to the conditions of H-1B employment. As previously established and discussed in the NPRM, a change in work location requiring a new LCA is a material change potentially impacting H-1B eligibility, and therefore requires petitioners file an amended or new petition, with all evidentiary requirements, under 8 CFR 214.2(h)(2)(i)(E). Submission of a complete petition allows USCIS adjudicators to conduct a thorough review of the material change to ensure continued eligibility for H-1B status.

Comment: A professional association urged DHS to make an additional exception at 8 CFR 214.2(h)(2)(i)(E)(2), where the source of the prevailing wage in the initial labor certification is a collective bargaining agreement governed by the Railway Labor Act, which sets wage rates nationwide.

Response: DHS recognizes the unique employment circumstances of workers under collective bargaining agreements. However, DHS declines to create an exception for positions where the source of the prevailing wage is a collective bargaining agreement. If a change in employment location requires a new LCA per DOL standards, then, under 8 CFR 214.2(h)(2)(i)(E), the employer will also be required to submit a new or amended H-1B petition to USCIS.

Comment: A trade association recommended amending the regulation so that "a minor reduction in hours" does not require a new filing.

Response: DHS declines to amend the regulations to allow for a certain reduction in hours that would not rise to the level of a material change. The NPRM did not propose to provide such an amendment. While the commenter did not define what it considers as a "minor reduction," the regulated public should have an opportunity to comment on any such framework.

Comment: Some commenters suggested modification to the required timeframe for employers submitting amended petitions to reflect a new place of employment. A trade association, noting the unpredictable nature of job changes and the rapid response required to ensure that qualified employees are present where needed, suggested USCIS

create a grace period for employers to file amended petitions following a "sudden or urgent change in a beneficiary's role," coupled with requiring evidence of increased pay in the interim if the material change results in a higher required wage. A university recommended revising the requirement that petitions must be filed before the change takes effect while leaving in place the "post-Simeio" guidance on changes in employment location, adding specific language allowing for a grace period after a material change takes place, or allowing for adjudicatory discretion on the level of material change involved with a location change. They commented that requiring an amended petition be filed before the material change takes effect contradicts 8 CFR 214.2(h)(11)(i)(A), which requires that a petitioner "immediately notify" USCIS of changes in the terms and conditions of employment which may affect eligibility for H-1B classification. They stated that the requirement to provide immediate notification is more reasonable than the requirement to file an amended petition before a change takes effect.

Response: DHS declines to provide a grace period for petitioners to file new or amended H-1B petitions reflecting material changes after they occur. Requiring amended petitions be filed before material changes occur is consistent with statutory and regulatory requirements that beneficiaries maintain status by only working in accordance with their approved petition. *See, e.g.,* 8 CFR 214.2(h)(2)(i)(H) (describing the requirements to qualify for H-1B portability, to include not previously working without authorization); 8 CFR 274a.12(b)(9) (stating that an H-1B nonimmigrant may only be employed by the employer through whom the status was obtained, unless authorized to work based on a pending petition based on H-1B portability). As explained in existing USCIS policy, petitioners are already required to notify USCIS of material changes before they occur. USCIS articulated this policy in its policy memorandum "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," which discusses the "USCIS position that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition."⁶³ Working in

⁶³ *See* USCIS, Policy Memorandum, PM-602-0120 USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of*

a manner or location not previously authorized before submission of a new or amended petition may constitute a violation of status.

DHS disagrees with the comment that this requirement is inconsistent with 8 CFR 214.2(h)(11)(i)(A), under which a petitioner must “immediately notify” USCIS of changes which may affect H–1B eligibility. Rather, new 8 CFR 214.2(h)(2)(i)(E)(2) adds needed specificity to this requirement, which may otherwise be unclear as to what “immediately” means. Further, 8 CFR 214.2(h)(11)(i)(A) is a broader provision that applies to situations other than when an amended or new petition must be filed, such as when the petitioner no longer employs the beneficiary. Thus, new 8 CFR 214.2(h)(2)(i)(E)(2) adds specificity in the narrower context of where there is a material change requiring an amended or new petition.

Comment: A legal services provider recommended clarifying that workers may continue to work after the filing, and they do not have to wait for approval to take effect. The commenter recommended the following regulatory language: “The beneficiary may begin working under the materially changed terms and conditions of employment upon the filing of the amended or new petition, assuming all other requirements and terms of eligibility are met.”

Response: DHS declines to edit the proposed regulatory text as suggested by this commenter. However, DHS reiterates that if the beneficiary is eligible for H–1B portability pursuant to 8 CFR 214.2(h)(2)(i)(H), the beneficiary would not need to wait for a final decision on the amended or new petition to begin working at the new place of employment. Such change may occur upon the filing of an amended or new petition with USCIS. Under H–1B portability, if an employer is filing an amended petition for the same employee and that employee meets the definition of an “eligible H–1B nonimmigrant” under 8 CFR 214.2(h)(2)(i)(H)(1), then the eligible H–1B nonimmigrant is authorized to work for that same employer in the new employment until the petition is adjudicated. This approach aligns with and codifies current USCIS practice, as clarified in USCIS policy memorandum “USCIS Final Guidance on When to File an Amended or New H–1B Petition

After *Matter of Simeio Solutions, LLC*.”⁶⁴

Comment: A university proposed that USCIS address that hybrid work arrangements are included in the definition of peripatetic work or are otherwise excluded from the definition of “worksites.” According to the commenter, this would alleviate some privacy concerns associated with disclosing the address and compensation in the LCA notice of filing, assuming the remote work location is within normal commuting distance to the employer’s office. Similarly, a form letter campaign recommended clarifying “that a beneficiary’s change of residential address that is unrelated to any business decision of the employer is not “a new job location” and would not trigger the requirement to file an amended petition.” An individual commenter reasoned that a hybrid employee’s personal decision to change locations is factually different from the situation in *Matter of Simeio Solutions* and should be recognized by USCIS as such.

Response: DHS acknowledges the concerns expressed by commenters related to remote and hybrid workers. However, DHS is not deviating from or expanding beyond DOL regulations through this rule. As noted in the NPRM, 20 CFR 655.715 includes definitions and examples of “place of employment” and “worksite” or “non-worksite.” 88 FR 72870, 72879 (Oct. 23, 2023). If an employee’s home residence constitutes a worksite under DOL definitions, employer obligations related to the LCA apply. For example, if a beneficiary’s home is their worksite as determined under DOL regulations, and they move to a new residential address in a different area of intended employment with higher wage obligations, whether at the employee’s choice or that of the employer, the employer is obligated to meet those higher wage obligations. This move would constitute a material change requiring a new LCA and submission of an amended or new H–1B petition. DHS declines to promulgate a provision under which a beneficiary’s remote work location is categorically excluded from the definition of a worksite, potentially conflicting with DOL regulations.

Comment: Some commenters suggested modifications related to

proposed short-term placement provisions, under which H–1B workers may be placed at a worksite not listed on the approved petition or corresponding LCA for up to 30 or 60 days if certain conditions are met, without requiring an amended H–1B petition. At proposed 8 CFR 214.2(h)(2)(i)(E)(2)(ii) and (iii), a healthcare provider urged DHS to clarify and define the terms “substantial” and “employee development” so organizations can ensure compliance with the rule. A professional association and a joint submission urged DHS to allow temporary, short-term placements for physicians beyond 30 or 60 days, thereby allowing physicians to provide care during public health emergencies such as natural disasters.

Response: DHS declines to adopt these suggestions. As stated in the NPRM, new 8 CFR 214.2(h)(2)(i)(E)(2) does not codify all relevant considerations related to when to file an amended petition, and stakeholders should still consult DOL regulations and policy when considering if a new LCA is required. 88 FR 72870, 72879 (Oct. 23, 2023). New 8 CFR 214.2(h)(2)(i)(E)(2) is consistent with DOL regulations at 20 CFR 655.735, under which short-term placements of less than 30 days, or in some cases 60 days, do not require a new LCA or an amended or new petition, provided there are no material changes. Regarding the request to clarify and define specific terms, DHS also reiterates that existing DOL regulations set forth criteria and guidance in connection with short-term placements. For example, as noted in the NPRM, 20 CFR 655.715 defines what would constitute an “employee developmental activity” and what would constitute a “place of employment” or “worksite” for purposes of requiring a new LCA. 88 FR 72870, 72879 (Oct. 23, 2023). As an additional example, 20 CFR 655.735(e) clarifies when it may be inappropriate to use the short-term placement provisions in lieu of filing a new LCA, and also clarifies when these provisions may offer flexibility in assignments to afford enough time to obtain an approved LCA for an area where an employer intends for H–1B nonimmigrants to have a continuing presence. In proposing new 8 CFR 214.2(h)(2)(i)(E)(2), DHS did not purport to expand or further define short-term placement requirements as they exist in DOL regulations. Rather, this rule confirms that changes in work locations that meet DOL definitions of short-term placement do not on their own require

⁶⁴ Simeio Solutions, LLC (July 21, 2015), available at https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.

⁶⁴ See USCIS, Policy Memorandum, PM–602–0120 USCIS Final Guidance on When to File an Amended or New H–1B Petition After *Matter of Simeio Solutions, LLC* (July, 21, 2015), available at https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.

an amended or new H-1B petition be filed with USCIS.

4. Deference

Comment: A couple of commenters expressed opposition to the proposal to codify USCIS' existing deference policy. An advocacy group expressed concern that codifying deference to prior petition approvals would allow USCIS adjudicators to "cut corners" and appease employers by approving petitions faster. The group cited remarks from a 2017 USCIS Policy Memorandum, which rescinded the deference policy on the basis that continued scrutiny of H-1B petitions was warranted, as the burden of proof in establishing eligibility lies with the employer, not the government. The advocacy group echoed USCIS' previous position that deference was impractical and costly to implement, and the agency's authority should not be constrained by prior approvals but, rather, based on the merits of each case.

A research organization similarly voiced concern that the codification of deference would constrain USCIS officers' fact-finding authority. The organization said that, under the proposed regulations, an officer would either have to assume no material error, change, or new information, or "merely take an applicant or petitioner's word." The organization wrote that this "leap of faith" would be unnecessary and constitute "a reckless abdication of authority." Furthermore, while citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988), the organization said that adjudicators are not bound to approve subsequent petitions where eligibility has not been demonstrated, merely because of a prior, potentially erroneous, approval. The organization also concurred with USCIS' concern expressed in a 2017 policy memorandum⁶⁵ that the deference policy would shift the burden of proof for establishing eligibility from the petitioner to the government. Therefore, the organization urged DHS to rescind the NPRM's proposed deference codification and the corresponding 2021 USCIS Policy Manual update and require USCIS officers to confirm all material facts before granting any request filed on Form I-129. The organization reasoned that such an approach would serve as a fraud detection mechanism and deterrent, and officers should not be constrained in

requesting additional evidence in the adjudication process, consistent with existing USCIS policy.

Response: DHS disagrees with these commenters. Deference to prior approvals involving the same parties and the same underlying facts does not equate to a lack of USCIS review of the petition. Petitioners continue to have the burden to present all required and relevant evidence to USCIS and to establish eligibility for the requested classification. DHS, however, agrees with the commenters that officers are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated strictly because of a prior approval, and USCIS decides each matter according to the evidence of record on a case-by-case basis.⁶⁶ USCIS will give close consideration before deviating from a prior approval involving the same parties and the same underlying facts. In exercising deference, adjudicators will not defer to prior approvals if: there was a material error involved with the prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility. *See* new 8 CFR 214.1(c)(5). If USCIS discovers that the petitioner or beneficiary engaged in fraud or willful misrepresentation of a material fact, the petition would not receive deference as that is new material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

DHS further disagrees that the deference policy is costly and impractical. Since the rescission of the deference policy in 2017, which some commenters suggested DHS reinstate, technological advancements—such as electronic filing and enhancements to the USCIS Electronic Immigration System (ELIS)—have improved ease of access to case records such that the pulling and reviewing of prior petitions is not an added burden in exercising deference. Additionally, commenters should note that through this rule, DHS is removing the sentence: "Supporting evidence is not required unless requested by the director" from 8 CFR 214.2(h)(14) and from 8 CFR 214.2(o)(11) and (p)(13). Petitioners have the burden to present required evidence with each filing, even with deference in place. As such, DHS does not agree that deference is a costly and impractical policy.

Comment: Numerous commenters expressed support for DHS's codification and clarification of its existing deference policy on prior determinations. A couple of commenters stated general approval of the codification of USCIS' deference policy. Other commenters supported deference to a prior decision when the underlying facts of a filing are unchanged and regarded this as a "smart," "sensible," and "common-sense" approach.

Many commenters regarded the codification of the deference policy as a positive development for upholding predictability, reliable and fair outcomes, consistent adjudications, and efficiency. For example, a joint submission concurred with DHS's statement that deference has "helped promote consistency and efficiency for both USCIS and its stakeholders," while an advocacy group said that deference reduces the Department's workload and ensures consistent and fair adjudications. A few companies welcomed the codification of USCIS' deference policy, reasoning that it would bring stability and "peace of mind" to employers and employees. One of the companies added that deference promotes consistency and efficiency for both the agency and petitioners, while another company reasoned that "predictability of outcomes is a fundamental aspect of the rule of law." Another company supported the codification on the basis that this measure, in concert with other proposed provisions, would improve the availability of H-1B visas, support innovative companies, provide greater certainty, and reduce burdens in the visa process.

A joint submission added that the proposed language would add clarity regarding the application of deference for petitioners, legal services providers, and adjudicators, which may be relied upon for personal and business planning purposes. A trade association additionally reasoned that codifying the deference policy would provide certainty to employers and reduce the need for extensive RFEs. Moreover, in addition to providing predictability and ameliorating inconsistencies in adjudications, a form letter campaign said that the codification of deference would close the officer training gap that further exacerbates disparities between decisions. Echoing the above remarks, a company regarded the proposed codification of the existing deference policy as a "key lever of efficiency" as USCIS focuses on sustaining operational effectiveness, achieving reasonable processing times, and upholding the

⁶⁵ *See* USCIS, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status," PM-602-0151 (Oct. 23, 2017).

⁶⁶ *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988).

integrity of U.S. immigration programs amid resource constraints. The company reasoned that USCIS should not expend adjudicatory resources to conduct a full de novo review of the same underlying facts and circumstances for eligibility. Furthermore, the company agreed that the application of deference would allow for predictable, consistent, and faster determinations “without compromising the level of scrutiny needed for substantive assessment.”

A few commenters remarked on the benefits of USCIS’ proposed deference codification for specific employment sectors. For example, an association remarked that the policy would reduce the administrative burden for higher education institutions in the USCIS filing process. A trade association remarked that the clarification around deference would streamline processing, reduce backlog stress, and improve the “well-being of the scientific workforce.”

Many commenters acknowledged that the proposed rule would codify longstanding USCIS policy, which was reinstated in 2021 through USCIS Policy Manual guidance. For example, a form letter campaign supported the codification, reasoning that the deference policy has essentially been “in effect since 2004.” An advocacy group said that the 2021 Policy Manual guidance, which instructed USCIS officers to defer to prior determinations when adjudicating extension requests unless there was a material error, change, or new circumstance, reversed 2017 policy rescinding deference and resulted in more work and extension denials for experienced technology employees. Citing a 2020 AILA Policy Brief, another advocacy group said that the 2017 rescission of the deference policy illustrated the benefits of this policy, as the rescission led to increased delays and backlogs, administrative burdens for employers, and no clear improvement to the integrity or efficiency of the H-1B program. A couple of trade associations and a business association similarly commended DHS for codifying the deference policy given the negative outcomes associated with its absence in the past, including “significant business disruptions” to companies and impacts to companies, employees, and families following the 2017 rescission. The business association cited these challenges as justification for bolstering the longstanding deference policy through regulation. An association wrote that the codification of deference aligns with the agency’s policy before its rescission in 2017. The association cited its comments on a 2021 Notice (86 FR 20398, Apr. 19, 2021) in which it

commended USCIS for reinstating the longstanding policy of deferring to prior approvals when no error or material change in fact has occurred.

In light of the above, commenters encouraged DHS to proceed with formalizing or codifying the existing deference policy in regulations.

Response: DHS agrees that codification of the deference policy will help ensure consistent and efficient adjudications and provide greater predictability to the visa petition process without, as noted by one commenter, compromising the level of scrutiny needed for substantive assessment. This provision may also reduce the need for RFEs, saving time for both USCIS and stakeholders. DHS recognizes that certain commenters find this provision beneficial for their specific employment sectors. New 8 CFR 214.1(c)(5) brings agency regulations in line with longstanding deference policy, as implemented in a 2004 memorandum, rescinded in 2017, and reinstated in 2021 in the USCIS Policy Manual. DHS agrees with the noted benefits of codifying this longstanding policy.

Comment: A few commenters, including a form letter campaign, expressly supported the change in regulatory language that would allow deference for any Form I-129 petition—not just extension requests. The campaign said that the acknowledgment that a petition may be filed with the same parties and underlying facts, other than for the purpose of an extension, would benefit everyone. A company endorsed the broadened scope of deference to include all requests filed on Form I-129 as an “appreciated acknowledgment that these efficiencies can also exist in other types of Form I-129 filings involving the same parties and underlying facts.” A joint submission, citing statements from the current USCIS Policy Manual, agreed that this change would ensure that the deference policy would not be misread as limiting deference to extensions and excluding other types of requests involving the same parties and material facts. To provide additional clarity on this point, the joint commenters encouraged DHS to replace the current title of 8 CFR 214.1(c) with “Extensions of Stay and Other Requests Filed on Form I-129.”

Response: DHS agrees with the benefits of new 8 CFR 214.1(c)(5) applying to all nonimmigrants using Form I-129 involving the same parties and the same underlying facts, not just to those seeking an extension of stay. Those seeking a change of status, amendment or extension of stay, or

consular notification of approval warrant the same deference unless there is a material error involved with a prior approval, material change in circumstances or eligibility requirements, or new, material information adversely impacting the petitioner’s, applicant’s, or beneficiary’s eligibility. DHS would also note that nothing in this provision modifies general eligibility requirements for a change or extension of status. Extending deference to any request filed on Form I-129 involving the same parties and underlying facts broadly enhances efficiency and consistency.

DHS declines to replace the title of current 8 CFR 214.1(c) with “Extensions of Stay and Other Requests Filed on Form I-129.” DHS acknowledges that the current title of 8 CFR 214.1(c) (“Extensions of stay”) may initially create confusion as to the applicability of the deference provisions to I-129s other than those requesting an extension of stay. However, DHS would also note that the commenter’s proposed title revision may also create confusion, as current 8 CFR 214.1(c) does not exclusively pertain to requests filed on Form I-129. For instance, 8 CFR 214.1(c)(2) pertains to extensions filed on Form I-539, and 8 CFR 214.1(c)(3) lists classifications ineligible for extension of stay. DHS believes this provision is most appropriately placed under 8 CFR 214.1(c) as proposed.

Comment: A professional association said it understood, as part of DHS’s proposed codification, that deference would not apply in cases of past USCIS eligibility determinations involving the same employer and position but a different beneficiary. The association concurred that deference would not be appropriate in such contexts.

Response: DHS agrees that deference should not be afforded to determinations involving the same employer and position but a different beneficiary.

Comment: Several commenters raised concerns with the proposed regulatory language limiting deference when there has been a material change in eligibility requirements and the potential impact on future adjudications. For example, a couple of companies said it is unclear whether the term “eligibility requirements” refers to the employer’s role requirements or the substantive requirements for H-1B eligibility, with one company stating that the latter interpretation could allow the Department to change the rules “midgame” and deny future extensions to individuals already on H-1B status. The companies, therefore, urged DHS to amend the regulatory text to state

clearly that the change in eligibility requirements refers to an employer's requirement for the role, not other regulatory or administrative changes. Similarly, a university expressed concern that USCIS would not grant deference to long-time H-1B holders where there is a change in eligibility (e.g., due to the degree requirement), even when the position and position requirements remain unchanged. The university, therefore, suggested that DHS remove the change in eligibility from the proposed deference regulation, or, alternatively, create an allowance for current H-1B holders, particularly if they are beneficiaries of an employment-based immigrant visa petition. While also expressing concerns about the potential impacts of the new requirements on those with approved H-1B visas, an association suggested that DHS remove the phrase "or eligibility requirements" from the proposed deference provision.

Similarly, a joint submission expressed concern with the inclusion of the term "material change in circumstances or eligibility requirements" in the description of factors that would lead to a decision to decline to give deference to a prior adjudication. See proposed 8 CFR 214.1(c)(5). The commenters wrote that many H-1B beneficiaries and their accompanying family members have been waiting for an immigrant visa to become available for "well over a decade," and these individuals justifiably rely on the ability to obtain future extensions of stay as long as the facts and circumstances of employment remain the same. Specifically, the joint commenters cautioned that the proposed changes to "specialty occupation" would jeopardize future extensions of stay for those who are "established and respected members of their professional and local communities." Moreover, the commenters said it would be "intrinsically inequitable" to subject individuals who have acted in good faith to maintain legal status to unpredictable policy interpretations of changing administrations. Accordingly, the commenters urged DHS to amend the proposed description of the factors that would preclude an exercise of deference by removing the reference to "changing eligibility requirements."

Response: DHS declines to remove the reference to "eligibility requirements" from new 8 CFR 214.1(c)(5). Under 8 CFR 103.2(b)(1), an applicant or petitioner must establish eligibility for the requested benefit at the time of filing the benefit request. It is unclear how USCIS adjudicators could determine

eligibility for the requested benefit if they defer to prior determinations made under different eligibility requirements. It is important to note that inclusion of "eligibility requirements" in this provision does not mean that a beneficiary previously found eligible will necessarily be found ineligible in future filings. Rather, as implemented at new 8 CFR 214.1(c)(5), when there has been a material change in eligibility requirements USCIS adjudicators "need not give deference" and will fully review the facts and regulations in place at the time of filing. With respect to the specific concern over provisions related to the specialty occupation determination, DHS reiterates that revisions to the regulatory language codify and better reflect adjudication practices. A position that was previously correctly determined to meet the definition of a specialty occupation should continue to do so and a beneficiary that was previously correctly determined to be qualified for such occupation should remain so qualified.

Comment: Many other commenters expressed particular concern with the intersection of the deference codification and the proposed changes to the definition and criteria of "specialty occupation." One such commenter said that attorneys had observed a limitation in the deference policy: that deference is "irrelevant" unless a professional first qualifies under the revised specialty occupation standards. A university similarly wrote that the changes to the definition of specialty occupation constitute material changes that would eliminate USCIS' deference to a prior petition, thereby eliminating predictability and forcing employers to demonstrate anew that the position qualifies as a specialty occupation. A business association also highlighted the "tension" between the two provisions, stating that USCIS cannot defer to a prior decision if a job no longer qualifies as a specialty occupation. As such, the association warned that the deference policy would not promote certainty and efficiency for those who have been "caught up" in the immigration process and who rely on long-standing definitions; rather, it would lead to "substantial business disruptions," harming its member companies, employees, and their family members.

A professional association said that in cases where a specialty occupation eligibility determination has already been made, the fairness and reliance interests would be particularly acute in the airline pilot industry, which involves extensive training and requires

extended time horizons for planning, scheduling, and service decisions. In this context, the association continued, reversing prior eligibility determinations could disrupt the airline industry, causing harm to pilot visa holders, their families, employers, crewmembers, and U.S. airline consumers. The association additionally noted that the same fairness and reliance interest would be implicated where DOS made the prior eligibility determination, rather than by USCIS itself.

A trade association supported the intent to codify USCIS' existing deference policy but said that, given the scope of changes contained in the proposed rule, it would be necessary for USCIS to outline how it would address changes in requirements during the intervening period between an initial H-1B approval and the time for when a new Form I-129 is filed.

Echoing the above concerns, many commenters encouraged DHS to proceed with codifying the deference policy while requesting clarification that any modifications to program requirements and standards would only apply to initial petitions filed after the rule's effective date. A joint submission urged DHS to adopt this approach to ensure that the codification of USCIS' deference policy fulfills the proposed rule's goal of creating "predictability for petitioners and beneficiaries and . . . fairer and more reliable outcomes." The commenters added that if the agency were to apply the changes for requirements or standards to individuals already in the immigration process, it would increase burdens and lead to unpredictable outcomes, harming employees, their families, and employers. A trade association cautioned that, as proposed, the provision would not protect employees already in the immigration process. The association urged DHS to clarify that changes to H-1B eligibility requirements would not apply to nonimmigrants who are in the immigrant visa backlog, reasoning that such individuals have relied on the current requirements for many years, and applying new standards could result in their loss of status or removal from the United States. The association thus encouraged DHS to protect employees and their families by ensuring that the new eligibility requirements would only apply to beneficiaries of initial petitions filed after the rule's effective date—not current H-1B beneficiaries who are already in the process. Another association, echoing these comments, reasoned that this clarification would

ensure fair and consistent adjudications. The association added that changing the requirements for individuals who have already been granted H-1B status before the final rule takes effect would harm its member companies' employees and their families while creating an "extremely unpredictable adjudication environment."

In line with the above recommendations, a business association proposed—outside of abandoning the specialty occupation changes—that DHS clarify that any deference policy would not apply new eligibility criteria to beneficiaries and families residing and working in the United States prior to the promulgation of the new standards. Instead, the association wrote, the new H-1B eligibility criteria should only apply to those whose initial petition was filed after the rule's finalization, and USCIS should delay the implementation of the requirements by at least 6 months to provide stakeholders with sufficient time to adapt and adjust their business practices accordingly. A professional association, expressing support for deference, additionally urged DHS to limit deference to petitions involving new employment and not use the policy to revoke or reconsider the eligibility of existing H-1B, E-3, or H-1B1 pilot visa holders or deny petitions for pilot visa holders to continue their current employment, make changes to their employment with their current employer, obtain concurrent employment, or change employers.

Several commenters proposed that DHS extend deference to the initial petitions of current H-1B holders. For example, a trade association suggested that DHS clarify that deference would be applied "liberally" to avoid re-adjudication under changed requirements during routine H-1B extensions or renewals. The association reasoned that H-1B beneficiaries often have resided in the United States for many years as they await the finalization of the immigrant visa process, and denying extensions based on new requirements would cause significant harm to visa holders, their employers, ongoing company projects, and the U.S. economy. The association added that changing program requirements without a correspondingly strong deference policy could harm families who have spent decades establishing their lives in the United States. A company similarly expressed concern about ensuring the opportunity to leverage deference for long-term H-1B visa holders due to the immigrant visa backlogs. The company said that these employees, who may have earned

their bachelor's degrees long before the existence of today's specialized degree fields, have a strong case for deference given the number of times USCIS has reviewed their circumstances in prior petitions under the same employer. Thus, the company concluded that longstanding H-1B holders should not be given less certainty than others about the ability to maintain their status while awaiting an immigrant visa, and urged DHS to clarify that deference can and should apply in such circumstances. Another company similarly encouraged DHS to extend deference to H-1B holders who could otherwise be impacted by other proposed changes, such as the revisions to the definition of "specialty occupation." A trade association likewise proposed that DHS specify in the final rule that deference would be based on the same standards and language contained in the original H-1B approval.

In line with the above remarks, an advocacy group urged the Department to "grandfather in" petitions that were approved before the finalization of key changes, such as the proposed definition of "specialty occupation." In the absence of such a policy, the advocacy group warned that previously approved petitions could be subject to full adjudication, undermining the improved efficiencies promised by the deference provision. The advocacy group additionally expressed concern that holding petitions subject to a stricter standard than when they were approved would lead to denials, resulting in those with longstanding H-1B status being forced to leave their jobs and the United States. In light of these concerns, the commenter encouraged DHS to clarify that deference can apply to filings that were approved before the definition changes.

Response: DHS acknowledges the concerns expressed by various commenters pertaining to the deference policy and its intersection with H-1B eligibility requirements, including the revised definition of and criteria for "specialty occupation" promulgated in this rule. However, DHS reiterates that an applicant or petitioner must establish eligibility for the requested benefit at the time of filing the benefit request. DHS also reiterates that the deference provision codified in this rule applies to all requests on Form I-129 involving the same parties and underlying facts, not only to H-1B petitions. It is unclear how USCIS could create an exception to this requirement when adjudicating H-1B petitions, nor did DHS propose to do so in the NPRM. It is conceivable that future regulatory changes impacting other nonimmigrant visa classifications

may occur which require petitioners to reestablish eligibility for the classification upon renewal. It seems that what commenters are requesting, with respect to deferring to eligibility determinations under previous regulatory requirements rather than those in place at the time of filing, goes beyond the scope of this rule and has much larger implications for all petitions and applications filed with USCIS.

DHS also reiterates that the specialty occupation provisions of this rule codify current USCIS policy. Because regulatory changes to the definition and criteria for specialty occupations are codifying current USCIS adjudication practices, a position that was previously correctly determined to meet the definition of a specialty occupation should continue to do so and a beneficiary that was previously correctly determined to be qualified for such occupation should remain so qualified.

Comment: Several commenters suggested changes to the language related to material error and general circumstances where deference would not apply. For example, a trade association and a joint submission welcomed the codification of deference but requested that DHS modify the "material error" standard to specify "pure errors of law." While stating the need for "more strength and clarity" in the regulations, the association reasoned that the "material error" standard is too broad and could create confusion for adjudicators.

Response: DHS declines to revise the first enumerated exception to the deference policy at new 8 CFR 214.1(c)(5) from "material error" to "pure errors of law." This proposed exception would too greatly narrow the level of discretion needed by USCIS adjudicators, such that consideration of material errors of fact, which may significantly impact eligibility for the requested classification or action, would be precluded.

Comment: A trade association urged DHS to explicitly state in the regulation that deference to prior adjudications applies to petitions involving changes in client locations, provided there are no other substantive changes in the role. Providing examples, the association said that when there is a change in client location, there often is no significant change in the worker's job duties. The association concluded that deference to prior adjudications where the role itself has not materially changed, would streamline the process and reflect the realities of modern consulting and technology roles.

Response: DHS declines to explicitly state in the regulation that deference to prior adjudications applies to petitions involving changes in client locations when there are no other substantive changes in the role. If a change in client location requires a new LCA, as determined by DOL regulations, the new location would constitute a material change. As such, DHS declines to codify in the regulations a blanket application of the deference policy for changes in client locations.

Comment: While endorsing the proposed codification, a company suggested that DHS clarify the circumstances where deference would not apply. In particular, to safeguard the intent behind the proposed codification and encourage the accurate application of the policy, the company requested that DHS clarify what constitutes “a material error involved with a prior approval;” “a material change in circumstances or eligibility requirements;” and “material information that adversely impacts the petitioner’s, applicant’s, or beneficiary’s eligibility.” The company additionally proposed that USCIS provide examples for adjudicators and petitioners, and if such circumstances are already defined in other regulations, these should be included in the rule as a point of reference. A form letter campaign also suggested further clarification around what would constitute a material change (e.g., a change in SOC code, a change in worksite address within the same Metropolitan Statistical Area (MSA), or a more than 50-percent difference in job duties).

Response: DHS declines to identify specific scenarios that would definitively fall under the enumerated exceptions to the deference policy, as USCIS decides each matter according to the evidence of record on a case-by-case basis. DHS notes generally that the exceptions to deference due to material error, material change in circumstances or eligibility requirements, or new material information, are intended to account for legal and factual errors, changes, or new information that impacts eligibility for the requested benefit or classification. A fact is material if it would have a natural tendency to influence or is predictably capable of affecting the decision.⁶⁷

An example of a material error of fact may include an incorrect determination that a beneficiary had earned the required licensure for their occupation. A material error of law involves the misapplication of an objective statutory

or regulatory requirement to the facts at hand. As held in *Matter of Simeio Solutions, LLC*, a change in geographic area of employment that would require a new LCA is considered a material change. For example, a change in location may impact eligibility if the new location is in an MSA with a higher wage. DHS declines to identify a specific percentage of job duties that must remain the same for deference to apply, such as 50 percent as suggested by commenter. There could be scenarios where only one job duty changes, but that job duty is the core function of the position and would constitute a material change. Because the possibilities and types of duties for each occupation are numerous, each case will be decided on its merits and on the evidence provided. A material change in eligibility requirements may include a change in statute or regulation that implements new requirements to qualify for the requested classification. New material information that adversely impacts the petitioner’s, applicant’s, or beneficiary’s eligibility includes information not previously available that would impact eligibility. An example may include information that the beneficiary’s license, which is required to perform the job, has been revoked by the licensing authority. New material information impacting eligibility also includes information that affects national security or public safety garnered from security checks conducted on beneficiaries and petitioners. Likewise, USCIS officers do not defer to a prior approval when there are indicators of potential fraud or willful misrepresentation of a material fact as that is new material information that adversely impacts eligibility.⁶⁸

Comment: A form letter campaign, expressing support for the deference policy, said that the proposed regulations fail to define what is considered the “same parties,” citing, for example a company going through a corporate restructuring and renaming but having the same FEIN, or a merger in which the company is acquired under a new FEIN.

Response: The term “same parties” in this context refers to the same petitioner and the same beneficiary. DHS declines to identify changes to the petitioning employer which definitively impact the “same parties” determination. However, DHS notes that a mere name change of the petitioner generally would not result

in the petitioner being considered a different party. Similarly, where an amended petition is not required under INA sec. 214(c)(10), 8 U.S.C. 1184(c)(10), the parties would generally be considered the same for purposes of deference. Conversely, if a petitioner is acquired under a new FEIN in a corporate restructuring and the terms and conditions of employment have changed, the petitioner would not generally be considered the same party for purposes of deference.

Comment: A form letter campaign requested further guidance on what an adjudicating officer must prove if they decide not to defer to prior determinations.

Response: DHS is codifying current USCIS deference policy, which requires the officer who determines that deference is not appropriate to acknowledge the previous approval(s) in the RFE, NOID, or denial. The officer must articulate the reason for not deferring to the previous determination (e.g., due to a material error, material change in circumstances, or new adverse material information). Officers will generally provide the petitioner an opportunity to respond to the new information. See 8 CFR 103.2(b)(16)(i).

Comment: While expressing support for the proposed codification of the current deference policy, a few commenters encouraged DHS to extend the provision to include deference to H-1B cap exemption determinations.

A professional association remarked that the proposed codification of the deference policy would be helpful but is insufficient to address deference to prior cap exemption determinations. The association reported situations where practitioners received different outcomes on petitions requesting cap exemption filed by the same employer with identical evidence to the same USCIS Service Center. Thus, to increase efficiency and predictability, the association suggested that DHS also apply deference to cap exemption determinations and suggested some modifications to proposed 8 CFR 214.1(c)(5).

To provide additional certainty to employers on cap exemption determinations, the association suggested that DHS adopt other measures, such as annotated approval notices, a fallback policy for establishing the validity of previous cap-exemption determinations, and requirements for petitioners to update USCIS with current evidence confirming their eligibility for cap exemption.

The association added that USCIS could foster greater predictability and

⁶⁸ See USCIS Policy Manual, Volume 2, “Nonimmigrants,” Part A, “Nonimmigrant Policies and Procedures,” Chapter 4, “Extension of Stay, Change of Status, and Extension of Petition Validity,” <https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4>.

⁶⁷ See *Kungys v. United States*, 485 U.S. 759, 770–72 (1988).

transparency by publishing a list of cap-exempt employers, to be updated periodically, which the commenter said would aid employers in planning and would assist H-1B workers who may not always be aware of whether they have been counted against the cap when contemplating a move to a different employer. The commenter proposed adding regulatory text in line with these suggestions.

An association of local government agencies similarly conveyed concerns from its members about “inconsistent and perplexing” decisions on cap exemption and proposed that once USCIS determines that an organization is exempt from the cap, it should defer to that determination “for a reasonable period of time.” The association suggested that USCIS define the duration of that reasonable period and annotate Forms I-797A and I-797B approval notices to confirm the grant of a cap exemption. The association reasoned that the current approach leads to “unpredictable” and “unfair” results when separate petitions containing identical information result in different determinations. The association further stated that the current adjudication process is inefficient and costly both for USCIS and nonprofit employers, as the process involves the review of extensive evidence by multiple officers, inconsistent decisions, RFEs, and NOIDs. The association added that deference to prior cap exemption determinations would align with the proposed rule’s replacement of deference in the case of “an extension of petition validity” with deference to a prior “request filed on Form I-129.”

In line with other commenters, a local government agency expressed concern about inconsistent decisions on cap exemption by USCIS and administrative burdens associated with RFEs and NOIDs. The agency recommended, in giving H-1B program stakeholders more predictability, that the Department state in the final rule that cap exemptions are within the ambit of the deference policy that the NPRM proposes to codify.

An advocacy group, expressing support for the deference codification, suggested that DHS implement a blanket cap-exemption approval system for nonprofit research organizations. The group reasoned that providing a blanket approval of an organization’s status as a nonprofit research organization for 1 or 2 years would streamline the application process for individual visas while preserving adjudicatory resources.

Response: DHS recognizes these commenters’ concerns and the need for consistent and predictable

determinations of cap-exempt status. However, DHS declines to expand the deference provision to include cap exemption determinations on petitions not involving the same parties and the same underlying facts. DHS did not propose through the NPRM to defer to prior cap-exempt determinations as a standard adjudicative practice. DHS further did not propose to establish a new, separate blanket approval process for the status of nonprofit research organizations or otherwise implement new operating procedures relating to cap exemption determinations. New 8 CFR 214.1(c)(5) codifies USCIS deference policy with respect to I-129 petitions involving the same parties and the same underlying facts. This approach strikes an appropriate balance to ensure fact specific adjudication. Furthermore, through this rule DHS is revising H-1B cap exemption provisions to provide additional flexibility to petitioners. These revisions may allay many of these commenters’ concerns by leading to greater consistency and clarity and potentially reducing the issuance of RFEs and NOIDs involving cap-exempt status.

DHS disagrees with the commenters’ statements that extension of the deference policy to any new request filed on Form I-129, not just limited to those requesting an extension of stay, suggests that deference may be extended to a petitioner’s cap exemption eligibility even with different beneficiaries. New 8 CFR 214.1(c)(5) explicitly states that the same parties and same underlying facts must be involved for deference to apply.

Comment: A trade association and business association requested that DHS clarify the application of the deference policy in scenarios involving more than one adjudicating agency, such as the blanket L-1 visa process. The commenters suggested that additional clarity in this area would reduce burdens on employers and their employees while improving efficacy in the adjudicatory process.

Response: DHS reiterates that, under current policy, USCIS officers consider, but do not defer to, previous eligibility determinations on petitions or applications made by U.S. Customs and Border Protection (CBP) or DOS. Officers make determinations on the petition filed with USCIS and corresponding evidence on record. This rule codifies and does not change this existing policy.

Comment: A legal services provider agreed with the codification of the existing deference policy and requested that DHS extend deference to portions of a petition that have not changed, such

as in cases where a petitioner obtains L-1B approval based on specialized knowledge and subsequently files a petition to change to L-1A status with the same company to assume a management position. The commenter acknowledged that the material change with the U.S. position prevents USCIS from deferring to the entire prior approval but suggested that USCIS should give deference to the previous determination that the beneficiary’s employment abroad met the requirements for L-1 status.

Response: DHS declines to codify deference to portions of petitions. The NPRM proposed to codify existing USCIS deference policy, which requires the same parties and the same underlying facts. DHS believes this approach improves efficiency and consistency while ensuring that officers conduct necessary fact specific determinations in adjudications.

5. Evidence of Maintenance of Status

Comment: A couple of commenters expressed general support for the proposed provisions related to the evidence of maintenance of status. A commenter stated that requiring such evidence streamlines the process and ensures compliance. A trade association expressed appreciation for DHS’s clarification of policies related to maintenance of H-1B status.

Response: DHS agrees that new 8 CFR 214.1(c)(6) will streamline and clarify the process and help ensure compliance.

Comment: Several commenters expressed general opposition to the proposed evidence of maintenance of status provision. A commenter expressed dissatisfaction with the proposal, adding that prior companies are unlikely to provide the forms USCIS is requesting, such as tax returns. Another commenter remarked that the proposed provision adds complexity to the process, potentially resulting in delays and increased compliance costs. A commenter called the proposal a “dramatic change” in the way nonimmigrant applications can be appealed in the event of a denial, adding that it is beyond the statutory authority granted by Congress and should be withdrawn. An advocacy group called the proposed provision “troubling,” stating it appears USCIS is seeking to punish employees whose employers have not paid full wages, which in turn undermines the ability of the Department of Labor to compel wage payment. A trade association objected to the proposal, stating the new requirement creates a situation where the approval of a petition may be

contingent on the beneficiary's ability to produce evidence that may be unavailable at the time of filing.

Response: New 8 CFR 214.1(c)(6) provides a non-exhaustive list of documents which may be submitted as evidence of maintenance of status. Petitioners are not required to submit every item listed and may submit alternate documentation not listed. DHS disagrees that this provision adds complexity, delay, or increased compliance costs. Rather, DHS expects that explicitly requiring evidence of maintenance of status at the time of petition filing will likely mitigate delay, by reducing the need to request additional evidence through RFEs or NOIDs. Based on USCIS experience, documents that evidence maintenance of status are often readily available in the normal course of business and are regularly and voluntarily submitted with extension petitions. DHS disagrees that this is a dramatic change in how denials can be appealed, noting that the language in this provision already exists. As noted in the preamble of the NPRM, new 8 CFR 214.1(c)(7) contains the same language as current 8 CFR 214.1(c)(5) except with added references to an "amendment" of stay and other non-substantive edits. 88 FR 72870, 72882 (Oct. 23, 2023). DHS rejects the claim that USCIS is seeking to punish employees whose employers have not paid full wages. This rule does not preclude employees from filing a wage-related complaint with DOL (or another governmental entity). By including a non-exhaustive list at new 8 CFR 214.1(c)(6), petitioners are given flexibility in the types of documentation which may be submitted to evidence maintenance of status. DHS also recognizes that there may be scenarios where evidence of maintenance of status is not available at the time of petition filing. This rule clarifies at new 8 CFR 214.1(c)(4) that USCIS may, in its discretion, excuse the late filing of an extension or amendment of stay request in certain circumstances.

Comment: Multiple commenters provided mixed feedback on the proposed provision. A company expressed general support for the proposal, elaborating that it would provide helpful clarity to evidentiary requirements, assist adjudicators in conducting efficient reviews, and would likely decrease the instance of RFEs or NOIDs. Additionally, the company expressed support for the modernization of regulatory language and the proposed amendment to 8 CFR 214.2(h)(14) to remove the sentence "[s]upporting evidence is not required unless requested by the Director." The

company also suggested a modification, stating that petitioners that fail to provide sufficient evidence of maintenance of status with the initial filing should be afforded an opportunity for correction through a RFE, rather than resulting in immediate denial of the petition.

While expressing agreement with the intent of the regulations to minimize the need for RFEs or NOIDs, an attorney remarked that the list of acceptable documents may embolden officers to expect and request more than what is typically required for approval. The attorney recommended using "or" instead of "and" in the final regulations. A law firm expressed that specification of the types of maintenance of status evidence that should be initially included with extension and amended petitions should advance the goal of reducing the issuance of RFEs and NOIDs. Additionally, the law firm provided a suggestion to specify that a change in an H-1B worker's remote work location is not a material change. A trade association commended DHS for proposing to codify evidentiary requirements, stating it provides certainty for employers and may result in a speedier adjudication process. However, the association suggested that DHS remove contracts and work orders in its list of evidence adjudicators may request, reasoning it would be unnecessarily onerous and subject to abuse.

Response: DHS agrees that this provision will provide clarity on evidentiary requirements, assist with efficient review, and likely decrease the need for RFEs and NOIDs. This rule does not implement a requirement under which failure to provide sufficient evidence of maintenance of status with the initial filing will result in immediate denial. The requirement at new 8 CFR 214.1(c)(6) to provide evidence of maintenance of status with Form I-129 requesting extension or amendment of stay will not change USCIS policy that generally provides for issuance of an RFE, or for notice and an opportunity to respond, prior to the denial of a petition. Furthermore, the list of documents included at new 8 CFR 214.1(c)(6) provides examples of individual documents which may be provided, either on their own or in conjunction with other documents, to meet this requirement. DHS does not believe amending this proposed provision to read "or" instead of "and" is necessary, nor is removing specific document types from this list necessary. DHS would also note that this provision does not define what constitutes a material change to a beneficiary's

employment. Rather, as clarified in the NPRM, providing evidence of maintenance of status will assist USCIS in determining whether the beneficiary was being employed consistent with the prior petition approval or whether there might have been material changes in the beneficiary's employment. 88 FR 72870, 72881 (Oct. 23, 2023).

Comment: A few commenters expressed concern that the proposal is ambiguous and potentially unduly burdensome. Despite the NPRM requiring proof that status had been maintained "before the extension of stay request was filed," the commenters said that the NPRM does not provide a specific temporal reference for this evidence. The commenters added the NPRM implies that evidence covering two pay periods may be long enough, yet this reference does not appear in the text of the proposed regulation. As a result, the commenters said this suggested temporal limitation may be disregarded, and adjudicators may issue RFEs or NOIDs if a petitioning employer submits proof of salary payments for only two pay periods. The commenters urged USCIS not to send current petitioners and the agency's own adjudicators "down a rabbit hole" of long-past activities requiring unattainable proof of a beneficiary's past engagements, associations, and activities involving prior employers. The commenters suggested regulatory language expressly stating that the petitioner would only be required to provide evidence of the last two pay periods while employed by the petitioner and clarifying that a determination that a beneficiary has failed to maintain prior status would not preclude an adjudicator from favorably exercising discretion to restore status.

A legal services provider expressed agreement with the added regulatory language stating that an amendment or extension must include proof the beneficiary has maintained status, reasoning it is current practice and necessary for USCIS to determine maintenance of status. The provider noted that USCIS sometimes issues RFEs for pay stubs covering a larger period, despite the I-129 instructions stating the beneficiary may provide the "last two pay stubs." An advocacy group thanked the Department for the clarification on evidence of maintenance of status, while also expressing the need for an exception for documentation in the event a medical condition resulting in leave of absence for the beneficiary.

Response: DHS declines to codify specific temporal parameters on evidence of maintenance of status under

new 8 CFR 214.1(c)(6). Petitioners should adhere to these regulations in conjunction with USCIS form instructions, which state that the petitioner may submit copies of the beneficiary's last 2 pay stubs, Form W-2, and other relevant evidence. Additionally, DHS recognizes that different employment positions have different pay structures and timelines, so codifying more specificity into this provision may be needlessly restrictive. 8 CFR 103.2(b)(8) already provides USCIS with the discretion to request missing required initial evidence or additional evidence to establish eligibility. DHS believes this provision strikes the balance of clarifying the requirement for evidence of maintenance of status with retaining flexibility for both petitioners and adjudicators. DHS also recognizes that employees may face circumstances necessitating a leave of absence from their employer. Current 8 CFR 103.2(b)(8) and 8 CFR 214.1(c)(6) as finalized, in conjunction with existing regulations and policies governing issuance of RFEs and NOIDs, allow for discretion in these situations.

Comment: A commenter expressed concern with the following sentence found at 8 CFR 214.2(l)(14)(i), stating “[An L-1] petition extension generally may be filed only if the validity of the original petition has not expired.” Specifically, the commenter expressed concern that this sentence would negatively impact the ability of L-1 beneficiaries to extend their nonimmigrant status if they pursued an immigration benefit allowed by INA section 248 during the 3-year look-back period or entered the United States pursuant to a grant of advance parole. Thus, the commenter urged USCIS to remove the sentence from the regulatory text, which the commenter said would “needlessly and unjustly” prevent otherwise law-abiding L-1 petitioners and beneficiaries from accessing the intracompany transferee nonimmigrant visa classification in instances where a previously approved L-1 petition had expired.

Response: DHS did not propose to add a sentence to 8 CFR 214.2(l)(14)(i) as described by the commenter. Current 8 CFR 214.2(l)(14)(i) already includes the statement, “A petition extension may be filed only if the validity of the original petition has not expired.” As explained in the NPRM, through this final rule DHS is adding the word “generally” to this existing sentence to account for untimely filed extensions that are excused consistent with 8 CFR 214.1(c)(4) and deleting the preceding sentence from current 8 CFR

214.2(l)(14)(i) which states, “Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.” 88 FR 72870, 72881 (Oct. 23, 2023). This rule also did not change general requirements for eligibility to change or extend nonimmigrant status. Someone who was previously in L-1 status and seeks to change back to L-1 status while requesting an extension of stay may still do so, assuming they are qualified under existing requirements. New 8 CFR 214.1(c)(6) adds the requirement that such a request must include evidence that the beneficiary has maintained the previously accorded nonimmigrant status before the extension request was filed. Nothing in this rule precludes L-1 petitioners and beneficiaries from continuing to access the L-1 visa classification in instances where a previously approved L-1 petition has expired, assuming they are otherwise qualified under existing regulations and policies.

6. Eliminating the Itinerary Requirement for H Programs

Comment: Several commenters stated their support for the elimination of the H program's itinerary requirement as it would eliminate administrative hurdles, unnecessary paperwork, duplicative content, would promote a more efficient adjudication process, and would lessen burdens on employers and employees.

In voicing support for the removal of H program's itinerary requirement, an attorney reasoned that it would reduce the workload and burden of USCIS officers in issuing RFEs requesting missing itineraries. A trade association mentioned that it would be especially helpful for graduates performing medical residencies in H-1B status since they may be working at different sites. A university stated its removal would provide clarity, consistency and predictability to employers and beneficiaries alike. A legal services provider reasoned that it is difficult to provide an exact, accurate itinerary due to the varying schedule over the course of the requested H-1B period.

Response: DHS agrees with the commenters that removing the itinerary requirement will help reduce unnecessary burdens and duplication of work for both petitioners and USCIS. As noted in the NPRM, and as further described below, the information provided in an itinerary is largely duplicative of information already provided in the LCA for H-1B petitions and the temporary labor certification (TLC) for H-2 petitions. 88 FR 72870, 72882 (Oct. 23, 2023).

Comment: In contrast to the above remarks, a couple of commenters expressed their opposition to the removal of the H program's itinerary requirement and included reasoning to support their decision. An advocacy group stated that the itinerary requirement was intended to deter and detect fraud. The advocacy group cited a report from the Office of the Inspector General that stated, “in many cases, the projects provided within the petition are non-existent which allows beneficiaries to arrive in the country and not work in accordance with the H-B agreements” and concluded that eliminating the itinerary requirement “will encourage more fraud.” A research organization reasoned that itineraries provide agency officers easy access to important information that can be used to uncover fraud and abuse in the H-1B program. The research organization suggested rather than eliminate the itinerary requirement, petitioners should provide more detailed itineraries to demonstrate that the petitioner has non-speculative employment.

Response: DHS disagrees that eliminating the itinerary requirement compromises the integrity of the H-1B program. Information that has historically been provided on an itinerary is provided elsewhere with the petition and required documentation. For example, the LCA and TLC require the petitioner to list the name and address where work will be performed, as well as the name and address of any secondary entity where work will be performed. The Form I-129 also requires the petitioner to provide the address where the beneficiary will work if different from the petitioner's address listed on the form. Further, DHS is proposing other measures to improve the integrity of the H-1B program, including codifying its authority to conduct site visits. In fact, the Office of the Inspector General report cited by one of the commenters relates to site visits, which DHS is addressing and strengthening through this rule and does not mention the itinerary requirement as an integrity or anti-fraud measure. Finally, eliminating the itinerary requirement is consistent with USCIS policy memorandum PM-602-0114 following the decision of the U.S. District Court for the District of Columbia in *ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 42 (D.D.C. 2020) (“the itinerary requirement in the INS 1991 Regulation [codified at 8 CFR 214.2(h)(2)(i)(B)] . . . has been superseded by statute and may not be applied to H-1B visa applicants”). See also *Serenity Info Tech, Inc. v.*

Cuccinelli, 461 F. Supp. 3d 1271, 1285 (N.D. Ga. 2020) (citing *ITServe*).

7. Validity Expires Before Adjudication

Comment: Several commenters expressed general support for proposed 8 CFR 214.2(h)(9)(ii)(D)(1) and (2) allowing petitioners to amend requested validity periods where the validity expires before adjudication. A commenter expressed that the proposed provision provides flexibility and avoids unnecessary re-filing in case of delays. A trade association commended USCIS on providing necessary flexibility when adjudication surpasses the dates of intended employment, while a law firm remarked that USCIS should be granted the flexibility as outlined in this provision. Another trade association commended DHS for providing flexibility for member companies, while adding that the proposed provision would also reduce filing costs.

A company expressed support for DHS's proposal, noting that when validity periods are not updated after the initially requested validity period has passed, serious consequences for the beneficiary can result. The company concluded that the proposed provision "simply" and "elegantly" solves the issue.

A legal services provider stated that the proposed provision would solve the issue of validity periods expiring before a petitioner wins an appeal by allowing the petitioner to modify the requested dates. An attorney commended the agency for the "creative" and "appreciated" provision. A trade association expressed favorable support for the option for petitioners to adjust the requested validity period if the petition is deemed approvable after the initially requested validity period expires. A joint submission expressed support for the proposed provision, noting the provision increases efficiency.

Response: DHS agrees with the commenters that allowing petitioners to request amended validity periods where the validity period expires before adjudication will increase flexibility and efficiency for stakeholders. DHS appreciates the comments noting the anticipated time and cost savings associated with this change.

E. Benefits and Flexibilities

8. H-1B Cap Exemptions

Comment: Several commenters expressed general support for the proposed H-1B cap exemption provisions at 8 CFR 214.2(h)(8)(iii)(F)(2)(iv), (h)(8)(iii)(F)(4),

(h)(19)(iii)(B)(4), and (h)(19)(iii)(C). A trade association applauded the proposed changes and said the changes will be a positive development to expand and strengthen the technology workforce. A professional association agreed and stated that the proposal would provide needed flexibilities to physicians and their employers as well as H-1B physician researchers. A company and a trade association stated that the proposal would be beneficial to public-private partnership programs between industry and nonprofits or universities. The trade association cited the CHIPS and Science Act of 2022 to indicate Congressional support for such collaborations. A university commented that the proposal would support international students and the growth of artificial intelligence, cybersecurity, education, and medicine sectors. An advocacy group stated that the proposal would support nonprofit contributions to public health, technological advancement, national security, and other national interests. A joint submission agreed that the proposal would support entrepreneurship and technological innovation, describing the commenters' partnerships with State governments for entrepreneurship programs. A joint submission wrote that the proposal would help legal services providers enlist needed H-1B labor.

Response: DHS agrees that the changes to the H-1B cap exemption provisions will benefit a variety of industries, occupations, and petitioner populations.

Comment: A legal services provider expressed general support for the proposed changes but also doubted that these changes would substantially increase the number of cap-exempt petitions.

Response: DHS acknowledged in the NPRM that it does not have data to precisely estimate how many additional petitioners would qualify for the expanded cap exemptions, but estimates that a fairly small population, between 0.3 percent and 0.8 percent of annual petitioners, may no longer be required to submit H-1B registrations as a result of the changes to the cap exemption provisions. 88 FR 72870, 72934 (Oct. 23, 2023). The NPRM specifically invited public comment regarding the number of additional petitioners that would qualify for cap exemption based on the modified standard as well as the percentage of current registrants (prospective petitioners that are cap subject) that may no longer have to submit a registration for the H-1B cap. The commenter did not provide data or cite to any research in support of their comment, nor did any other

commenters provide data or research to specifically address DHS's estimate. DHS did not make any changes to its final analysis as a result of this comment.

Comment: Some commenters opposed the changes to the cap exemption provisions. An advocacy group stated that they oppose the exemptions for universities, nonprofit research entities, and government research programs and recommended that "[t]he caps should be lowered on visa programs and their benefits to employers should be removed." A few commenters generally stated that the proposal would increase abuse of the H-1B program through loopholes for outsourcing companies to bypass the cap, with one commenter noting that this change will "flood" H-1B visas to non-profit organizations.

Response: DHS disagrees that these changes would provide loopholes to bypass the statutory cap. Congress set the current annual number of noncitizens who may be issued H-1B visas or otherwise provided H-1B status at 65,000, as well as the "advanced degree exemption" of an additional 20,000 H-1B visas for noncitizens who have earned a master's degree or higher from a U.S. institution of higher education. See INA sec. 214(g)(1), (5), 8 U.S.C. 1184(g)(1), (5). Congress also established the exemptions to the annual H-1B cap for workers who will be employed at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965, as amended) or a related or affiliated nonprofit entity, and workers who will be employed at a nonprofit or governmental research organization.⁶⁹ These exemptions are not numerically capped. See INA sec. 214(g)(5)(A)–(B), 8 U.S.C. 1184(g)(5)(A)–(B). No provisions adopted in this final rule allow DHS to exceed the statutory limitation on the number of H-1B visas issued per fiscal year. Nor do the provisions allow DHS to create a new type of cap exemption.

⁶⁹ Congress did not define the terms "nonprofit research organization" and "governmental research organization" in INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). Because Congress did not define these terms and has delegated discretionary authority to DHS, DHS may reasonably define the terms consistent with their ordinary meanings and the overall statutory scheme. See *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (explaining that a statute's meaning may be that the agency is authorized to exercise a degree of discretion and empowered to prescribe rules to fill in statutory gaps based on "reasoned decision making."). In addition, DHS has express delegated authority to administer the immigration laws and issue regulations pursuant to INA section 103(a), 8 U.S.C. 1103(a), and to issue regulations pertaining to the admission of nonimmigrants, and set conditions for nonimmigrant petitions pursuant to INA section 214(a) and (c), respectively, 8 U.S.C. 1184(a) and (c).

Instead, these provisions are intended to clarify and simplify eligibility for the existing cap exemptions at INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). The commenters did not provide data or cite to research to support their assertions concerning abuse of these current cap exemptions and how the new changes would significantly increase abuse of these cap exemptions. DHS does not expect these changes will increase abuse because the revised cap exemptions still contain meaningful limitations, such as the requirement that research is a fundamental activity of the petitioning entity.

Comment: A commenter wrote that increasing cap exemptions without expanding immigrant visa limits would exacerbate backlog issues and be unfair to H-1B workers currently waiting for employment-based permanent residence in the United States.

Response: DHS notes that Congress sets limits on the number of immigrant visas that can be issued each year and that DHS does not have the statutory authority to increase these limits. To the extent the commenter is requesting an increase in the number of immigrant visas, that request is beyond the scope of this rulemaking. While DHS is unable to precisely estimate how many additional petitioners will now qualify for cap exemption, the increase is expected to be small, and the commenter has not provided any evidence to the contrary. Further, not every beneficiary of a cap-exempt H-1B petition will ultimately seek an immigrant visa. Additionally, nothing prohibits a noncitizen from applying for an immigrant visa while outside the United States based on a qualifying family relationship, offer of employment, or another applicable basis. The order of consideration for immigrant visas is based on the applicable priority date, preference category, and country of chargeability. 8 U.S.C. 1152, 1153(e). The fact that a small number of additional noncitizens may be provided H-1B status annually is unlikely to materially impact overall demand for immigrant visas or cause those currently applying for an immigrant visa or adjustment of status to wait longer. Thus, DHS believes that impacts to immigrant visa processing or retrogression are speculative and, to the extent there is an impact, it is likely to be small. Further, DHS notes that USCIS has taken a number of steps to assist individuals who may be waiting for an “immediately available” immigrant visa.⁷⁰ As explained in the NPRM and

in this final rule, the intent of the changes to the regulations related to H-1B cap exemption is to clarify, simplify, and modernize eligibility for cap-exempt employment, and to provide additional flexibility to petitioners to better implement Congress’s intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are to be employed at a qualifying institution, organization, or entity. 88 FR 72870, 72883 (Oct. 23, 2023). Therefore, DHS believes that the benefits of these changes outweigh the potential impacts, if any, on immigrant visa backlogs.

Comment: A few commenters generally supported revising the requirements for beneficiaries who are not directly employed by a qualifying organization, reasoning that the changes acknowledge the value of their contributions and ensures that essential work, even if not directly related to the organization’s core mission, is recognized and supported, leading to a more efficient and productive research ecosystem. A professional association supported the proposal to treat H-1B holders who contribute to the missions of qualifying organizations as cap-exempt, reasoning that doing so is consistent with Congressional intent to keep graduates and educators in the United States. The commenter also stated that the cap would be needed to facilitate expanding public-private partnerships between universities and industry. A law firm also supported the proposal as consistent with congressional intent and promoting flexibility, transparency, and more equitable outcomes.

Response: DHS appreciates these commenters’ support for the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. DHS believes these provisions add flexibility while retaining necessary guardrails to cap exemption determinations.

Comment: An advocacy group opposed the proposal contending it would formalize a practice the commenter claimed nonprofits and companies already use to avoid H-1B caps on for-profit employees. The commenter referenced as examples a university’s entrepreneur program and another similar entrepreneur program through which entrepreneurs may be exempt from the H-1B cap. A union cited the same article as the advocacy group, expressing concern about

working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/uscis-actions-to-support-adjustment-of-status-applicants-who-are-in-h-1b-status-in-the-united-states.

partnerships between research or nonprofit institutions and other entities seeking to qualify for cap-exempt H-1B visas and stating they should be publicly disclosed to prevent abuse and exploitation of loopholes. The union also referenced a case where, the commenter wrote, an exploitative staffing agency was able to use the H-1B system by falsely claiming that school districts that would be employing H-1B visa holders had partnerships with public universities, and also referenced visa fraud litigation against another university. Likewise, a research organization wrote that the proposal would allow for-profit organizations to benefit from the cap exemption. The commenter referenced a 2016 letter from Senator Chuck Grassley as highlighting cases of universities abusing the H-1B program to evade cap limitations and stated that the proposal would contravene INA sec. 214(g)(5). The research organization commented that USCIS failed to adequately address these concerns in the proposed rulemaking, and that USCIS did not justify the proposed changes or demonstrate the congressional intent for broad inclusion of beneficiaries who are not directly employed by qualifying employers and are “splitting their time” to conduct non-qualifying work. In line with these comments, the research organization urged DHS to withdraw proposed 8 CFR 214.2(h)(8)(iii)(4) and (h)(19)(iii)(C), stating they unlawfully expand the positions and employers who may petition for a cap-exempt worker.

Response: DHS acknowledges the stated concerns but disagrees with these commenters. Exemption from the H-1B cap for those employed at qualifying institutions is a feature of the H-1B program established by Congress. Congress established cap exemptions for H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization. INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). Some of the references cited by the commenter contain no evidence of abuse of the H-1B program or a use of the program that is contradictory to existing rules. Additionally, DHS did not propose to publicly disclose partnerships between research or nonprofit institutions and other entities seeking to qualify for cap-exempt H-1B visas and declines to do so through this final rule.

More generally, DHS recognizes the potential for program abuse and bad actors, but, false representations are not an issue limited to cap exemption. H-

⁷⁰ See USCIS, “FAQs for Individuals in H-1B Nonimmigrant Status,” <https://www.uscis.gov/>

1B program integrity is a matter of serious importance to DHS, and USCIS is continuously monitoring for potential fraud and abuse in the program. For example, through USCIS' Administrative Site Visit and Verification Program (ASVVP), immigration officers in the Fraud Detection and National Security Directorate (FDNS) make unannounced site visits to collect information as part of a compliance review to ensure petitioners and beneficiaries follow the terms and conditions of their petitions.⁷¹ USCIS takes a more targeted approach to site visits for certain employers and petitions and also encourages anyone to report suspected fraud or abuse in the H-1B program through the existing ICE Tip Form or other tip forms, as appropriate.⁷²

The ability of USCIS to pursue and take action when fraud is found is enhanced by other provisions of this rule, including provisions requiring a bona fide job offer and bona fide employment and the site visit provisions. Additionally, DHS believes that H-1B cap exemption provisions, as finalized in this rule, contain sufficient guardrails to protect against abuse, particularly in the context of beneficiaries who are not directly employed by a qualifying institution, organization, or entity, as raised by the commenter. Notably, 8 CFR 214.2(h)(8)(iii)(F)(4) governs the quantity and nature of work that must be performed to qualify for H-1B cap exemption when not directly employed by a qualifying institution, organization, or entity. Additionally, 8 CFR 214.2(h)(19)(iii) outlines specific requirements for qualifying institutions, organizations, and entities, including those with which petitioning employers may be affiliated. DHS believes that these provisions, in conjunction with other provisions related to H-1B program integrity, serve as adequate safeguards against abuse. The changes in this rule better implement Congress's intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are

employed at a qualifying institution, organization, or entity, while still protecting the integrity of the H-1B program, including the numerical allocations.

Comment: A research organization requested that USCIS eliminate the allowance of cap exemptions for beneficiaries not "directly" employed by a qualifying institution by rescinding current 8 CFR 214.2(h)(8)(iii)(F)(4), stating that doing so would reduce fraud and abuse.

Response: DHS declines to eliminate the allowance of cap exemptions for beneficiaries not directly employed by a qualifying institution and did not propose to do so through the NPRM. Congress chose to exempt from the numerical limitations in INA sec. 214(g)(1) noncitizens who are employed "at" a qualifying institution, which is broader than being employed "by" a qualifying institution. USCIS interprets the statutory language as reflective of congressional intent that certain noncitizens who are not employed directly by a qualifying institution may nonetheless be treated as cap-exempt by virtue of the nature of their job duties.⁷³ USCIS therefore allows a petitioner to claim exemption on behalf of a beneficiary if the beneficiary will spend the majority of their work time performing job duties at a qualifying institution that will further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying entity. New 8 CFR 214.2(h)(8)(iii)(F)(4). The burden remains on the petitioner to establish the qualifying work being performed by the beneficiary, and that one of the fundamental purposes, missions, objectives, or functions of the qualifying institution is either higher education, nonprofit research, or government research.

Comment: A joint submission supported the proposed amendment but recommended that, in light of difficulty in measuring the "at least half" standard, USCIS clarify that the standard be measured over the course of the petition's validity period, rather than a smaller unit of time. Similarly, an advocacy group recommended that USCIS provide an alternative standard of hours per week to clarify when a position qualifies under the "at least half" standard. Another joint submission supported the proposal as

recognizing remote or hybrid work structures.

Response: DHS appreciates the commenters' support for this change to 8 CFR 214.2(h)(8)(iii)(F)(4) and agrees that it will increase flexibility for employers and beneficiaries. DHS declines to specify that the standard be measured over the course of the petition's validity period. Codifying such specificity could potentially open the door for abuse of the requirements to qualify for H-1B cap exemption. For example, if a petitioning employer submits an H-1B petition requesting a 3-year period of employment, with the first 18 months of work to be conducted wholly at any otherwise cap subject employer, the beneficiary could conceivably change employment and never work at the qualifying cap-exempt institution. DHS also declines to specify a number of hours per week that will enable beneficiaries to qualify for H-1B cap exemption. Doing so would be impractical given varying work schedules. Furthermore, DHS believes such specificity is unnecessary because the "at least half" standard provides sufficient clarity. USCIS will continue to review each petition on a case-by-case basis to determine eligibility for H-1B cap exemption.

Comment: A commenter wrote that the proposal would negatively impact U.S. workers in the technology and IT sectors, stating that these workers are currently facing mass layoffs. A research organization commented that the proposed "at least half" standard lacks rationale or adequate evaluation on the number of cap-exempt positions the proposal would create. The commenter wrote that the proposal would facilitate abuse of the H-1B program, referencing a case from a university as showing a qualifying entity requiring U.S. workers to train H-1B replacements for their positions.

Response: DHS disagrees with these commenters' concerns with respect to these cap exemption provisions. The submission noting Americans in the technology and IT sector facing severe reductions in the job market did not provide data or resources to support this claim. DHS also notes that a revision from "majority" to "at least half" does not reflect a significant change in this requirement. Under existing regulations, a beneficiary could meet the "majority" standard by spending just a little more than 50% of their time working at a cap-exempt institution, organization, or entity. The new rule requires "at least half" of time, meaning 50% or more, which is not a significant change. Regarding the comment that the rule did not provide an adequate evaluation on

⁷¹ See USCIS, "Administrative Site Visit and Verification Program," <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate/administrative-site-visit-and-verification-program> (last reviewed/updated Mar. 6, 2023).

⁷² See USCIS, "Combating Fraud and Abuse in the H-1B Visa Program," <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program> (last reviewed/updated Feb. 9, 2021). The ICE Tip Form is available online at <https://www.ice.gov/webform/ice-tip-form> (last visited Dec. 9, 2024). Anonymous tips may alternately be reported to ICE via the toll-free ICE Tip Line, (866) 347-2423.

⁷³ See S. Rep. No. 106-260 (April 11, 2000) (stating, regarding S. 2045, the bill that was enacted into AC21, that individuals should be considered cap exempt ". . . by virtue of what they are doing" and not simply by reference to the identity of the petitioning employer).

the number of cap-exempt positions the proposal would create, DHS notes that the NPRM generally projected a likely increase in the population of petitioners eligible for cap exemption but could not precisely estimate how many additional petitioners would now qualify. 88 FR 72870, 72934 and 72915 (Oct. 23, 2023) (Table 12. Summary of Provisions and Impacts of the Proposed Rule). Evaluating such impact with specificity is not practically feasible as DHS does not have data on the number of petitions requesting cap exemption that were previously denied because they did not meet the prior “majority of” standard but would now be approvable because they would meet the new “at least half” standard.

DHS acknowledges the commenter’s concerns about potential abuse of the H–1B program. However, it is unclear from the sources cited by the commenter whether and how such abuses stem from existing cap exemption requirements, or whether such abuse would be further increased by revisions to cap exemption requirements as codified in this rule. The commenter claims without evidence that certain H–1B workers were previously subject to the cap. They further claim without basis that these same workers would be cap-exempt under the changes in this rule; such cap exemption status cannot be projected on a generalized level, as USCIS determines eligibility on a case-by-case basis.

Comment: A form letter campaign wrote that the proposed “at least half” standard is an improvement but still exceeds statutory requirements. The campaign stated that H–1B employees may spend less than half of their time working for the qualifying entity while still being essential to that entity, additionally reasoning that measuring the “at least half” standard would impose administrative burdens. The campaign recommended that the regulatory text remove this standard.

Response: DHS declines to remove the regulatory text requiring a beneficiary spend “at least half” of their time working at a qualifying institution to be eligible for cap exemption. Removing this requirement would effectively allow beneficiaries who spend any amount of time whatsoever at a qualifying institution, however minimal, to qualify for H–1B cap exemption. Such allowance would leave the door open for potential abuse of H–1B cap requirements. Additionally, DHS believes that allowing for H–1B cap exemption based on any time working at a qualifying institution would not align with congressional intent. DHS

recognizes that Congress chose to exempt from the H–1B cap beneficiaries who are employed “at” a qualifying institution. DHS interprets this statutory language as reflective of Congressional intent that certain beneficiaries who are not directly employed by a qualifying institution may be treated as cap-exempt based on the nature of their job duties.⁷⁴ DHS believes that the “at least half” standard implemented at 8 CFR 214.2(h)(8)(iii)(F)(4) helps ensure that individuals are effectively furthering an activity in support of one of the fundamental purposes of the qualifying institution.

Regarding the comment about administrative burdens, it is true that petitioners will continue to bear the burden of establishing eligibility for cap exemption. However, employers should be able to clearly document their H–1B beneficiaries’ job duties and the typical work schedule. The requirement that a beneficiary spend at least half of their time at a qualifying institution strikes a reasonable balance between offering flexibility while maintaining program guardrails.

Comment: A couple of joint submissions supported the proposed text as recognizing that an organization may have more than one fundamental purpose, mission, objective, or function and the cap-exempt petitioner need not show the beneficiary’s work contributes to all these purposes.

Response: This change updates the availability of cap exemptions to include beneficiaries whose work directly contributes to, but does not necessarily predominantly further, the qualifying organization’s fundamental purpose, mission, objectives, or functions, which DHS believes to be a more reasonable standard. Further, this change reflects the modern reality that a qualifying organization may have more than one fundamental purpose, mission, objective, or function, which should not preclude an H–1B beneficiary from being exempt from the H–1B cap.

Comment: A form letter campaign stated that the proposed text is burdensome, unclear, and unduly restrictive. The campaign recommended

that “namely, either higher education, nonprofit research, or government research” be stricken, providing an example as indicating where an H–1B employee could perform duties at a hospital that are essential but clinical rather than focused on higher education or research.

Response: DHS declines to adopt this commenter’s recommendation. Under new 8 CFR 214.2(h)(8)(iii)(F)(4), an H–1B beneficiary must spend at least half of their work time performing job duties which directly further an activity that supports or advances one of the fundamental purposes, missions, objectives or functions of the qualifying institution, organization, or entity. The petitioner must demonstrate that the beneficiary’s job duties directly further a purpose, mission, objective, or function related to higher education, nonprofit research, or government research, as applicable. Removing the language requested by the commenter (“namely, either higher education, nonprofit research, or government research”) would expand cap exemption eligibility too broadly and beyond congressional intent. INA sec. 215(g)(5)(A)–(B) specifically requires that the beneficiary be employed at a qualifying institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization; taking out the references to “higher education, nonprofit research, or government research” from 8 CFR 214.2(h)(8)(iii)(F)(4) would be inconsistent with the clear language of the statute. Congressional intent was to exempt from the H–1B cap certain workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations.⁷⁵ As noted in the NPRM, DHS is revising “the” to “an” to acknowledge that a qualifying organization may have more than one fundamental purpose, mission, objective, or function, and that this fact should not preclude an H–1B beneficiary from being exempt from the H–1B cap. 88 FR 72870, 72884 (Oct. 23, 2023). If a beneficiary’s job duties at the qualifying organization are unrelated to higher education, nonprofit research, or government research, they would not be

⁷⁴ See USCIS, “Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)” (Pub. L. 106–313) (June 6, 2006) (“Congressional intent was to exempt from the H–1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations.”), <https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf>.

⁷⁵ See USCIS, “Guidance Regarding Eligibility for Exemption from the H–1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)” (Pub. L. 106–313) (June 6, 2006) (citing S. Rep. No. 106–260 (April 11, 2000)), <https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf>.

eligible for cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(4).

Comment: An advocacy group recommended that the proposed text be supported with examples, including that a worker's duties further a fundamental objective of a qualifying institution if those duties pertain to their employer's role in a regional innovation effort that includes the qualifying institution, and that the text clarify that advancing regional innovation is a "normal, primary, or essential purpose" of any organization officially participating in a federally sponsored regional innovation initiative.

Response: DHS declines to adopt this recommendation. If the beneficiary will not be directly employed by a qualifying institution, organization, or entity identified in INA section 214(g)(5)(A) or (B), to qualify for an exemption under such section they must spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties must directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. If a beneficiary meets the above requirements, they will be eligible for H-1B cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(4). DHS is unable to make a blanket determination that beneficiaries working as part of a regional innovation effort will meet the definitional requirements as requested by the commenter. USCIS adjudicators will continue to review each petition on a case-by-case basis to determine whether the beneficiary is eligible for cap exemption.

Comment: A form letter campaign supported the proposed change, reasoning that the nexus requirement was burdensome and resulted in unnecessary RFEs. A joint submission also supported the proposal and stated that the current nexus requirement is unnecessary.

Response: The revisions to 8 CFR 214.2(h)(8)(iii)(F)(4), as finalized by this rule, require the petitioner to establish that the beneficiary's duties further an activity that supports one of the fundamental purposes, missions, objectives, or functions of the qualifying entity, namely, either higher education, nonprofit research, or government research. DHS agrees this language renders the "nexus" requirement redundant and unnecessary.

Comment: A professional association generally supported expanding

recognition for telework, especially in the field of telehealth, in the proposed rule. The commenter recommended that USCIS expand 8 CFR

214.2(h)(8)(iii)(F)(4) to explicitly provide for telehealth work. A form letter campaign, another commenter, and a joint submission also expressed support for recognizing telework and hybrid work arrangements under the proposed rule. An advocacy group and a joint submission supported the proposal and stated that H-1B regulations should focus on duties performed rather than location of work performed.

Response: As stated in the NPRM, DHS is aware that many positions can be performed remotely. 88 FR 72870, 72884 (Oct. 23, 2023). However, DHS declines to expand 8 CFR 214.2(h)(8)(iii)(F)(4) to explicitly provide for telehealth. Before promulgation of this rule, 8 CFR 214.2(h)(8)(iii)(F)(4) was silent on the matter of remote work arrangements. As proposed and finalized, 8 CFR 214.2(h)(8)(iii)(F)(4) states, "When considering whether such a position is cap-exempt, the proper focus is on the job duties, rather than where the duties are performed." The regulation, as proposed and finalized, further states that work performed at the qualifying institution may include work performed in the United States, "through telework, remote work, or other off-site work." This language sufficiently clarifies that the location where job duties are performed does not, on its own, determine cap-exempt status and would not, on its own, preclude telehealth. DHS reiterates that nothing in this rule changes DOL's administration and enforcement of statutory and regulatory requirements related to labor condition applications. See 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I. These requirements are unaffected by this rule and continue to apply to all H-1B employers. Additionally, nothing in this provision changes other statutory or regulatory requirements governing an occupation.

Comment: A union opposed the proposed changes to 8 CFR 214.2(h)(8)(iii)(F)(4) as a potential loophole that could allow abuse by private third-party employers, including staffing companies, through falsely claiming partnerships with school districts and higher education. The commenter also expressed concerns about a perceived "lower threshold for cap exemption under the proposed rule" and stated that the facilitation of remote work for H-1B beneficiaries could be used to facilitate the offshore transfer of work. The commenter further

stated that the proposal would create a loophole for beneficiaries in locations with low prevailing wages to perform work for an entity with an onsite location in a geographical area with higher prevailing wages.

Response: DHS disagrees that the proposed change from "the majority of" to "at least half" will open a loophole for abuse by third-party employers. While changing the terminology may slightly expand who is eligible for the cap exemption, it will still require an employer to demonstrate that the beneficiary's duties "directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research." New 8 CFR 214.2(h)(8)(iii)(F)(4). This is still a meaningful limiting standard that not every third-party employer that simply places its employees "at" a qualifying institution will be able to meet. Further, this provision does not expand or afford the cap exemption outside of congressional intent, but instead clarifies, simplifies, and modernizes eligibility for cap-exempt H-1B employment.

DHS also disagrees that this provision will be a potential loophole that will provide for lower wages and lead to outsourcing work overseas. The physical location where duties are performed is not determinative of H-1B cap exemption eligibility. However, this rule does not change the fact that the physical location where duties are performed is relevant for wage requirements, as governed by DOL regulations. DHS also disagrees that the clarification that work performed "at" a qualifying institution may include work performed in the United States through telework, remote work, or other off-site work will facilitate the offshore transfer of work. The commenter did not explain why it believed this to be the case, and DHS notes that there is nothing currently in the H-1B regulations prohibiting remote work. DHS also notes that the revised definition of "United States employer," which requires the employer to have "a bona fide job offer for the beneficiary to work within the United States, which may include telework, remote work, or other off-site work within the United States," may help to alleviate the commenter's concern. See new 8 CFR 214.2(h)(4)(ii) (emphasis added).

Comment: A commenter requested DHS to allow cap-exemption for beneficiaries who are conducting research in a for-profit institution but

have their salary mostly paid by projects funded by non-profit organizations.

Response: DHS notes that a petitioner filing for a beneficiary as cap-exempt, where the beneficiary will not be directly employed by a qualifying institution, is required to establish that the beneficiary's duties will further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying entity. DHS declines to make any additional changes to the provision being finalized through this rulemaking. DHS places the focus on the work being performed by the beneficiary, rather than who pays the beneficiary for that work.

Comment: Citing INA sec. 214(g)(5), a professional association asserted that both the current regulation and the proposed rule exceed statutory authority by distinguishing H-1B beneficiaries on the basis of their employment at qualifying entities or with other entities at the same workplace. The commenter stated that any H-1B beneficiary at an exempt workplace should be exempted from the H-1B cap, citing legislative history in support of their position. The commenter stated that USCIS should make no distinction between H-1B beneficiaries employed "at" or "by" a qualified entity. While initially proposing more limited revisions to 8 CFR 214.2(h)(8)(iii)(F)(4), the commenter then stated that 8 CFR 214.2(h)(8)(ii)(F)(4) should be rescinded in its entirety, stating the only regulatory standard required to implement the affiliation-based cap exemption provision of the statute is that found at 8 CFR 214.2(h)(8)(ii)(F)(2). The commenter also stated that it is imperative for qualifying physicians to be exempt from the H-1B cap, given the difficulties that arise in the employment of H-1B physicians due to differences in academic and DHS's fiscal year calendars.

Response: DHS disagrees with the assertion that the current and final rules exceed statutory authority. DHS further notes that certain regulations cited by the commenter, namely 8 CFR 214.2(h)(8)(ii)(F)(4) and (2), do not exist; based on the context of the comment, DHS will assume the commenter is referring to § 214.2(h)(8)(iii)(F)(4) and (2), respectively. The statute's reference to "employed at" is ambiguous, as it is not clear if "at" is meant to refer to a physical location or to the employer. Notably, this same ambiguity allows for DHS to provide for telework, remote work, and work at other off-site locations to be included in this final rule and for which the commenter expressed support. The longstanding

regulation and the changes made by this final rule provide the best interpretation of an ambiguous statute and are consistent with the intent of Congress. If, as the commenter implies, the only determinative factor is the physical location of the work to be performed, that interpretation would be contrary to congressional intent because Congress intended to exempt foreign national workers who would directly contribute to the research or education missions of institutions of higher education or certain research organizations⁷⁶ and, thus, would lead to anomalous results. For example, a business employing workers who will be physically located at a university or research organization that provides access to its facilities (e.g., a university that simply rents out office space on its campus), would qualify for cap exemption based on the commenter's interpretation, even if the work performed is independent of, and entirely unrelated to, the mission of the university or research organization. That would be inconsistent with congressional intent which is to provide cap exemption to certain H-1B beneficiaries "by virtue of what they are doing."⁷⁷ Providing for cap exemption based solely on the location where the work is performed would also increase the risk of abuse.⁷⁸

DHS acknowledges that the period of post-graduate employment for physicians generally does not align with DHS's fiscal year, under which periods of employment for cap-subject H-1B nonimmigrants fall. Such discrepancy between employment dates and the October 1 fiscal year start date may occur for other occupations or employers as well. However, DHS declines to rescind current 8 CFR 214.2(h)(8)(iii)(F)(4) or to revise it in a manner other than that proposed in the NPRM. The regulations allowing for H-1B cap exemption, as proposed in the NPRM and finalized in this rule, strike a necessary balance between providing

flexibility to petitioners and beneficiaries and ensuring that Congress' aims in exempting certain workers from the H-1B cap based on their contributions at qualifying institutions, organizations or entities are not undercut by employment that is peripheral to those contributions.

Comment: A joint submission provided strong support for this provision, specifically in relation to start-up and entrepreneurs, noting the "major difficulties" with the current structure and process for both immigrant entrepreneurs and key hires, particularly involving the inability to definitively rely on being selected for the H-1B lottery. The joint submission also notes how "the cap-exempt visa pathway has emerged as a critical channel for immigrant entrepreneurs to grow their business[es] in the U.S., boosting new business formation, attracting venture capital, and driving American job creation." The submission also stated that USCIS should support and encourage use of H-1B cap exemption by codifying best-practices for individuals to pursue entrepreneurial or otherwise economically valuable activity, stating that the standard usage of cap-exemption to promote entrepreneurship involves a cap-exempt entity sponsoring an initial, primary petition and a beneficiary-owner sponsoring a secondary petition in relation to a startup.

Response: DHS appreciates the support expressed by the commenters and agrees the provision provides flexibility and clarity, including for beneficiary-owners who are also affiliated with a qualifying organization. DHS declines to codify in this rule best practices for entrepreneurs seeking H-1B cap exemption as requested by the commenter. Current 8 CFR 214.2(h)(8)(iii)(F)(6) details the parameters under which an H-1B beneficiary may be exempt from the cap if they are concurrently employed by a cap-exempt and a nonexempt employer. Specifically, when petitioning for concurrent cap-subject H-1B employment, the petitioner must demonstrate that the H-1B beneficiary is employed in valid H-1B status under a cap exemption under INA section 214(g)(5)(A) or (B), the beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions. If the cap-exempt employment ends, the individual becomes cap-subject unless previously

⁷⁶ See S. Rep. No. 106-260 (Apr. 11, 2000) (providing that individuals should be considered cap exempt because "by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans" and not simply referencing the identity of the petitioning employer or the physical location where the work is performed for purposes of permitting cap exemption).

⁷⁷ *Id.*

⁷⁸ See, e.g., U.S. Dep't of Justice, U.S. Attorney's Office, "Wright State University Agrees to Pay Government \$1 Million for Visa Fraud" (university agreed to use its cap exempt status to apply for H-1B visas for a privately held software company's employees, falsely claiming that these employees would physically work at the university's school campus), <https://www.justice.gov/usao-sdoh/pr/wright-state-university-agrees-pay-government-1-million-visa-fraud>.

counted. The parameters and requirements relating to concurrent employment with a cap-exempt and nonexempt employer outlined in 8 CFR 214.2(h)(8)(iii)(F)(6) apply to all H-1B petitioners and beneficiaries, including entrepreneurs. Furthermore, regulatory codification of best practices is not appropriate because employment scenarios include unique, specific fact patterns and must be addressed on a case-by-case basis. Petitioners bear the burden to establish eligibility for the requested classification, to include eligibility for cap exemption and beneficiary ownership.

Comment: A joint submission and a law firm expressed general support for the proposed “nonprofit research organization” and “governmental research organization” definitions as providing clarity in current regulations and to create more flexibility for the beneficiaries and entities affected by the revision. A couple of advocacy groups, trade associations, and other commenters supported exempting higher education, nonprofit, and government research organizations from annual numerical limits on H-1B availability. A professional association and a company wrote that the proposed definitions would diversify international postdoctoral graduates’ available career paths.

Response: DHS appreciates these comments and agrees that revising the definitions of nonprofit entity, nonprofit research organization, and government research organization will increase clarity and flexibility for a variety of petitioners and beneficiaries.

Comment: An advocacy group cited 8 U.S.C. 1184(g)(5)(B) in stating that the proposed definition for nonprofit research organizations would bring H-1B regulations into alignment with congressional intent.

Response: DHS agrees that the new definition for nonprofit research organizations better aligns with congressional intent. DHS recognizes that Congress chose to exempt from the numerical limitations in INA section 214(g)(1) beneficiaries who are employed “at” a qualifying institution, which is a broader category than beneficiaries employed “by” a qualifying institution. Congressional intent was to exempt from the H-1B cap certain nonimmigrant workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access

to a continuous supply of H-1B workers without numerical limitation.⁷⁹ The definitional changes finalized in this rule increase flexibility and clarity to better meet this intent.

Comment: Many commenters generally expressed support for the proposal to replace the language “primarily engaged in basic research and/or applied research” with “a fundamental activity of” basic research and/or applied research at 8 CFR 214.2(h)(19)(iii)(C). A professional association agreed and stated that the proposed change is consistent with congressional intent “to help keep top graduates and educators in the country.” A joint submission wrote that the proposed language would align regulations with the standard found for formal written affiliation agreements and reduce confusion. A local government agency supported the proposed change and expressed its understanding that a petitioner need not be “directly and primarily” engaged in research and that petitioners would no longer need to prove the percentage of their staff or budget dedicated to research but would need to demonstrate instead that research is a “principal activity” of the petitioner. A commenter agreed that the proposal furthers congressional intent behind the H-1B program by focusing on actual work performed and contributing to the education of Americans. An individual commenter supported the proposal and wrote that the “fundamental activity” language is sufficiently protective of the program. An advocacy group expressed support for USCIS’ proposed revision as a way to address this issue and improve regulatory uniformity.

Response: DHS agrees that this proposed change will provide more clarity, uniformity, and flexibility for those who will not be directly employed by a qualifying institution, organization, or entity. As noted in the NPRM, the “fundamental activity” standard for formal written affiliation agreements was codified in DHS regulations at current 8 CFR 214.2(h)(8)(iii)(F)(2)(iv) and (h)(19)(iii)(B)(4) through a final rule published in 2016, and DHS believes that the changes to new 8 CFR 214.2(h)(19)(iii)(C) to align the standards will enhance clarity.⁸⁰ In

⁷⁹ See USCIS, “Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)” (Pub. L. 106–313) (June 6, 2006) (citing S. Rep. No. 106–260 (April 11, 2000)), <https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf>.

⁸⁰ DHS recognizes that the definition of “nonprofit research organization or government research organization” at new 8 CFR

addition, in the NPRM DHS acknowledged that it was making changes to 8 CFR 214.2(h)(19)(iii)(C) to effectuate the desired policy with respect to the H-1B cap exemption. 88 FR 72870, 72885–72886 (Oct. 23, 2023). Because the cap exemption provision in 8 CFR 214.2(h)(8)(F)(2)(iv) cross references the H-1B ACWIA fee exemption in 8 CFR 214.2(h)(19)(iii)(C) for the definitions of nonprofit research organization and governmental research organization, the definitional changes were made there. The regulatory parity between the definitional standards for the H-1B cap exemption and the H-1B ACWIA fee exemption has been in place since 2016 when DHS first codified its interpretation of AC21 amendments establishing the H-1B cap exemption for certain entities, including nonprofit research organizations and governmental research organizations, and, as proposed, DHS is continuing that parity with the changes made in this final rule.⁸¹

Comment: A company recommended that USCIS provide further guidance to define “fundamental activity,” stating that doing so would support industry reliance on the new definition and provided several suggested examples. The commenter noted that DHS offers “some” guidance in the present

214.2(h)(19)(iii)(C) differs from DOL’s definition of “nonprofit research organization or governmental research organization” at 20 CFR 656.40(e)(1)(iii). However, DHS definitions are separate from, and generally serve different purposes than, DOL definitions. Specifically, the DHS definition of “nonprofit research organization or government research organization” at new 8 CFR 214.2(h)(19)(iii)(C) is used to determine whether an H-1B petitioner is exempt from the H-1B cap under INA 214(g)(5)(B), 8 U.S.C. 1184(g)(5)(B), and from paying the ACWIA fee under INA 214(c)(9)(A), 8 U.S.C. 1184(c)(9)(A). In contrast, the DOL definition of “nonprofit research organization or government research organization” at 20 CFR 656.40(e) is used for prevailing wage determinations under INA 212(p)(1)(B), 8 U.S.C. 1182(p)(1)(B). See also 20 CFR 655.731(a)(2)(vii) (cross-referencing definition at 20 CFR 656.40(e) for purposes of H-1B LCAs).

⁸¹ See 80 FR 81900, 81919 (Dec. 31, 2015) (proposing to conform DHS regulations to the then-existing policy pertaining to the definitions of several terms in INA section 214(g)(5) and the applicability of those terms to the ACWIA fee exemption provisions and the AC21 cap exemption provisions). The cross reference between the provisions was codified in the final rule. See 81 FR 82398, 82486 (Nov. 18, 2016). The provision codified at 8 CFR 214.2(h)(8)(ii)(F) was subsequently redesignated as 8 CFR 214.2(h)(8)(iii)(F). See 84 FR 888, 954 (Jan. 31, 2019). Note, however, that the policy of extending the definitions from the ACWIA fee context to the H-1B cap exemption context predates the codification of that policy. See Mem. from Michael Aytes, Assoc. Dir. for Domestic Ops., USCIS, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on section 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (Public Law 106–313) (June 6, 2006); <https://www.uscis.gov/sites/default/files/document/memos/ac21c060606.pdf>.

rulemaking by stating that “a fundamental activity would still have to be an important and substantial activity, although it need not be the organization’s principal or foremost activity under the current ‘primary’ construct.” The commenter also asked DHS to include examples where the application of the proposed standard would be less clear, stating there is a lack of guidance on the application of the standard that would help to ensure consistency while contributing to economic growth and development within this important segment of the United States economy.

Response: As noted by the commenter and stated in the NPRM, a “fundamental activity” is “an important and substantial activity, although it need not be the organization’s principal or foremost activity.” 88 FR 72870, 72885 (Oct. 23, 2023). While this change may somewhat expand who is eligible for a cap exemption, DHS does not expect or intend this to be a significant change for petitioners. Similar to how a petitioner may have demonstrated that it was primarily engaged in research under the prior standard, a petitioner may demonstrate that research is one of its fundamental activities by showing that research constitutes an important and significant activity within the context of its overall operations. The types of evidence that may be probative generally remain the same. For example, probative evidence may include the petitioner’s mission statement, descriptions of the petitioner’s research efforts and ongoing research projects, the petitioner’s operating budget dedicated to research as evidenced by relevant tax forms, and staffing descriptions that indicate the level of staffing dedicated to research. However, unlike the prior “primarily” standard, a petitioner no longer needs to demonstrate that research is the principal or foremost activity, *i.e.*, that research constitutes more than 50% of its operations compared to all its other activities.⁸² While there is not an exact minimum percentage that would always be required to meet the “fundamental activity” standard, it remains the petitioner’s burden to establish eligibility for cap exemption. USCIS adjudicates each petition on a case-by-

case basis, taking into consideration the totality of the facts.

DHS does not believe that it is necessary to provide additional guidance through this rulemaking but may consider providing additional guidance in the future through other means such as the USCIS Policy Manual. DHS declines to provide specific guidance on the examples provided by the commenter because those examples, without further context, could support a decision either in favor of or against granting a cap exemption. For example, “a company that is at the outset of starting a research department” may or may not qualify for cap exemption depending on all the relevant facts, such as how much of its resources (including time, money, and personnel) it dedicates to such research. Similarly, “a company that pauses its research for a period of time and then resumes its research activities” may or may not qualify depending on all the relevant facts, such as the length of pause and the resources dedicated to the resumption of its research activities.⁸³ As USCIS adjudicates each petition on a case-by-case basis, taking into consideration the totality of the facts, USCIS is not providing additional guidance or examples in response to this comment.

Comment: An advocacy group supported the proposed definition but recommended that USCIS clarify that government-chartered nonprofits involved in research through regional hubs qualify as nonprofit research organizations, stating that “organizations that work on later stages of technology development should be able to qualify as research organizations.” The advocacy group commented that a “key goal of the regional hubs is the commercialization of its earlier stage research,” and that a “majority of technologies developed through basic and applied research fail to reach commercialization and subsequently benefit U.S. citizens.” The advocacy group recommended that USCIS define research organizations to include nonprofits and government entities that conduct research as part of their role in a regional hub.

Response: DHS reiterates its goal of slightly modifying the definition of employers who are exempt from the H-1B cap in order to provide additional clarity and flexibility for these types of cap exemptions. Changing the definition

of “nonprofit research organization” and “governmental research organization” by replacing “primarily engaged” and “primary mission” with “fundamental activity” provides potential exemption from the H-1B cap for a nonprofit entity or governmental research organization that conducts research as a fundamental activity but is not primarily engaged in research or where research is not the primary mission. This will create more flexibility for nonprofit and governmental research organizations and for beneficiaries who are not directly employed by a qualifying organization. There is nothing in this final rule that will preclude nonprofits and government entities that conduct research as part of their role in a regional hub from potentially qualifying for cap-exemption. However, it remains the petitioner’s burden to demonstrate eligibility for the benefit sought.⁸⁴ Therefore, DHS declines to further define research organization or otherwise modify the definition in this rule.

Comment: An advocacy group recommended that the proposed regulations explicitly state that a “nonprofit research organization or governmental research organization or educational or government organization may perform or promote more than one fundamental activity.”

Response: DHS declines to adopt this suggestion. Under this rule, the definition of a nonprofit research organization or government research organization at new 8 CFR 214.2(h)(19)(iii)(C) states that “[a] nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity.” DHS declines to expand this definition to also include reference to educational or government organizations. This provision applies explicitly to nonprofit research organizations and governmental research organizations. DHS also notes that new 8 CFR 214.2(h)(8)(iii)(F)(2)(iv), pertaining to affiliation agreements between nonprofit entities and institutions of higher education, and new 8 CFR 214.2(h)(19)(iii)(B)(4), pertaining to exemption from the American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in 8 CFR 106.2 for

⁸² Cf. *Open Soc’y Inst. v. USCIS*, 573 F. Supp. 3d 294, 305 (D.D.C. 2021) (“Based on the totality of evidence in the record, and considering its research activities in proportion to its other activities, we conclude that the record does not demonstrate that [Open Society] is directly and principally engaged in research. The research conducted by [Open Society] is incidental, or, at best, secondary to its principal activities. . . .”), dismissed No. 21–5251, 2022 WL 4002149 (D.C. Cir. Aug. 29, 2022) (*per curiam*).

⁸³ In both of these examples, the company, as with any other petitioner, would also have to demonstrate it meets all other eligibility requirements, including having a bona fide job offer for the beneficiary and meeting the definition of a nonprofit research organization.

⁸⁴ See INA section 291, 8 U.S.C. 1361; *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 549 (AAO 2015) (“It is the petitioner’s burden to establish eligibility for the immigration benefit sought.”); *Matter of Skirball Cultural Center*, 25 I&N Dec. 799, 806 (AAO 2012) (“In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.”)

nonprofit entities related to or affiliated with an institution of higher education, are revised to include a statement that, “[a] nonprofit entity may engage in more than one fundamental activity.” Nothing in this rule precludes an educational or government organization from qualifying as an affiliated or related non-profit under 8 CFR 214.2(h)(8)(iii)(F)(2), nor under any of the other cap exemptions at 8 CFR 214.2(h)(8)(iii)(F). Finally, at new 8 CFR 214.2(h)(8)(iii)(F)(4), addressing H–1B beneficiaries not directly employed by a qualifying institution, organization, or entity, DHS removed the requirement that a beneficiary’s duties “directly and predominately further the essential purpose, mission, objectives or functions” of the qualifying institution, organization, or entity and replaced it with the requirement that the beneficiary’s duties “directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions” of the qualifying institution, organization, or entity. These revisions sufficiently acknowledge the potential for more than one fundamental activity, where applicable, of institutions, organizations, and entities relevant to cap exemption determinations.

Comment: A union opposed the proposed changes to 8 CFR 214.2(h)(19)(iii)(C) as opening a loophole for nonprofit and government employers not engaged in research to qualify for a cap exemption by claiming a “secondary interest in research to qualify as a cap exempt entity.” The commenter further stated that “[t]he lower threshold for cap exemption under the proposed rule would create an incentive for nonprofits and government employers to restructure or reconfigure their operations to qualify for cap exemption.”

Response: DHS disagrees that the proposed change from “primarily engaged” and “primary mission” to “a fundamental activity of” in 8 CFR 214.2(h)(19)(iii)(C) will open a loophole for nonprofit and government employers not engaged in research to qualify for a cap exemption. While changing the terminology may slightly expand who is eligible for the cap exemption, it would still require that an employer demonstrate that research is a “fundamental activity,” which is a meaningful limiting standard. A fundamental activity would still have to be an important and substantial activity, although it need not be the organization’s principal or foremost activity as required under the current

“primary” construct.⁸⁵ Therefore, nonprofit and government employers not engaged in research would still not qualify.

Comment: A research organization commented that the proposal to qualify an organization as cap-exempt if one of its many “fundamental activities” is research “is so expansive that virtually any nonprofit organization will become newly eligible for cap-exemption.” The commenter stated that USCIS has not clearly defined “research” or “fundamental activity” and has no expertise in doing so, contrasting that against the “primarily” standard as applied by the National Science Foundation. The commenter stated that DHS provides “no substantive rationale” for the changes, citing the text from the NPRM as failing to meaningfully explain the revisions and failing to provide a “bright-line criteria to identify eligibility.” The commenter said that the changes would create an adjudication and litigation nightmare for DHS due to lawsuits from denials of cap-exempt claims. The commenter also cited statistics demonstrating the increase in cap-exempt petitions and stated that DHS has not adequately shown a compelling reason to expand those numbers further. The commenter requested that DHS provide the public with a detailed analysis of how the changes would impact the H–1B program and the scale of those impacts at the NPRM stage.

Response: DHS disagrees that the result of this change will effectively qualify any nonprofit entity as eligible for H–1B cap exemption. The change to 8 CFR 214.2(h)(19)(iii)(C), as proposed and finalized, requires establishing that research is one of the fundamental activities of the nonprofit research organization or government research organization. Not every activity an organization engages in would be considered a “fundamental activity.” A fundamental activity would still have to be an important and substantial activity, although it need not be the organization’s principal or foremost activity. DHS disagrees with the commenter that virtually any nonprofit claiming to engage in an activity that it labels or considers as “research” would be eligible for cap exemption. Such a nonprofit would still have to show that research is one of its fundamental activities. Moreover, the nonprofit must show that the research being conducted meets the definition of “basic research”

⁸⁵ Multiple comments leading to the 2016 final rule also expressed concern that the “primary purpose” requirement was too restrictive, although in the context of 8 CFR 214.2(h)(8)(ii)(F)(2)(iv) and (h)(19)(iii)(B)(4). 81 FR 82403.

and/or “applied research” under 8 CFR 214.2(h)(19)(iii)(C). This is another meaningful limitation against a nonprofit simply claiming to engage in some activity that it labels as “research.” Regarding the comment that DHS did not define the terms “research” or “fundamental activity,” DHS disagrees and notes that it is revising existing definitions of “basic research” as well as “applied research” at 8 CFR 214.2(h)(19)(iii)(C).

Regarding the concern that the rule does not provide “bright-line criteria to identify eligibility,” it is not appropriate to provide “bright-line criteria” because research activities and employment scenarios include unique, specific fact patterns and must be addressed on a case-by-case basis. Petitioners bear the burden to establish eligibility for the requested classification, to include eligibility for cap exemption.

Regarding the comment requesting that DHS provide the public with a detailed analysis of how the changes would impact the H–1B program, the NPRM generally projected a small increase in the population of petitioners eligible for cap exemption but could not precisely estimate how many additional petitioners would now qualify for cap exemption. See 88 FR 72934, 72915 (Table 12. Summary of Provisions and Impacts of the Proposed Rule). Evaluating such impact with specificity is not practically feasible.

With respect to the comment that DHS provided no substantive rationale for the changes, DHS disagrees. As explained in the NPRM, changing the regulatory definition to “fundamental activity” provides for a reorientation of cap exemptions for nonprofit research organizations and governmental research organizations aligning with current “fundamental activity” standard found for formal written affiliation agreements under 8 CFR 214.2(h)(8)(iii)(F)(2)(iv) and (h)(19)(iii)(B)(4), which would bring more clarity and predictability to decision-making, for both adjudicators and the regulated community. 88 FR 72870, 72884 (Oct. 23, 2023).

Comment: A joint submission expressed general support for the proposed revision at 8 CFR 214.2(h)(19)(iii)(C). An advocacy group encouraged DHS to “finalize its proposal insofar as it will again count indirect research as among the [qualifying] research activities,” describing activities such as funding and monitoring the research of others as activities that would fall under “indirect research.” The group said that the provision acknowledges the full breadth of nonprofit “research,” thereby

providing additional flexibility and reducing burdens for nonprofit employers seeking cap exemption. Another advocacy group supported the proposed changes and recommended that “qualifying research includes not only basic and applied research but can also include later stages of research, such as technology development and transfer.”

Response: DHS generally agrees with the commenter that the revised requirements to qualify for H–1B cap exemption will provide petitioners seeking cap exemption additional clarity and flexibility. However, DHS does not agree with further broadening or changing the proposed parameters for qualifying activities, as the commenters suggested. DHS also does not agree with the commenter’s characterization of the proposed changes as allowing “indirect research.” In this response, DHS clarifies that the definition at 8 CFR 214.2(h)(19)(iii)(C), as proposed and finalized, does not allow for “indirect research” in the sense of allowing cap exemption for a nonprofit organization that merely funds and monitors the research of others but does not itself directly conduct any research. DHS reiterates that 8 CFR 214.2(h)(19)(iii)(C) requires the nonprofit organization to *engage* in research. Further, 8 CFR 214.2(h)(19)(iii)(C) states that “basic research and applied research . . . may include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle.” While funding and monitoring the research of others may fall under this provision, the petitioner must also direct such research on an ongoing basis throughout the research cycle. In other words, this language is meant to allow the petitioning entity to qualify for cap exemption only if the petitioner takes an active, consistent role in designing, analyzing, and directing the research of others. Simply providing some funds and sporadically monitoring the research of others, without more, would not be sufficient to meet new 8 CFR 214.2(h)(19)(iii)(C). Such a low standard could open a loophole for nonprofit and government employers not engaged in research or lead to abuse by third-party employers seeking to qualify for a cap exemption simply by giving funds to a qualifying non-profit.

Similarly, DHS declines to state in new 8 CFR 214.2(h)(19)(iii)(C) that “qualifying research includes not only basic and applied research but can also include later stages of research, such as technology development and transfer.” The phrase “technology development and transfer” is undefined and, without

additional specificity, could open a loophole for nonprofit and government employers not engaged in research or lead to abuse by third-party employers seeking to qualify for a cap exemption simply by claiming to be developing and transferring someone else’s research. Thus, DHS declines to specifically include reference to indirect research or technology development and transfer in the regulatory text.

Comment: An attorney writing as part of a form letter campaign supported the proposal to forego the requirement at 8 CFR 214.2(h)(19)(iv)(B) that tax-exempt organizations have an IRS document evidencing nonprofit status to also state whether the organization is primarily an educational or research organization. A law firm agreed that this proposal would align with the changes to research being a “fundamental activity” of the qualifying organization or entity. A local government agency also supported this proposal, reasoning that some tax-exempt organizations are created through statute and thus may lack IRS documentation. An advocacy group also supported the proposal, stating that DHS adjudicators have, in the past, made erroneous inquiries and denials based on the activities of the commenter as indicated in its tax forms.

Response: DHS agrees that amending the definition of “nonprofit or tax-exempt organization” to no longer require that the petitioner provide evidence of its approval by the IRS as a tax-exempt organization for research or educational purposes will help simplify and clarify the process for adjudicators and for stakeholders. DHS is not proposing to eliminate or otherwise change the overarching requirement that a qualifying nonprofit or tax-exempt petitioner be an institution of higher education or a related or affiliated nonprofit entity, or a nonprofit research organization or a governmental research organization institution, as required by the statute and regulations. A petitioner will still need to submit documentation to demonstrate that it is a nonprofit or tax-exempt organization, such as tax returns, tax exemption certificates, references to the organization’s listing in the IRS’s most recent list of tax-exempt organizations, articles of incorporation, bylaws, or other similar documentation. Through this rule, DHS is merely clarifying that such documentation does need not to be in the form of an IRS letter.

Comment: An association of local governmental agencies and an additional local government agency commented that the American Competitiveness Act in the Twenty-First

Century did not distinguish types of nonprofit entities. The commenters wrote that the proposal at 8 CFR 214.2(h)(19)(iv) exceeds statutory authority by excluding some nonprofit organizations from qualifying for cap exemption and recommended removing references to sections 501(c)(3), (c)(4), and (c)(6) of the Internal Revenue Code (IRC) to avoid this issue.

Similarly, a professional association commented that distinguishing nonprofit entities affiliated with an institution of higher education under section 501(c)(3), (c)(4), or (c)(6) of the IRC lacks statutory support and recommended that the proposal at 8 CFR 214.2(h)(19)(iv) include, but not limit, tax-exempt organizations to those defined in the cited sections 501(c)(3), (c)(4), and (c)(6).

Response: DHS did not propose to substantively change the longstanding requirement at current 8 CFR 214.2(h)(19)(iv) that the nonprofit be defined as a tax-exempt organization under section 501(c)(3), (c)(4) or (c)(6) of the IRC.⁸⁶ As explained in the H–1B NPRM, 8 CFR 214.2(h)(19)(iv) “would more simply state that a nonprofit organization or entity ‘must be determined by the Internal Revenue Service [to be] a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3) (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).’”

DHS disagrees that this longstanding requirement is contrary to law. Rather, INA sec. 214(g)(5)(A) clearly limits eligibility to those nonprofit organizations that are “affiliated” with an institution of higher education and INA 214(g)(5)(B) limits eligibility to a “nonprofit research organization.” The limitations at paragraph (h)(19)(iv) relating to tax-exempt organizations under 501(c)(3), (c)(4), and (c)(6) are consistent with INA 214(g)(5)(A) and (B), and further promotes the INA’s goals of improving economic growth and job creation by facilitating U.S.

⁸⁶ See “Petitioning Requirements for the H–1B Nonimmigrant Classification Under Public Law 105–277,” 63 FR 65657, 65658 (Nov. 30, 1998) (interim final rule with request for comments) (codifying paragraph (h)(19)(iv) requiring a nonprofit organization or entity to be qualified as a tax exempt organization under section 501(c)(3), (c)(4), or (c)(6) of the Internal Revenue Code); “Petitioning Requirements for the H–1B Nonimmigrant Classification Under Public Law 105–277,” 65 FR 10678, 10679 (Feb. 29, 2000) (final rule) (declining a suggestion to allow organizations that are tax exempt under state or local law to qualify as non-profit organizations for the purposes of the ACWIA, and declining another suggestion to expand the definition of the organizations considered to be nonprofit to include all non-profit organizations (not just non-profit research organizations), on the basis that there is no legislative support for either suggestion).

employers' access to high-skilled workers, particularly at these institutions, organizations, and entities.⁸⁷ DHS will finalize 8 CFR 214.2(h)(19)(iv) as proposed.

Comment: A joint submission recommended that the proposal at 8 CFR 214.2(h)(19)(iv) clarify that “[a]n organization with its own tax filing and payroll can qualify for cap-exemption even if it is part of a larger nonprofit and uses the parent nonprofit’s Federal employer identification number (FEIN)” and that “[a] nonprofit that engages a Professional Employer Organization (PEO) for human resource and payroll services may still qualify for cap-exemption even if the taxpayer identification number of the PEO is used for those functions.”

Response: DHS declines to add the requested language to this provision. A non-profit organization may be exempt from the cap if it is determined by the Internal Revenue Service as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6), thereby meeting the definition of a nonprofit organization or entity as codified at new 8 CFR 214.2(h)(19)(iv), or if it is primarily engaged in basic research and/or applied research, thereby meeting the definition of a nonprofit research organization as codified at new 8 CFR 214.2(h)(19)(iii)(C). USCIS cannot make a generalized assessment as to whether a particular organization or entity will qualify for cap-exempt status. However, as USCIS has previously noted,⁸⁸ use of a PEO will not, standing alone, negate an employer’s cap-exempt qualification. USCIS will consider all relevant factors and review the totality of the evidence for each petition using the preponderance of the evidence standard to determine cap-exempt status.

Comment: A trade association and a local government agency suggested that USCIS clarify when State and local

governments can be qualifying tax-exempt organizations. Specifically, the trade association suggested that USCIS clarify that tax-exempt organizations that can create qualifying affiliations with universities include state and local governmental and quasi-governmental entities. The local government agency suggested that 8 CFR 214.2(h)(19)(iv) be revised to directly reference tax-exempt government entities.

Other commenters voiced concern that the proposed revision would exclude an entire class of entities that currently meet the current definition of “non-profit entity” but would not meet the definition in the proposed regulation change. One of these commenters said that the current definition of “non-profit entities” has two parts—first that the nonprofit organization or entity is “defined” as a tax-exempt organization under IRC 501(c)(3), (c)(4), and (c)(6), and second that the nonprofit has been “approved” as a tax-exempt organization for research or educational purposes—whereas the proposed regulation change requires that the nonprofit organization or entity “must be determined by the Internal Revenue Service” as a tax-exempt organization under IRC 501(c)(3), (c)(4), and (c)(6). This commenter stated that governmental units, such as local and State governments, are exempt from income taxation under IRC section 115, but would not be classified as tax-exempt organizations in the proposed rule and requested that they be provided for as cap-exempt entities. The commenter provided an example of a private religious school being cap-exempt under the proposed rule where a public school would not. The commenter said that since the H-1B cap exemption requirements mirror the requirements under the ACWIA, related to exemption of the ACWIA fee for H-1B employers, the proposed rule should be modified to include public primary and secondary schools, since nonprofit private primary and secondary schools would already be covered under the IRC 501(c)(3), (c)(4), and (c)(6) requirement.

Response: State and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv) should generally continue to qualify as tax-exempt organizations under new 8 CFR 214.2(h)(19)(iv). In proposing to revise 8 CFR 214.2(h)(19)(iv), DHS’s intention was simply to remove the unduly burdensome requirement under 8 CFR 214.2(h)(19)(iv)(B) that the IRS letter itself state that the petitioner’s approval as a tax-exempt organization was “for research or educational purposes.” 88

FR 72886 (Oct. 23, 2023). It was never DHS’s intention to restrict, much less eliminate, eligibility for state and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv). DHS did not propose to eliminate or otherwise change the other requirements under 8 CFR 214.2(h)(19)(iv). As with current 8 CFR 214.2(h)(19)(iv)(A), new 8 CFR 214.2(h)(19)(iv) will continue to define nonprofit or tax-exempt organizations based on the Internal Revenue Service’s definition of a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).

DHS declines to further revise 8 CFR 214.2(h)(19)(iv) to directly reference tax-exempt government entities or public primary and secondary schools, as requested by the commenters. USCIS cannot make a generalized assessment as to whether a particular organization or entity will qualify as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6). As stated above, state and local governments that currently qualify as nonprofit or tax-exempt organizations under 8 CFR 214.2(h)(19)(iv) should generally continue to qualify as tax-exempt organizations under new 8 CFR 214.2(h)(19)(iv).

DHS further reiterates that government entities may still qualify for cap exemption. State and local governments may qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(B)(4), if the nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. Additionally, they may qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(C) if they are a governmental research organization and a fundamental activity of the organization is the performance or promotion of basic and/or applied research. They may also qualify under new 8 CFR 214.2(h)(8)(iii)(F)(4) if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying

⁸⁷ See S. Rep. No. 106–260 (April 11, 2000) (AC21 sought to help the American economy by, in part, exempting from the H-1B cap “visas obtained by universities, research facilities, and those obtained on behalf of graduate degree recipients to help keep top graduates and educators in the country”); see also “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 81 FR 82398, 82447 (Nov. 18, 2016) (stating that DHS’s policy of allowing cap exemption for individuals employed ‘at’ and not simply employed ‘by’ a qualifying institution “is consistent with the language of the statute and furthers the goals of AC21 to improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers . . .”).

⁸⁸ USCIS, Electronic Reading Room, H-1B Cap Exemptions—Baker (Oct. 18, 2023), <https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf>.

institution, organization, or entity, namely, either higher education, nonprofit research, or government research. USCIS will consider all relevant factors and review the totality of the evidence for each petition using the preponderance of the evidence standard to determine cap-exempt status.

Comment: A joint submission agreed that the proposal should provide for government entities that serve research and educational purposes and requested USCIS provide additional information relating to how it will adjudicate cap exemptions. The commenter expressed concerns with the definition of nonprofit organizations, stating it fails to include specific guidance for government entities that serve research and educational purposes, such as a community health center or a public school system. The comment referenced a USCIS letter as indicating that USCIS would continue to consider these entities for cap exemption on a case-by-case basis, as well as provide clarifying language specifying the different ways the cap exemption standard may be met.

Response: USCIS will continue to consider H-1B cap exemption requests on a case-by-case basis, taking into consideration the eligibility requirements, as well as any documentation submitted to establish eligibility. USCIS reviews the totality of the evidence for each petition using the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular organization or affiliation will qualify for cap-exempt status. While government entities that serve research and educational purposes may not qualify for cap exemption by meeting the definition of a nonprofit entity, as noted by the commenter, such government entities may still qualify for cap exemption under new 8 CFR 214.2(h)(19)(iii)(C) if a fundamental activity of the organization is the performance or promotion of basic and/or applied research. They may also qualify under new 8 CFR 214.2(h)(8)(iii)(F)(4) if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. Revisions to the definition of nonprofit or tax-exempt organizations at 8 CFR 214.2(h)(19)(iv) are intended to clarify and streamline

evidentiary requirements for cap exemption eligibility. DHS believes the provisions in this rule related to H-1B cap exemptions will increase flexibility and better reflect Congress's intent, as well as better represent modern employment situations.

Comment: An organization requested that 8 CFR 214.2(h)(19)(iv) be amended to include language that an organization will not be precluded from establishing eligibility as a United States employer, under paragraph (h)(4)(ii), merely because the organization is controlled by one individual.

Response: DHS does not believe that the requested clarification is necessary as there is no such preclusion in the regulations, either in new 8 CFR 214.2(h)(19)(iv) or (h)(4)(ii).

Comment: A professional association cited a 2023 letter from USCIS⁸⁹ as stating that there is no collaboration time requirement between a university and an affiliated nonprofit for the purpose of cap exemption and that USCIS recognized university-government collaborations for training, education, and research purposes.

Response: DHS agrees that there is no statutory or regulatory requirement for a particular period of prior collaboration between a university and an affiliated nonprofit for purposes of H-1B cap exemption eligibility. DHS also recognizes the potential of government organizations collaborating with universities for training, education, and research purposes. In the case of affiliations, a government research entity may qualify for cap exemption if they employ a beneficiary who will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the permissible fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. USCIS officers will review the totality of the evidence for each petition using the preponderance of the evidence standard to determine whether a particular organization or affiliation will qualify for cap-exempt status.

Comment: A professional association provided several recommended amendments to the proposed rule at 8 CFR 214.2(h)(8)(iii)(F)(2), including:

- Specifying that a nonprofit entity is "operated by" an institution of higher

education when key personnel of the nonprofit entity are shared with the institution of higher education, or whether the institution of higher education controls key decisions and programs of the nonprofit entity;

- Defining "attached" to include its common-sense meaning; and the terms "member, branch, cooperative, or subsidiary" to be consistent with their common legal meaning;

- Providing examples of an "active working relationship" and confirming that new relationships memorialized through a formal written affiliation agreement meet the regulatory standard;

- Confirming that "formal written affiliation agreements entered into between an institution of higher education, and the parent organization of the petitioner qualify for purposes of 8 CFR 214.2(h)(8)(iii)(F)(2)(iv), so long as the petitioner can provide documentation to show that petitioner is bound by the terms of the affiliation agreement."

A joint submission also recommended definitions for the terms "active working relationship" and "attached." These commenters stated that a definition of the former could clarify the evidence required to show an active working relationship for cap exemption purposes and that the latter could address the lack of caselaw or guidance on the meaning of "attached" by including in the definition "a consistent collaboration with the institution of higher education, or that the institution of higher education has a vote or key role in the administration of the nonprofit's program or budget."

Response: DHS appreciates these suggestions. However, DHS did not propose to revise 8 CFR 214.2(h)(8)(iii)(F)(2) and declines to do so through this rulemaking. Regarding the specific suggestions to clarify when a nonprofit entity is "operated by" an institution of higher education, as reflected in 8 CFR 214.2(h)(8)(iii)(F)(2)(ii), while shared key personnel and control of key decisions and programs may be relevant factors, DHS reiterates that USCIS officers will review the totality of the evidence for each petition using the preponderance of the evidence standard to determine whether a particular affiliation will qualify for cap-exempt status. DHS declines to define the terms "attached" or "member, branch, cooperative, or subsidiary" as they appear in 8 CFR 214.2(h)(8)(iii)(F)(2)(iii). Whether a nonprofit entity is attached to an institution of higher education depends on its status as a member, branch, cooperative, or subsidiary, as is stated in

⁸⁹ USCIS, Electronic Reading Room, H-1B Cap Exemptions—Baker (Oct. 18, 2023), <https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf>.

the provision, and DHS does not believe these corporate relationships require further clarification in this regulation. Further, DHS declines to provide a definition of “active working relationship” and declines to confirm that formal written affiliation agreements between an institution of higher education and the parent organization of the petitioner qualify for purposes of 8 CFR 214.2(h)(8)(iii)(F)(2)(iv), as these relationships will be examined on a case-by-case basis.

Comment: A commenter said that another way to ensure greater levels of consistency in cap exemption adjudications would be for the agency to consider a separate rulemaking to establish a distinct adjudication procedure for determining whether an entity is eligible for a cap exemption, which the commenter said USCIS already does in other contexts such as Blanket L petitions. The commenter said that an advance determination of eligibility for the H-1B cap exemption with the ability to premium process, would give petitioners greater certainty in knowing that they must—or may not—file cap-exempt petitions for H-1B workers. The commenter added that the lack of consistency in adjudications means that petitioners who have been previously approved for cap exemption cannot be assured that the exemption would be honored in the filing of a subsequent petition even when the underlying facts have not changed.

Response: Under DHS regulations, eligibility for cap exemption is determined on a case-by-case basis. The NPRM did not propose to create a new, separate adjudication process for cap exemption determinations and such a process is not currently operationally feasible. USCIS may need to create a new form as well as a framework for this new adjudication. Even if DHS were inclined to adopt the commenter’s suggestion, the regulated public should have an opportunity to comment on any such process and framework. DHS is unable to adopt this suggestion through this rule but may consider it in future rulemaking efforts.

Comment: An advocacy group generally requested that the proposed regulations provide for educational institutions and U.S. Government projects as cap-exempt employers. A trade association requested that the proposal provide for university research parks specifically for cap exemption purposes.

Response: DHS regulations state that an H-1B nonimmigrant worker is exempt from the cap if employed by: (1) an institution of higher education; (2) a

nonprofit entity related to or affiliated with such an institution; (3) a nonprofit research organization; or (4) a governmental research organization. See 8 CFR 214.2(h)(8)(iii)(F)(1) through (3). Institutions of higher education are defined in section 101(a) of the Higher Education Act of 1965. If not directly employed by the qualifying institution or organization, the individual must meet the requirements outlined in 8 CFR 214.2(h)(8)(iii)(F)(4). USCIS reviews the totality of the evidence for each petition using the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular organization or affiliation will qualify for cap-exempt status.

9. Automatic Extension of Authorized Employment Under 8 CFR 214.2(f)(5)(vi) (Cap-Gap)

Comment: Many commenters, including law firms, research organizations, and trade associations, expressed general support for the automatic extension of authorized employment under 8 CFR 214.2(f)(5)(vi) (“cap-gap”). A commenter stated that the proposed provision could help many people, while an advocacy group remarked that it would be welcomed by students, employers, and universities. Another commenter expressed that the proposed provision would help many newly selected H-1B beneficiaries. A university welcomed the proposed provisions in as much as they would support graduates who are employed in the United States in industry positions. A union expressed that the proposed provision would benefit many in the higher education workforce.

Response: DHS agrees with these commenters that automatically extending employment authorization for F-1 students during the period known as the “cap-gap” will help prevent the disruptions in employment authorization that some F-1 nonimmigrants seeking H-1B change of status have experienced over the past several years. DHS recognizes the hardships that a disruption in employment authorization could cause to both affected individuals and their employers and seeks to prevent potential future disruptions by extending cap-gap relief.

Comment: Many commenters further expressed that the proposed provision would provide benefits to students, including increased flexibility, reduced disruption to employment authorization due to processing delays, and a smooth transition from their educational pursuits to the workforce. A professional association and a joint

submission expressed support for extending the cap-gap timeframe, stating it would allow future medical students to remain in the United States to complete their education, training, and residency. A couple of commenters, including a university, elaborated that a smoother transition for students allows industries to benefit from their skills, enhances the United States’ labor market, and strengthens its position as the premier global destination for higher education. A couple of commenters added that the proposed provision is crucial for ensuring fairness, efficiency, and transparency in the H-1B process, thereby benefitting both applicants and employers. Another commenter remarked that the added flexibility to the F-1 program would allow students to gain valuable work experience in the United States, thus creating a more dynamic, innovative, and inclusive workforce. The commenter concluded that this would bolster the overall prosperity and competitiveness of U.S. industries on a global stage. While discussing the proposed provision’s benefits to students, a couple of commenters, including a professional association, expressed that the current period of “limbo” causes American-trained students not to pursue employment in the United States. A few commenters, including a trade association and a professional association, stated that the proposed provision would greatly improve employees’ sense of certainty.

A company expressed general support for the proposed provision, noting that the proposal would reduce instances of work authorization gaps for individuals utilizing F-1 OPT in the event of increased processing times and future unavailability of the premium processing option for H-1B cap petitions. Similarly, an advocacy group expressed that the proposed provision would provide “much-needed” relief in the face of delays, including if premium processing is suspended for H-1B petitions.

Response: DHS agrees that the provisions in this rule will benefit students, employers, industries, and the United States. Students and employers will benefit from greater certainty about the maintenance of their employment authorization. Industries will benefit from the skill sets of these students. Further, the United States will remain attractive to global talent and improve its ability to retain such talent.

Comment: A professional association applauded DHS for taking actions that improve efficiency and are based on real-world realities such as the academic calendar, USCIS workload,

and processing times. Similarly, a trade association applauded USCIS for the proposed changes to better align status durations and authorization dates to current conditions as they pertain to adjudications. Another professional association remarked that the proposed provision would allow USCIS additional time to process petitions before the “deadline.” A university expressed optimism that the increased processing window for H-1B petitions could alleviate some of the delays associated with other benefit applications that USCIS adjudicates, such as OPT, STEM OPT, or changes of status.

Response: DHS believes that automatically extending employment authorization for F-1 students during the period known as the “cap-gap” will result in more flexibility for F-1 students and USCIS and will help to avoid disruptions to U.S. employers that are lawfully employing F-1 students. In addition to avoiding employment disruptions, the lengthier extension of F-1 status and post-completion OPT or 24-month extension of post-completion OPT employment authorization for F-1 students with pending H-1B petitions until April 1, which is one year from the typical initial cap filing start date, accounts for USCIS’ competing operational considerations and would enable the agency to balance workloads more appropriately for different types of petitions.

Comment: A few commenters expressed that the proposed provision would positively impact the U.S. economy. A commenter remarked that the increased flexibility in the F-1 program would open the door to skilled students who contribute significantly to the economy. Another commenter remarked that the proposed provision would have positive impacts on the U.S. economy, including by ensuring the payment of education fees and the collection of income taxes from workers. A company commented that the proposed enhancements would play a pivotal role in attracting and retaining top global talent that is crucial for propelling U.S. economic growth.

Response: DHS agrees with this feedback that implementing this automatic extension until April, rather than October 1, of the relevant fiscal year will provide stability for F-1 students that will increase the United States’ ability to attract and retain top global talent. DHS also generally agrees that this provision will have positive impacts on the U.S. economy, such as by benefiting employers to gain productivity and potential profits that the F-1 students’ continuing

employment will provide, as discussed in section IV(A)(3)(viii) below.

Comment: Multiple commenters stated that the proposed provision would provide benefits to employers. A few commenters, including a trade association, a professional association, and a business association, remarked that the proposed provision would greatly improve employers’ sense of certainty, while a joint submission stated that the proposal would provide much needed predictability for employers to lawfully employ F-1 students. A professional association and a trade association commented that the proposed flexibilities would allow for better recruitment efforts among U.S. employers. A company expressed that the proposed improvements would support U.S. companies at the frontier of innovation. A university stated that the proposed cap-gap extension would reduce the negative impact on output experienced by employers, specifically for the jobs in research or technology-related areas. A trade association remarked that extending the cap-gap coverage would save company costs since they would not have to file under premium processing. A legal services provider agreed with the proposed provision, reasoning it should reduce the instances where employers have to terminate or place their “cap-gap” employees on leave on October 1 of a given year while their H-1B cap petitions were still pending.

Response: DHS agrees that expanding the duration of the cap-gap extension and employment authorization, as applicable, will benefit employers by providing stability and helping to avoid disruptions caused by adjudication delays.

Comment: A commenter suggested that USCIS provide F-1 students in OPT with the option of three to six months of leave to travel, in addition to the existing 60-day grace period, after graduation. The commenter added that this would allow students to visit their home country, travel in case of emergencies, and reduce pressure on the job market. A commenter suggested that USCIS consider extending OPT to at least 2 years for all undergraduate and graduate programs, adding that the U.S. is at a disadvantage compared to other developed markets that offer more generous employment visa options. Another commenter requested that USCIS extend validity of STEM OPT automatically until May of the year in which it expires, thereby providing an additional opportunity to get into the H-1B lottery and use the cap-gap if selected.

Response: DHS declines to adopt the commenter’s suggestions concerning OPT and the STEM OPT extension, as such suggestions are beyond the scope of this rulemaking.

Comment: A commenter asked if the starting criterion for cap-gap could be March 1 instead of April 1 to address the issue of applicants who are registered in the lottery but lose work authorization before the results are announced. A couple of commenters asked that cap-gap extensions be based on the status of the student applicant at the time of H-1B registration rather than the status at the time of petition filing, reasoning the current rule is disadvantageous to applicants whose OPT status expires during the H-1B filing period.

A company encouraged DHS to further extend cap-gap to all beneficiaries registered in the H-1B lottery until USCIS concludes the lottery selection for the fiscal year. A commenter further requested an automatic extension of F-1 OPT until USCIS officially announces cap fulfillment or the commencement of the next cap season, stating this would address challenges faced by students who are not initially selected but their OPT status expires before the next round of selection.

Response: DHS declines to adopt the commenters’ suggestions to change the “starting criterion” for the automatic extension from April 1 to March 1, or otherwise to the date that an organization submits an H-1B registration on a student’s behalf. As explained in the NPRM, DHS was concerned with extending employment authorization and status because it could reward potentially frivolous filings that would enable students who may ultimately be found not to qualify for H-1B status. 88 FR 72870, 72887 (Oct. 23, 2023). DHS does not believe that the risks of allowing frivolous filings is outweighed by other factors that might merit extending cap-gap employment or status prior to filing a petition.

Regarding the suggestions to allow F-1 students remain in lawful status through the adjudication of H-1B petitions filed on their behalf, DHS will not make the requested changes to extend F-1 status and associated employment authorization, as applicable, through the commencement of the next cap season, when USCIS concludes registration selection for the relevant fiscal year, or when USCIS announces that the cap has been reached. DHS does not believe that these changes are necessary because April 1 of the relevant fiscal year is

further into the future than those three conditioning events. In the three most recent H-1B cap seasons, USCIS has commenced the next H-1B cap season, concluded all registration selection rounds, and announced that the respective H-1B caps have been fulfilled before April 1 of the respective fiscal years.

Comment: While expressing general support for the proposal, an attorney suggested that DHS revise the cap-gap provision to automatically extend status and employment authorization until adjudication of the H-1B petition is complete. The attorney added that there is no guarantee that extending the cap-gap would solve the issue at hand due to current processing delays and USCIS adjudication backlogs. A trade association echoed the request for the cap-gap provision to be extended until final adjudication of the H-1B petition, reasoning that the risk of fraud would be relatively low.

Response: As noted in the NPRM, according to USCIS data for FY 2016 through 2022, USCIS adjudicated approximately 99 percent of H-1B cap-subject petitions requesting a change of status from F-1 to H-1B by April 1 of the relevant fiscal year.⁹⁰ 88 FR 72870, 72887 (Oct. 23, 2023). By automatically extending employment authorization until April 1 of the relevant year, DHS expects USCIS will be able to adjudicate nearly all H-1B cap-subject petitions requesting a change of status from F-1 to H-1B by this date.⁹¹ DHS declines to automatically extend employment authorization until the final adjudication of the H-1B petition given the size of the affected population and the subjectivity of the circumstances surrounding the delay in final adjudication of H-1B petitions for this population. Further, providing a certain end-date of employment authorization provides needed clarity with respect to the verification of employment authorization and reduces the risk of unauthorized employment.

Comment: A joint submission proposed that USCIS eliminate the April 1 outside limit on cap-gap coverage and instead extend status and work authorization throughout the entire pendency of the petition. Alternatively, the commenter recommended further clarity regarding the proposed regulatory term “until the validity start date of the approved petition” and proposed alternative language to refer to

a petition that “not been finally adjudicated by the requested start date on the petition.”

Response: DHS declines to adopt the commenters’ suggestion to extend status and work authorization through the adjudication of the petition for the reasons explained above. Further, DHS believes that the regulatory text stating that duration of status and employment authorization will be automatically extended “until the validity start date of the approved petition” is sufficiently clear. The commenters’ suggested language regarding petitions that have not been finally adjudicated would also allow extensions of status and work authorization for petitions that have been denied and appealed, which was not contemplated in the proposed rule. DHS is concerned that such an expansion could create an incentive for petitioners to file frivolous appeals in order to obtain extensions of status or work authorization, and therefore, declines to adopt this suggestion.

Comment: Many commenters provided additional suggestions in response to the proposed provision. To address the F-1 60-day grace period in the cap-gap context, a professional association asked DHS to include language in 8 CFR 214.2(f)(5)(vi) to clarify when the 60-day grace period would start if an H-1B petition has been denied, revoked, or withdrawn before April 1 or remains pending on April 1.

Response: As noted in the NPRM, if the H-1B petition underlying the cap-gap extension is denied before April 1, then, consistent with existing USCIS practice, the F-1 beneficiary of the petition, as well as any F-2 dependents, would generally receive the standard F-1 grace period of 60 days to depart the United States or take other appropriate steps to maintain a lawful status. 88 FR 72870, 72887 (Oct. 23, 2023) (citing 8 CFR 214.2(f)(5)(iv)). If the H-1B petition is still pending on April 1, then the beneficiary of the petition is no longer authorized for OPT and the 60-day grace period begins on April 1. 88 FR 72870, 72887 (Oct. 23, 2023). Although the F-1 beneficiary may not work during the 60-day grace period, individuals generally have been allowed to remain in the United States in an authorized period of stay while a subsequent H-1B petition and change of status request is pending. While this is stated in the preamble to the proposed rule, DHS declines add this language to the regulatory text.

Comment: An advocacy group provided the following suggestions in response to the proposed provisions:

- Extend the 24-month extension of post-completion OPT an additional 24

months in case the OPT beneficiary is not selected in the lottery;

- Extend OPT to a total of 36 months; and

- Increase the grace period to 180 days so that the OPT holder has adequate time to switch back to F-1 or obtain another status.

Response: The revision of the cap-gap extension finalized in this rulemaking is intended to provide greater flexibility and better prevent disruptions in employment authorization specifically for F-1 students who are beneficiaries of qualifying H-1B cap-subject petitions. As the suggestions to expand the STEM OPT extension, expand the period of time during which F-1 students may engage in OPT, and double the F-1 grace period, are unrelated to the goals of cap-gap extension, they are beyond the scope of this rulemaking and DHS declines to adopt the suggestions.

Comment: Several commenters generally opposed the extension of cap-gap and work authorization. A commenter stated that the cap-gap extension would hurt American students, while another commenter expressed that F-1 students should be limited to 90 days to find a job, as this would take jobs away from citizens who better understand the culture and workings of the United States.

Response: To qualify for this automatic extension, an F-1 student must be the beneficiary of a pending, timely-filed, non-frivolous H-1B cap-subject petition that requests a change of status. *See* new 8 CFR 214.2(f)(5)(vi)(A). As these F-1 students are necessarily seeking employment that is subject to annual numerical allocations, and the H-1B petitions filed on their behalf by a petitioning employer must be non-frivolous, DHS believes that the eligibility requirements for the automatic extension are sufficient to ensure that U.S. citizen students and workers are not adversely affected by the continued ability of these F-1 students to maintain employment authorization until April 1 of the relevant fiscal year.

Comment: While expressing general opposition, an advocacy group stated that DHS should deny visas to employers of post-graduate students until U.S. citizens in similar situations find employment. Citing an opinion piece on its own website, an organization stated that the proposed rule does not address the incentives that employers are given to hire F-1 nonimmigrant visa holders over recent American graduates. Another commenter asked USCIS to reconsider any changes that expand access to OPT, reasoning that the system incentivizes

⁹⁰ USCIS, OP&S Policy Research Division (PRD), Computer-Linked Application Information Management System 3 (C3) database, Oct. 27, 2022. PRD187.

⁹¹ *See* 88 FR 72870, 72887.

employers to favor noncitizens over citizens since many OPT employers and workers are excused from paying the usual Federal payroll taxes. An advocacy group expressed that the proposed provision is not rooted in statute nor does it cite any legal justification for the change, thus the proposed changes are unauthorized by law. Similarly, another organization urged DHS to rescind all regulations and proposals that allow F–1 nonimmigrant visa holders to work in the United States following graduation, stating that OPT is not authorized under Federal immigration law and creates unlawful competition among workers. The organization added that allowing F–1 nonimmigrant visa holders to extend their period of authorized stay for the purpose of working after they are no longer students violates the scheme Congress created to regulate the admission of nonimmigrants and employment in the United States.

Response: DHS acknowledges the concerns of these commenters but notes that the INA does not contain a requirement that all H–1B petitioners seeking to employ F–1 nonimmigrants conduct a labor market test to determine that there are no able, willing, qualified, and available U.S. workers. DHS declines to impose such a requirement, as that was not proposed in the NPRM and is beyond the scope of this rulemaking. Additionally, DHS does not agree that potential short-term tax incentives employers or workers may experience are a reason to avoid finalizing revisions to 8 CFR 214.2(f)(5)(vi). DHS is aware that, under Internal Revenue Service (IRS) rules, some noncitizens, including F–1 students, may be exempt from paying some Federal taxes for a certain duration of time. However, it is not certain that every F–1 student who benefits from the automatic cap-gap extension of authorized employment will qualify for exemption from Federal taxation. DHS does not believe that potential short-term tax exemption for some F–1 students is a reason to decline to adopt this provision and notes that changes to IRS rules to extend the same Federal tax obligations to employers of F–1 students would need to be addressed by the IRS, not DHS. DHS will proceed with expanding the automatic extension as proposed.

DHS disagrees that the longstanding cap-gap provisions, or the proposed changes to the cap-gap provisions as finalized in this rule, are ultra vires. As stated under the Legal Authority section of the NPRM, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), authorizes the Secretary to prescribe, by regulation, the

time and conditions of the admission of nonimmigrants. 88 FR 72872–72873. As the D.C. Circuit Court of Appeals held, “[t]he Department’s charge to set the ‘conditions’ of nonimmigrant admission includes power to authorize employment—a fact that Congress has expressly recognized by statute.” *Wash. All. of Tech. Workers v. Dep’t of Homeland Sec.*, 50 F.4th 164, 190 (D.C. Cir. 2022). Thus, contrary to the commenter’s assertion, the expansion of the cap-gap provisions as finalized in this rule are consistent with the Secretary’s authority under section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1) and not ultra vires.

Comment: A professional association recommended that USCIS extend dual intent to F–1 visas and offer a “direct route” for doctoral candidates to transition from F–1 to H–1B status, as this would help attract and retain foreign talent and benefit the U.S. economy.

Response: DHS declines to adopt the suggestions. The requirement that a student have a residence in a foreign country which the student has no intention of abandoning and to demonstrate nonimmigrant intent is grounded in statute and beyond the scope of this rulemaking. As to the request to offer a “direct route” for doctoral candidates to transition from F–1 to H–1B status, it is not clear if the commenter is requesting a cap exemption, a set aside under the advanced degree exemption, or a different “direct route.” Regardless, DHS declines to adopt this suggestion. DHS responded to a similar comment in the final rule, “Improving the H–1B Registration Selection Process and Program Integrity,” published on February 2, 2024. This commenter requested that DHS introduce degree-based categorizations in the selection system, reasoning that such an approach would allow more advanced degrees, like Ph.D.s., to have a unique category to align with the specialty-based nature of the H–1B classification. 89 FR 7456, 7474 (Feb. 2, 2024). DHS responded to this comment, explaining that in the NPRM, DHS did not propose to prioritize or give preference to any registration based on skills, salaries/wages, education, experience, industry, or any other new criteria and declined to implement this suggestion. 89 FR 7456, 7474 (Feb. 2, 2024). Similarly, DHS will not adopt this suggestion.

Comment: A university encouraged USCIS to improve the Computer Linked Application Information Management System (CLAIMS), so that correct data flows into the Student and Exchange Visitor Information System (SEVIS)

once USCIS has adjudicated H–1B petitions for which F–1 students are listed as beneficiaries. The university elaborated that if this solution is not feasible, the Student and Exchange Visitor Program (SEVP) could be given access to the approval information to increase communication between USCIS and SEVP.

Response: DHS and component agencies are making continuous enhancements to these and other systems. However, DHS believes that further improvements, to the extent they are necessary, can be accomplished outside of the regulatory process. Therefore, DHS declines to adopt these suggestions as part of this final rule.

10. Other Comments on Benefits and Flexibilities

Comment: A commenter remarked that the rule should be flexible and adaptable to changing economic conditions and workforce demands to ensure that the programs remain responsive to the needs of American businesses and the global economy. Another commenter encouraged USCIS to explore solutions for international students who wish to stay and contribute to the United States by exploring alternative visa pathways or retention measures.

Response: While DHS values flexibility and adaptability, this comment lacks specificity about the changes DHS could make to this rule to promote those values. DHS always strives to balance flexibility and adaptability with clarity and integrity, and DHS believes this rule strikes that balance. With respect to exploring solutions for international students who wish to stay and contribute to the United States, increasing the automatic extension of duration of status and authorized employment under 8 CFR 214.2(f)(5)(vi) will allow F–1 students greater flexibility to remain in the United States while their H–1B petitions are adjudicated. Additional changes as suggested by the commenter, such as exploring alternative visa pathways or retention measures, are beyond the scope of this rulemaking.

Comment: A commenter proposed the inclusion of provisions that allow H–1B visa holders to engage in supplementary income-generating activities in creative and AI-related fields, reasoning that these opportunities would foster innovation, job creation, and contribute to the United States’ cultural and technological diversity. Another commenter suggested that H–1B holders be permitted to switch or work with multiple employers at the same time.

Response: It is unclear in what context the commenters propose to allow H–1B workers to engage in supplementary income-generating activities, such that existing regulations would not allow for such arrangements. An H–1B beneficiary may change employers if their new employer files a new petition requesting H–1B classification and an extension of stay for the beneficiary, *see* 8 CFR 214.2(h)(2)(i)(D). With respect to allowing H–1B beneficiaries to work for multiple employers, DHS notes that H–1B workers are permitted to change employers, *see* 8 CFR 214.2(h)(2)(i)(D), and obtain authorization to work concurrently for multiple employers, *see* 8 CFR 214.2(h)(2)(i)(C) (requiring that a separate petition be filed by each employer). In either scenario, an eligible H–1B beneficiary may start concurrent or new employment upon the filing of a non-frivolous H–1B petition or as of the requested start date, whichever is later. *See* 8 CFR 214.2(h)(2)(i)(H). Therefore, DHS will not make a change to this rule resulting from these comments.

Comment: A joint submission requested clarification on immediate and automatic revocation, specifically on the language stating that “[t]he approval of an H–1B petition is also immediately and automatically revoked upon notification from the H–1B petitioner that the beneficiary is no longer employed.” While discussing a terminated worker’s ability to rejoin a petitioning company within a 60-day grace period so long as the petition has yet to be revoked, the commenters stated that the current requirement to notify USCIS immediately of a termination, along with the proposed automatic revocation provision, would effectively nullify this ability.

Response: DHS proposed to amend 8 CFR 214.2(h)(11)(ii) as part of its effort to modernize and improve the H–1B program, adding benefits and flexibilities and eliminating unnecessary burdens. Currently, 8 CFR 214.2(h)(11)(i)(A) states that, “If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.” When a petitioner submits a letter according to 8 CFR 214.2(h)(11)(i)(A), oftentimes the petitioner does not further request USCIS to take a specific action on the petition and therefore USCIS has to take the extra step of issuing an additional notice, such as a Notice of Intent to Revoke (NOIR) to confirm the petitioner’s intent. This is an inefficient process as the NOIR essentially asks the petitioner to confirm

what was already stated in the letter notifying USCIS that it no longer employs the beneficiary. New 8 CFR 214.2(h)(11)(ii) eliminates this redundancy and provides for immediate and automatic revocation upon notification from the H–1B petitioner that the beneficiary is no longer employed by the petitioner. The requirement that the petitioner notify USCIS of any material change, including when a beneficiary is no longer employed by a petitioner, is not a new requirement. DHS believes that this slight modification will increase efficiency for both stakeholders and USCIS, and reduce unnecessary, time-consuming tasks such as issuing unnecessary notices for which USCIS rarely receives a response or outcome other than revocation of the approved H–1B petition.

USCIS also has encountered companies using this technicality in the regulatory language to allow beneficiaries to retain an approved H–1B petition for additional time beyond that for which they would otherwise be eligible. These companies would submit a statement saying the beneficiary stopped working, thus complying with the existing 8 CFR 214.2(h)(11)(ii) regulatory language, but they would not explicitly request withdrawal or automatic revocation of the petition to retain the appearance of a valid petition approval for the beneficiary until a NOIR, petitioner response, and subsequent revocation could be completed. The appearance of a valid petition approval, and corresponding maintenance of status, creates potential confusion, particularly for other agencies that may rely upon the approval notice to validate eligibility for certain benefits.

The joint submission also states that finalizing this rule would “effectively nullify the clear intent” of an existing USCIS web page⁹² explaining options for terminated nonimmigrant workers because that web page indicates that a terminated worker can rejoin a petitioning company during the 60-day grace period as long as the petition has not been revoked. However, DHS notes that the web page further explains “If your employer notified us of the termination, thus automatically revoking the petition approval, the employer would need to file a new

petition with us.”⁹³ This is consistent with new 8 CFR 214.2(h)(11)(ii). DHS therefore does not agree that new 8 CFR 214.2(h)(11)(ii) will “nullify the intent” of the web page. Further, DHS believes that finalizing this rule will eliminate redundancy and promote efficiency in adjudications. Therefore, DHS declines to make any changes in response to this comment.

F. Program Integrity

11. Provisions To Ensure Bona Fide Job Offer for a Bona Fide Specialty Occupation Position

i. Contracts

Comment: A joint submission and a trade association stated that requesting contractual agreements would not help adjudicators in determining whether the position satisfies the specialty occupation requirements, as they often do not contain information about the position’s minimum educational requirements. Both commenters added that these documents do not normally discuss minimum educational requirements for jobs being performed pursuant to the agreements as they are not typically relevant to the parties’ business interests, cannot be practicably obtained due to nondisclosure provisions within those contracts, that the contractual evidence of minimum educational requirements is not always germane to the specialty occupation criteria, and that an H–1B petitioner may not have a contract with a third-party employer. The joint submission stated that when a petitioner and a client negotiate for a specific deliverable, clients do not typically seek to impose any minimum educational requirements on the employees the petitioner might assign to the project as the satisfactory completion of the project is the overarching objective. Similarly, a legal services provider voiced concern that most work orders would not contain the minimum educational requirements outlined in the proposed rule and that a USCIS officer could deny the petition even when the minimum educational requirements to perform the duties are clear from all of the other evidence submitted.

Response: DHS is aware that contracts do not always contain minimum educational requirements. DHS also recognizes that information that may be

⁹² See DHS, USCIS, *Options for Nonimmigrant Workers Following Termination of Employment* (last reviewed/updated Apr. 1, 2024),

<https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment>.

⁹³ See DHS, USCIS, *Options for Nonimmigrant Workers Following Termination of Employment* (last reviewed/updated Apr. 1, 2024),

<https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment>.

relevant to one scenario (e.g., where the beneficiary will be staffed to fill a position within the end-client's organization) might not be equally relevant or probative to other scenarios (e.g., where the petitioner is hired to complete a project for the end-client and determine necessary staffing allocation to complete the project). DHS did not propose to require the submission of contracts in all instances. Rather, DHS proposed to clarify its existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) ("USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication."). Current 8 CFR 214.2(h)(4)(iv)(A) requires petitioners to submit evidence to establish that the beneficiary is qualified to perform services in a specialty occupation and that the services the beneficiary is to perform are in a specialty occupation. The petitioner bears the burden of establishing eligibility for an immigration benefit.⁹⁴ If the required initial evidence submitted by the petitioner is sufficient to establish that the services the beneficiary is to perform are in a specialty occupation and that the beneficiary is qualified to perform services in that specialty occupation, then additional evidence would not be needed to establish the minimum educational requirements for the position and would, therefore, not be requested under new 8 CFR 214.2(h)(4)(iv)(C). However, under existing USCIS policy, if the petitioner has not satisfied its burden, the adjudicating officer would generally issue an RFE to request evidence of eligibility.⁹⁵ The RFE should identify the eligibility requirement(s) that has not been established and why the evidence submitted is insufficient; identify any missing evidence specifically required by the applicable statute, regulation, or form instructions; identify examples of other evidence that may be submitted to establish eligibility; and request that the petitioner submit such evidence. The adjudicating officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency.⁹⁶ At the same time, DHS

will not limit USCIS' prerogative to request contracts, work orders, or other similar evidence if it is determined such evidence would aide adjudicators in ascertaining whether a position is a specialty occupation, as claimed. Consistent with this policy, new 8 CFR 214.2(h)(4)(iv)(C) lists examples of evidence that may be requested by USCIS, and submitted by the petitioner, to establish eligibility. If evidence, such as contracts or work orders, is unavailable or does not contain the requested information, the petitioner may submit alternative evidence to establish eligibility. Regarding the commenter's concern about petitions where the position's minimum educational requirements are clear from all of the other evidence submitted, in such a case, USCIS would not likely issue an RFE for additional evidence of the position's minimum educational requirements.

Comment: An attorney, writing as part of a form letter campaign, requested that USCIS retain its current guidance noted in the document "PM-602-1114 Rescission of Policy Memorandum on Contracts and Itineraries" which the commenter said, "does not create extra work for both the H-1B petitioner and their clients." A law firm stated that the request for contracts would run counter to other streamlining measures and be contrary to the statements in the proposed rule.

Response: As stated in the NPRM, USCIS already has the authority to request contracts and other similar evidence. 88 FR 72870, 72901 (Oct. 23, 2023). DHS acknowledges that since USCIS Policy Memorandum PM-602-0114, "Rescission of Policy Memoranda," was issued in July 2020, contracts and legal agreements have generally not been requested for H-1B petitions. DHS further acknowledges, as a result of new 8 CFR 214.2(h)(4)(iv)(C) and other provisions of this final rule, that petitioners may be requested to submit such documentation in some cases. However, while USCIS has not generally requested such evidence in recent years, USCIS retains the authority to request such evidence and, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of that authority. Contracts and similar evidence may be helpful to establish the minimum educational requirements to perform the duties of a position and that there is a bona fide job offer and a position in a specialty occupation for the beneficiary, thereby establishing eligibility for H-1B nonimmigrant classification. Therefore, DHS believes it

is appropriate to codify the authority to request such evidence and put stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties. Further, DHS does not believe that this provision runs counter to other measures from the proposed rule because, again, petitioners bear the burden of establishing eligibility for an immigration benefit⁹⁷ and nothing in this rule is intended to relieve petitioners of that burden.

In response to stakeholder comments, DHS is revising the contracts provision at 8 CFR 214.2(h)(4)(iv)(C) in this final rule to state that USCIS may request contracts or similar evidence "showing the bona fide nature of the beneficiary's position" rather than "showing the terms and conditions of the beneficiary's work" as stated in the NPRM. This revision is intended to clarify that USCIS will be reviewing contracts or similar evidence to determine if the position is bona fide, not that USCIS will be specifically looking at the terms and conditions of the beneficiary's work, which could include the terms and conditions as specified by the petition, but would not include the terms and conditions of the beneficiary's work more generally, which could imply that officers will be looking for an employer-employee relationship or the right to control. As explained in the NPRM and elsewhere in this final rule, DHS is removing the reference to the employer-employee relationship from the definition of U.S. employer, consistent with current practice since June 2020 when, following a court order and settlement agreement,⁹⁸ USCIS formally rescinded its January 2010 policy guidance on the employer-employee relationship.⁹⁹ As a result, USCIS no longer requires the petitioner to establish a right to control the beneficiary's work.

As also noted above, the provision provides greater transparency by putting

⁹⁷ See INA 291.

⁹⁸ See *ITServe All., Inc. v. Cissna*, 443 F.Supp.3d 14, 19 (D.D.C. 2020) (finding that the USCIS policy interpreting the existing regulation to require a common-law employer-employee relationship violated the Administrative Procedure Act as applied and that the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) is ultra vires as it pertains to H-1B petitions).

⁹⁹ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf. This memorandum rescinded the USCIS policy memorandum "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," HQ 70/6.2.8 (AD 10-24) (Jan. 8, 2010).

⁹⁴ See INA 291, 8 U.S.C. 1361.

⁹⁵ See USCIS Policy Manual, Vol. 1, "General Policies and Procedures," Part E, "Adjudications," Chap. 6, "Evidence," <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6>.

⁹⁶ See USCIS Policy Manual, Vol. 1, "General Policies and Procedures," Part E, "Adjudications,"

Chap. 6, "Evidence," <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6>.

stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's specialty occupation position and the minimum educational requirements to perform the duties. Such evidence will not be requested in all cases, but only those where the petitioner has otherwise failed to meet its burden of proof to establish eligibility by a preponderance of the evidence. Finally, DHS believes that codification of the authority to request contracts or other evidence will help enhance the integrity of the H-1B program, which is a primary goal of this final rule.

Comment: A joint submission and a trade association stated contracts and work orders specifying minimum educational requirements are not legally probative in most employment contexts, and in actual business practice often do not exist at all, and that the proposed provision "creates the potential to exclude sectors of the economy from the H-1B program, as well as place burdensome obligations on parties not before USCIS." The joint submission added that the scope of the burden for providing documentation would be disproportionate to the goal of ensuring a bona fide job offer, stating that although the NPRM does not mandate the submission of contracts, it is strongly suggested. The commenters requested USCIS give more consideration to codifying that client contracts would continue to be an optional—but not necessary—type of evidence to support an H-1B petition.

Joint submission commenters wrote that codifying the ability to request contracts would be an invitation for adjudicators to view contracts as a basic requirement for all H-1B petitions, even when such contracts are legally irrelevant to establishing the existence of a bona fide job offer, particularly in consideration of the fact that the burden of proof is a "preponderance of the evidence" standard. The commenters added that the proposed regulation goes far beyond that which is necessary by establishing a requirement potentially applicable to all that is only probative in a subset of situations. The joint submission also stated that the types of evidence envisioned by this rule are not universal to all business models and arrangements, making the rule significantly burdensome, if not in some cases impossible. The commenters said that the proposed regulatory change also fails to recognize that the petitioning H-1B employer may not have a contract with the end client at whose business location the H-1B worker would be placed upon which to draw, which the

commenter described as an entirely common practice. For these reasons, the commenters said that the proposed regulation fails to recognize the complex and rapidly changing nature of modern-day business arrangements, and, in so doing, creates unnecessary and unfair roadblocks to employers who need to access key talent using the H-1B program.

Response: As noted, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of DHS's existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) ("USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication."). DHS does not expect that such evidence will be requested in all cases, and thus disagrees with commenters that the provision will be unduly burdensome, create unfair roadblocks for petitioners, or exclude sectors of the economy. DHS recognizes that information that may be relevant in one scenario (e.g., where the beneficiary will be staffed to fill a position within the end-client's organization) might not be equally relevant or probative in other scenarios (e.g., where the petitioner is hired to complete a project for the end-client and determine necessary staffing allocation to complete the project). DHS did not propose to request the submission of contracts in all instances.

With respect to commenters' concerns that specified documentation may not exist and that the types of evidence identified in the regulation "are not universal," DHS notes that, in USCIS's adjudicative experience, generally, petitioners have been able to submit written agreements (or business arrangements/requests for services) between relevant parties in a service transaction and that such agreements are relevant and probative in certain cases. It is reasonable to expect petitioners, when relevant and probative, to continue to submit such documentation, most often in the form of contracts, work orders, or end-client letters. These documents, when relevant and probative, often assist DHS in establishing the type of work to be performed, the bona fide nature of the specialty occupation position, the skills and resources required to perform the work, and the bona fide nature of the beneficiary's job offer. Further, new 8 CFR 214.2(h)(4)(iv)(C) provides a non-exhaustive list of documents that may be requested in order to establish the bona fide nature of the beneficiary's

position and the minimum educational requirements to perform the duties of the position. However, it is important to note that new 8 CFR 214.2(h)(4)(iv)(C) does not require or mandate submission of any specific type of evidence or in any specific format and, as noted in the NPRM, petitioners may submit other documentation that is detailed enough to provide a sufficiently comprehensive view of the position being offered to the beneficiary and the bona fide nature of the position. 88 FR 72870, 72901 (Oct. 23, 2023). While this provision does not require petitioners to submit any specific type of documentation, such as contracts or legal agreements between the petitioner and third parties, the petitioner must demonstrate eligibility for the benefit sought.¹⁰⁰

DHS also disagrees that this codification of USCIS' authority to request evidence showing the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties is unduly burdensome for petitioners. Again, new 8 CFR 214.2(h)(4)(iv)(C) does not require the submission of contracts or similar documents, and DHS does not anticipate that this evidence will be requested in all cases. In fact, DHS anticipates that in the majority of cases, petitioners will not be requested to submit contracts or similar evidence to demonstrate the existence of a bona fide position in a specialty occupation position. However, DHS believes that it is important to have clear authority in the regulations so that officers may request contracts, work orders, or other similar evidence where the petitioner has not shown that a bona fide position is available for the beneficiary. For example, uncorroborated statements about a claimed in-house project for a company with no history of developing projects in-house, standing alone, would generally be insufficient to establish the existence of a bona fide position in a specialty occupation. In such a case, an officer could request contracts or other similar evidence.

Comment: A joint submission said that many client contracts contain nondisclosure provisions that prohibit disclosure of the contracts to third parties, and the language of the proposed regulation would put these petitioners in a very difficult place where they must choose between violating a specific contractual provision prohibiting disclosure or having an H-1B petition for a key

¹⁰⁰ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

employee denied. The joint submission said that the implied risk of denial from noncompliance is made clear in the proposed rule by stating, “Although a petitioner may always refuse to submit confidential commercial information, if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial.”¹⁰¹

The company, along with an individual commenter, stated that documents could contain “highly confidential information related to controlled technology (including those involving government contracts), restricted from disclosure by government authorities or subject to non-disclosure agreements” and would not verify the minimum educational requirements for the position. The company stated that employers should not be required to produce records “irrelevant to the H–1B petition or sensitive business information when other information is available and sensitive information could be discoverable through the Freedom of Information Act,” adding that “the same information can also be provided by letters signed by an authorized company official and supplier representative.” The commenter requested that “at the very least” employers be able to redact or omit sensitive information and that adjudicators not be able to deny H–1B petitions based on unavailable or inapplicable requested evidence, when the petitioner provides other probative evidence of the job offer and educational requirements of the offered position. Similarly, a trade association requested that USCIS clarify that, due to the highly confidential and sensitive nature of contracts, work orders, and similar evidence, redactions do not impact an officer’s ability to evaluate the nature of the relationship between parties. Similarly, an individual commenter said that the proposed provisions provide no additional assurances of confidentiality of the documents being provided and do not address how contracts can be provided when the terms of the contracts specifically provide that they should not be disclosed to any person or agency.

Response: DHS is aware that contracts and associated documents could contain confidential or sensitive information. As noted in the NPRM and in line with current practice, if a petitioner submits contracts or other requested evidence that may contain trade secrets, for example, the petitioner may redact or sanitize the relevant sections to provide a document that is still sufficiently

detailed and comprehensive yet does not reveal sensitive commercial information. 88 FR 72870, 72901 n.110 (Oct. 23, 2023). Alternatively, petitioners may submit other relevant and probative evidence, such as a letter signed by the end client. Petitioners will not be required to provide sensitive information that is irrelevant and does not show the non-speculative nature of the beneficiary’s position or the minimum educational requirements to perform the duties. However, as the petitioner bears the burden of establishing eligibility for an immigration benefit,¹⁰² it is critical that the submitted evidence contain all information necessary for USCIS to adjudicate the petition. Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner’s confidential business information when it is submitted to USCIS. See 5 U.S.C. 552(b)(4), 18 U.S.C. 1905. Additionally, a petitioner may request pre-disclosure notification. See “Predisclosure Notification Procedures for Confidential Commercial Information.” E.O. 12600, 52 FR 23781 (June 23, 1987).

Comment: A few commenters voiced general concern that requests for documentation from petitioners and third parties would be burdensome, especially for smaller IT consulting firms and startups. A company and an advocacy group voiced concern with codifying an expectation that USCIS would request contracts, work orders, or similar evidence of the job offer due to employers being unable to provide complete copies of statements of work. A professional association and a law firm said the proposed rule would “unfairly” require third party employers to produce a higher amount of documentation to immigration authorities, making them more susceptible to “broad, trivial inquisitions.”

A trade association stated that the requirement would ignore “the reality of contract law” because parties would not want to bind themselves to something contractually that is not necessary to the performance of the object and purpose of the contract, and because it would create contractual obligations to and for persons that are not in privity with all of the contracting parties, such as the H–1B beneficiary. The commenter added that such a dynamic could create burdens for the legal system in the event a contract dispute arises. Both the joint submission and the trade association said that due to these factors, requesting contractual evidence in support of a

bona fide job offer would be arbitrary and capricious.

Response: DHS does not agree that this provision will be unduly burdensome on petitioners and does not agree that it will unfairly require any petitioner, including those where the beneficiary will provide service to a third-party, to provide a higher amount of documentation. Again, in all H–1B visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought.¹⁰³ Specifically, a petitioner must establish, among other things, that the beneficiary will perform services in a specialty occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. Where the beneficiary will be staffed to a third party, this may be demonstrated by contracts or other similar evidence to establish the bona fide nature of the beneficiary’s position and the minimum educational requirement(s) to perform those duties, thus ensuring that the beneficiary will perform services in a specialty occupation.¹⁰⁴ While the evidence needed to satisfy the petitioner’s burden may differ from case to case, the essential elements of what the petitioner must establish remain the same. Therefore, while additional evidence may be required in some cases, DHS does not agree that this is unfair or unduly burdensome.

As stated previously, DHS does not anticipate that this evidence will be requested in all cases, but there may be cases where additional evidence is

¹⁰³ See INA sec. 291, 8 U.S.C. 1361; *Matter of Simeio Solutions*, 26 I&N Dec. 542, 549 (AAO 2015) (“It is the petitioner’s burden to establish eligibility for the immigration benefit sought.”); *Matter of Skirball Cultural Center*, 25 I&N Dec. 799, 806 (AAO 2012) (“In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.”); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) (“In most administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought.”).

¹⁰⁴ See *Defensor v. Meissner*, 201 F.3d 384, 387–88 (5th Cir. 2000) (“If only [the employer’s] requirements could be considered, then any alien with a bachelor’s degree could be brought into the United States to perform a nonspecialty occupation, so long as that person’s employment was arranged through an employment agency which required all clients to have bachelor’s degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1–B [sic] visas to positions which require specialized experience and education to perform.”).

¹⁰¹ 88 FR 72901 & n.110 (citing *Matter of Marques*, 16 I&N Dec. 314 (BIA 1997)).

¹⁰² See INA 291.

needed to establish eligibility. For example, if a petitioner claims that a beneficiary will be staffed to a third-party yet fails to provide any documentation to establish the nature of the work to be performed by the beneficiary or the requirements of the position, then corroborating evidence may be needed to demonstrate the bona fide nature of the beneficiary's position and the minimum educational requirement to perform the duties. When submitted, these documents should be detailed enough to provide a sufficiently comprehensive view of the position being offered to the beneficiary. The documentation should also include the minimum educational requirements to perform the duties. Documentation that merely sets forth the general obligations of the parties to the agreement, or that does not provide specific information pertaining to the actual work to be performed, would generally be insufficient. If the existing contracts or work orders do not provide this level of detail, or the petitioner believes that they are unable to provide such evidence because of confidentiality or non-disclosure provisions, petitioners could provide other evidence, such as end-client letters that provide this information or similar evidence that petitioners think is relevant and probative. Through the proposed provision, which is being finalized in this rule, DHS is putting stakeholders on notice of the kinds of evidence that could be requested to establish the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties.

Furthermore, DHS disagrees that this provision is arbitrary and capricious. As explained above, DHS is not requesting contracts or similar evidence in all cases. If the petition includes sufficient evidence of the bona fide nature of the position and the minimum educational requirements to perform the job duties, USCIS officers will not request additional documentation in this regard. Furthermore, DHS is aware that some contracts may not contain minimum educational requirements for a position. If contracts are unavailable or do not include the relevant information, petitioners may submit other reliable evidence to demonstrate the bona fide nature of the position or the minimum educational requirements for the proffered position. Additionally, DHS is revising the regulatory language from what it proposed such that new 8 CFR 214.2(h)(4)(iv)(C) does not contain the phrase the "terms and conditions of the beneficiary's work." This change clarifies that contracts are being

requested for limited purposes and not for the purpose of establishing an employer-employee relationship.

Comment: A few commenters stated that the proposed provision to "require employers to show they have existing contracts for projects" would contradict DOL rules governing a job offer, which the commenters said converts the LCA into a de facto contract for employment.

Response: DHS does not agree that new 8 CFR 214.2(h)(4)(iv)(C) requires "employers to show they have existing contracts for projects" in all cases. Rather, as noted above, it is a codification of DHS's existing authority to request contracts, work orders, or similar evidence, in appropriate cases in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) ("USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication."). While the reference to the LCA being converted "into a de facto contract for employment" is unclear, DHS notes that nothing in new 8 CFR 214.2(h)(4)(iv)(C) conflicts with DOL regulations and reiterates that this provision is a codification of existing DHS authority. While the LCA does contain information regarding the proffered position and the employer, as well as attestations from the employer regarding, among other things, wages and working conditions, it does not contain information regarding the specific educational requirements of the proffered position and thus will not be sufficient to establish that a position is in a specialty occupation.¹⁰⁵ Additional evidence may be needed in order to demonstrate the bona fide nature of the beneficiary's position and/or the minimum educational requirement to perform the duties, and new 8 CFR 214.2(h)(4)(iv)(C) clarifies the authority of USCIS to request such evidence as needed.

Comment: A professional association and a law firm stated that DHS's proposal to request contracts or similar evidence overstepped its congressional authority, citing the 2020 court case *ITServe Alliance, Inc.* The commenters stated that the District Court for the District of Columbia held that Congress did not intend to give USCIS the broad authority to request this type of evidence for H-1B visas under the American Competitiveness and Workforce Improvement Act of 1998 and wrote that itinerary and contract

evidence for proving non-speculative terms and conditions of the work is "a total contradiction" of providing temporary expertise in a qualifying specialty occupation position. The commenter stated that terms and conditions of the beneficiary's daily duties "change day-to-day to adjust to complex, unique situations." The commenters also stated that general terms and conditions like educational requirements are already disclosed in submitted documents like the Labor Condition Application and the I-129, Petition for a Nonimmigrant Worker. A trade association said that the codification of the authority to request contracts and similar evidence would be an unnecessary holdover from the employer-employee relationship requirement. The commenter, along with a legal services provider, cited the decision in *ITServe Alliance, Inc.*, as justification for why USCIS should not finalize the provision granting DHS the authority to request contracts and similar evidence. The trade association stated that the proposed rule only makes passing mention of *ITServe Alliance, Inc.* and simply repackages prior policies. Similarly, a legal services provider voiced concern that the proposed provision would result in the revival of the guidance of the 2018 Policy Memo, which was overturned in *ITServe Alliance, Inc.* The commenter stated concern that USCIS would begin requesting excessive evidence of the contractual relationship in the "overreaching way" that it did before the 2020 court settlement, which the commenter said would overburden employers and their clients, and create more work for USCIS in issuing RFEs.

Response: DHS disagrees with commenters' assertions that it is seeking to reinstate prior policy guidance from the 2018 memorandum *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites*.¹⁰⁶ DHS is not suggesting that a contract is required or that contracts will be requested to accompany every petition. As explained in the NPRM and above, DHS is codifying USCIS' authority to request contracts, work orders, or similar evidence, in accordance with 8 CFR 103.2(b) (USCIS may request additional evidence if the evidence submitted does not establish eligibility) and 214.2(h)(9) ("USCIS will consider all the evidence submitted and

¹⁰⁵ DOL's regulation at 20 CFR 655.705(b) specifically recognizes that "DHS determines. . . whether the occupation named in the labor condition application is a specialty occupation."

¹⁰⁶ USCIS, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," PM-602-0157 (Feb. 22, 2018) (rescinded), <https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>.

any other evidence independently required to assist in adjudication.”¹⁰⁷ With new 8 CFR 214.2(h)(4)(iv)(C), DHS is simply putting stakeholders on notice of the kinds of evidence that could be requested. While an H–1B petitioner is not required to submit contracts or legal agreements between the petitioner and third parties, the petitioner must demonstrate eligibility for the benefit sought.¹⁰⁸ By contrast, the 2018 memorandum stated that petitioners must establish, among other things, that “the petitioner has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested in the petition” and that “the employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.”¹⁰⁹ There are no such requirements in this final rule. Again, new 8 CFR 214.2(h)(4)(iv)(C) codifies USCIS’ authority to request contracts and similar evidence but does not require submission of such evidence in all cases. Similarly, new 8 CFR 214.2(h)(4)(iii)(F) codifies the requirement that a petitioner must demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date but does not require petitioners to identify and document the beneficiary’s specific day-to-day assignments for the entire validity period requested.

DHS further disagrees with commenters’ assertions that this provision conflicts with the court’s findings in *ITServe Alliance, Inc. v. Cissna*, 443 F.Supp. 3d 14 (D.D.C. 2020). The district court in that case found, in pertinent part, that it was arbitrary and capricious for USCIS to interpret the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) to require “contracts or other corroborated evidence of dates and locations of temporary work assignments for three future years.”¹¹⁰ Similarly, the court found that the

“requirements that employers (1) provide proof of non-speculative work assignments (2) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs’ visa petitions.”¹¹¹ However, the *ITServe* court did not find that USCIS’ general authority to request corroborating evidence in appropriate cases—which falls far short of requiring evidence of the dates and locations of temporary work assignments for the duration of the validity period—to be impermissible.

While DHS disagrees with these comments, DHS is making some changes to the regulatory text to allay some commenter concerns. First, DHS is adding regulatory text to 8 CFR 214.2(h)(4)(iii)(F) to explicitly state that the petitioner “is not required to establish non-speculative day-to-day assignments for the entire time requested in the petition.” Further, DHS is not finalizing the “terms and conditions” language at new 8 CFR 214.2(h)(4)(iv)(C) as proposed in the NPRM. As noted above, this change clarifies that contracts are being requested for limited purposes and not for the purpose of establishing an employer-employee relationship. Also, while the definition of “U.S. employer” at 8 CFR 214.2(h)(4)(ii) is being amended to codify the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States, the petitioner will not be required to establish an employer-employee relationship with the beneficiary for the duration of the requested validity period. Collectively, these changes will aid in improving the integrity of the H–1B program while also highlighting that DHS does not intend to reinstate the former policies and practices that some courts have found invalid.

Comment: An individual commenter and a trade association voiced concern that the proposed bona fide job offer provisions were reinstating old policies and stringent measures that could have detrimental effects on businesses. An individual commenter and a law firm stated that the provisions designed to ensure bona fide employment are “individually and collectively incompatible with the entire practice of contracting specialized IT services,” as they would upset companies’ longstanding reliance interests and would be disruptive to the technology needs of American businesses due to the high demand for computer and technology specialists, which the commenters stated could only be met

through using international talent. The commenter additionally said that the rule would “revive invalidated guidance and rules” that were put in place to “‘target’” information-technology companies and would be contrary to the INA as well as arbitrary and capricious.

Response: DHS does not agree that the provisions to ensure a bona fide job offer for a specialty occupation position, including the codification of USCIS’ authority to request contracts or other similar evidence, are contrary to the INA or revive invalidated policies such as those addressed in the court’s decision in *ITServe Inc. v. Cissna* and rescinded by USCIS in a June 17, 2020 policy memorandum.¹¹² As discussed above and in the NPRM, new 8 CFR 214.2(h)(4)(iv)(C) is a codification of USCIS’ existing authority to request evidence such as contracts and similar evidence. This provision is intended to ensure that there is a bona fide job offer to employ the beneficiary in a bona fide position in a specialty occupation, which is essential to the integrity of the H–1B program. Without a requirement to demonstrate that there is an actual position being offered, there would be no way for DHS to determine if the position is in a specialty occupation, and thus no way for DHS to determine whether the statutory definition of an H–1B nonimmigrant worker as someone who is “coming temporarily to the United States to perform services in a specialty occupation. . . .” has been met. See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b).

This provision does not require a day-to-day accounting of the beneficiary’s tasks, but requires that the petitioner demonstrate there is a bona fide offer of employment for the beneficiary and that the bona fide position in a specialty occupation is immediately available upon the requested start date on the petition. As explained above, DHS is making changes to be responsive to concerns raised by commenters, including adding regulatory text to 8 CFR 214.2(h)(4)(iii)(F) to explicitly state that the petitioner “is not required to establish non-speculative day-to-day assignments for the entire time requested in the petition.” This added regulatory text is consistent with *ITServe Inc. v. Cissna* and highlights DHS’s intent to differentiate this rule from former policies and practices that some courts have found invalid.

DHS further disagrees that new 8 CFR 214.2(h)(4)(iv)(C), either on its own or in

¹⁰⁷ See also, INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1) (stating that an H–1B petition shall be in such form and contain such information as the Secretary shall prescribe); cf. *Pars Equality Ctr. v. Blinken*,—F. Supp. 3d—, 2024 WL 4700636, at *4–6 (N.D. Cal. Nov. 5, 2024) (observing that similar language in INA sec. 202(a), 8 U.S.C. 1202(a), regarding visa applications confers broad discretion on the agency with respect to what supporting evidence is required (citing cases)).

¹⁰⁸ See USCIS, “Rescission of Policy Memoranda,” PM–602–0114 (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

¹⁰⁹ USCIS, “Contracts and Itineraries Requirements for H–1B Petitions Involving Third-Party Worksites,” PM–602–0157 (Feb. 22, 2018) (rescinded).

¹¹⁰ 443 F.Supp. 3d at 41.

¹¹¹ *Id.* at 20.

¹¹² DHS, USCIS, “Rescission of Policy Memoranda,” PM–602–0114 (June 17, 2020), available at https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

combination with the other integrity measures in this final rule, are “incompatible with the entire practice of contracting specialized IT services” as asserted by the commenter. Again, many of these provisions are codifications of existing DHS authority and are intended to provide added clarity regarding the eligibility requirements for the H-1B classification and to enhance the integrity of the H-1B program. Further, the changes made in this final rule are applicable to all H-1B petitioners, not just those that provide IT services. DHS does not believe that codification of the existing authority to request evidence such as contracts or similar evidence, either by itself or in combination with other new integrity provisions in this final rule, will upset petitioners’ reasonable reliance interests or disrupt American businesses’ ability to meet technology needs.

Comment: A trade association said it wanted to ensure that USCIS is aware of legitimate business reasons integral to infrastructure design for employees—whether they are U.S. citizens, permanent residents, or H-1B visa holders—to work at a client site. The commenter provided an example of such a situation where engineers may have to work on a project site where the work of an engineer would depend upon the work of other contractors on the project and there would be better outcomes if the entire team was together on site. The commenter requested that “USCIS contemplate these legitimate business reasons for employees, including H-1B visa holders, to work at a client site before it issues time-consuming RFEs to the employer.”

Response: DHS is aware that there are legitimate business reasons for employees to work at a client site and is not limiting or restricting the ability of H-1B beneficiaries to perform their duties at third-party worksites. However, entities filing H-1B petitions that contemplate such scenarios must still satisfy the H-1B specialty occupation requirements. As explained in the NPRM and in response to other comments, DHS is codifying USCIS’ authority to request contracts, work orders, or similar evidence, in accordance with 8 CFR 103.2(b). Similarly, as discussed further below, DHS is codifying the existing requirements that there be a bona fide position in a specialty occupation available to the beneficiary as of the start date of the validity period and that the petitioner have a bona fide job offer for the beneficiary to work within the United States. DHS does not anticipate that finalizing these provisions will

inhibit the ability of H-1B beneficiaries to work at third-party worksites, since DHS is codifying existing authority rather than imposing new requirements with respect to its ability to request contracts or similar evidence and requiring a bona fide job offer and a bona fide position in a specialty occupation available to the beneficiary.

ii. Bona Fide Employment

Comment: Several commenters voiced appreciation for the proposed provision to require non-speculative employment at the time of H-1B petition filing. A trade association stated that preventing the H-1B program from being used to bring in temporary foreign workers for speculative workforce needs helps improve the H-1B program’s integrity and its role in meeting the immediate and specific needs of U.S. employers. Several commenters supported the NPRM’s clarification that daily work assignments for the duration of the H-1B validity period are not required for non-speculative employment, and that DHS does not intend to limit H-1B validity periods based on contract, work order, or itinerary terms. One commenter recommended that DHS verify in the final rule that USCIS adjudicators cannot limit H-1B validity periods based on contract, work order, or itinerary terms.

Response: DHS agrees that requiring H-1B petitioners to establish that there is a position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition is an important measure for maintaining program integrity. As discussed below, a number of commenters expressed concern over the term “non-speculative” and, in response to those comments, DHS is replacing “non-speculative” with “bona fide,” so that new 8 CFR 214.2(h)(4)(iii)(F) will state, in relevant part, “[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.” This is not intended to be a substantive change, but to clarify what DHS meant by “non-speculative” and to emphasize that this provision is consistent with current policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.¹¹³ Regarding daily work assignments, DHS explained in the NPRM, 88 FR 72870, 72902 (Oct. 23,

2023), and is adding to the regulatory text through this final rule, that petitioners are not required to establish specific daily work assignments through the duration of the requested validity period. While DHS does not intend to limit validity periods based on the end-date of contracts, work orders, itineraries, or similar documentation, DHS declines to add any limiting language through this rulemaking. As noted above, DHS is adding the following clarifying language to new 8 CFR 214.2(h)(4)(iii)(F): “A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.” As this new language makes clear that petitioners are not required to establish specific daily assignments, DHS believes it is sufficiently clear that USCIS will not limit validity periods based on the end-date of contracts, work orders, itineraries, or similar documentation.

Comment: A few individual commenters and a company said that the proposed provision would work to eliminate IT staffing companies. A business association stated that USCIS has repeatedly confused speculative employment with a speculative project. The commenter said that employment, and the right to receive pay, are guaranteed in the H-1B program once an employee enters the country and is available to start work, therefore making all H-1B employment non-speculative as a matter of law. The commenter added that, in contrast, all employment is based on speculative projects regardless of whether a product or consulting company is employing the H-1B beneficiary. The commenter recommended allowing employers to assume the risk of finding sufficient productive work for an employee to perform or suffer a financial liability if it fails to achieve this aim, in order to be more consistent with the INA.

Further, the commenter claimed that the proposed rule arises out of an attempt to curb the already prohibited practice of “benching without pay.” The commenter stated that DOL has already established rules governing a bona fide job offer that does not revolve around a non-speculative project, and that according to DOL, a bona fide job offer is complete when the petition has been approved and the employee is available for work in the United States. The commenter said that the statute and regulations do not create a requirement to show actual work the employee would perform, and in fact creates allowance for an employee to do no work provided they are paid in accordance with the employment contract/LCA. The commenter requested

¹¹³ See USCIS, “Rescission of Policy Memoranda,” PM-602-0114 (June 17, 2020).

that DHS consider that enforcement powers for rules against benching without pay have been explicitly delegated to DOL since 2001, and DHS “has no such authority codified in the statute.”

Response: DHS does not agree that codifying the requirement of bona fide employment will eliminate IT staffing companies. Nor does DHS agree that this provision confuses “speculative employment” with a “speculative project.” However, to add clarity to the provision, DHS is replacing “non-speculative” with “bona fide,” so that new 8 CFR 214.2(h)(4)(iii)(F) states, in relevant part, “[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.” This revision does not change the meaning or intent of the provision, which requires the petitioner to establish that it has a real position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. A bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business.

DHS recognizes that employment may be actual, but contingent on petition approval, and emphasizes that employment that is contingent on petition approval, visa issuance (when applicable), or the grant of H-1B status may still be considered bona fide. Further, DHS disagrees with the commenters that requiring a bona fide position in a specialty occupation conflicts with DOL regulations regarding LCA requirements and its prohibition on benching without pay. Requiring a bona fide position is not the same as prohibiting benching without pay. This rule does not propose to change guidance on benching, which is generally prohibited by law to prevent foreign workers from unfair treatment by their employers and to ensure that the job opportunities and wages of U.S. workers are being protected.¹¹⁴ Nor does DHS agree with the commenters’ assertion that obligations under the LCA such as the right to receive pay render “all H-1B employment non-speculative

as a matter of law.” Although the LCA and DOL regulations impose obligations on employers, the mere existence of these obligations does not, by itself, satisfy all statutory requirements for H-1B eligibility. As explained in the NPRM, the requirement of non-speculative employment derives from the statutory definition of an H-1B nonimmigrant worker as someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation” See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Although an employer has wage obligations under the LCA and DOL regulations, this alone does not establish that the beneficiary will be performing services in a specialty occupation. DHS must determine whether the duties of the position normally require the attainment of a U.S. bachelor’s or higher degree in a directly related specific specialty to qualify the position as a specialty occupation, and whether the beneficiary has the appropriate qualifications to perform those duties. DHS is unable to make such determinations where the employment itself is undetermined. The bona fide employment requirement is also consistent with current USCIS policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that the petitioner will employ the beneficiary in a specialty occupation.¹¹⁵

Comment: Several commenters voiced opposition to the proposed requirement for non-speculative employment on the grounds that it repeats prior DHS policies that lack basis in the INA and have been overturned by courts. The trade associations stated that the proposed rule is part of a pattern of DHS activity in contravention of court rulings and the INA, including a 1998 proposed rule and a 2018 Policy Memorandum. The commenters said that while the INA limits H-1B visas to those who would “perform services . . . in a specialty occupation” and while the program is not designed to allow individuals to job search within the United States or allow companies to recruit foreign workers based on entirely speculative expansion plans or workforce needs, the proposed rule disregards longstanding Departmental guidance recognizing that employment with a contracting firm may satisfy those requirements even without predetermined assignments to third-party client sites for the entire duration of the visa period. The commenters stated that, in regards to

speculative employment, the INA only requires a petitioning employer to show that “the purported employment is actually likely to exist for the beneficiary,” suggesting that adjudicators would invariably issue requests for production, which has served as the basis for court decisions to invalidate previous attempts by DHS to demand non-speculative work assignments. A few commenters cited *ITServe Alliance, Inc.*, where the court addressed challenges to the 2018 Policy Memo. The commenters stated that in *ITServe Alliance, Inc.*, the court ruled that the Policy Memo’s interpretation of “specialty occupation,” which required proof of non-speculative work assignments for the duration of the visa, was in contravention of the INA, which the court stated had emphasized “occupation” instead of “job,” which “would likely encompass a host of jobs . . . with concomitant but differing job duties” and “[n]othing in [the INA’s] definition requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition.” The joint submission added that the *ITServe Alliance, Inc.* court held that “[w]hat the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.”

Response: As explained above, DHS is replacing “non-speculative” with “bona fide,” so that new 8 CFR 214.2(h)(4)(iii)(F) states, in relevant part, “[a]t the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.” DHS disagrees with the commenters that the requirement to establish a bona fide position at the time of filing lacks a basis in the INA. As explained in the NPRM, this requirement derives from the statutory definition of an H-1B nonimmigrant worker as someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation” See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Demonstrating bona fide employment is a basic, fundamental requirement¹¹⁶ and is essential to maintaining the integrity of the H-1B program. The agency has long held that the H-1B classification is not intended

¹¹⁴ There are certain limited circumstances where benching is not prohibited. See INA section 212(n)(2)(C)(vii) (listing exceptions to the prohibition on unpaid benching).

¹¹⁵ See USCIS, “Rescission of Policy Memoranda,” PM-602-0114 (June 17, 2020).

¹¹⁶ *Serenity Info Tech, Inc. v. Cuccinelli*, 461 F.Supp.3d 1271 (N.D. GA. (2020) (recognizing that “[d]emonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement.”).

as a vehicle for a person to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts.¹¹⁷ This approach is consistent with current USCIS policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a position in a specialty occupation.¹¹⁸

The requirement to establish a bona fide position at the time of filing does not conflict with the court's findings in *ITServe Alliance, Inc.* Importantly, DHS is not attempting to require evidence of non-speculative employment for the entire period of time requested in the petition. As clearly stated in the NPRM, "establishing nonspeculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period." 88 FR 72870, 72902 (Oct. 23, 2023). Further, in response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, "A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition." This new regulatory language makes clear that DHS does not require employers to establish non-speculative and specific assignments for every day of the intended period of employment. The *ITServe* court found, in pertinent part, that the "requirement that employers (1) provide proof of non-speculative work assignments (2) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs' visa petitions."¹¹⁹ However, the *ITServe* court did not find that a general requirement for bona fide employment—which falls short of requiring non-speculative work assignments for the duration of the visa period—to be impermissible. This requirement is consistent with current USCIS policy guidance that the petitioner will employ the beneficiary in a specialty occupation position.¹²⁰

Comment: A law firm stated that the proposed provision to require non-speculative employment was arbitrary

and capricious, as it contradicted 1995 policy memoranda advising that "[t]he submission of [contracts between the employer and the alien work site] should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation" and "[t]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts." The commenter stated that DHS did not explain whether or to what extent the proposed provision represents a departure from these earlier memoranda and that DHS failed to consider relevant reliance interests on these earlier memoranda.

Response: DHS notes that the memoranda referenced by the commenter, a November 13, 1995 memorandum entitled "Supporting Documentation for H-1B Petitions," and a December 29, 1995 memorandum entitled "Interpretation of The Term 'Itinerary' Found in 8 CFR 214.2(h)(2)(i)(B) as It Relates to the H-1B Nonimmigrant Classification," were rescinded by the 2018 memorandum "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."¹²¹ Although the 2018 memorandum was itself rescinded by the "Rescission of Policy Memoranda" memorandum published on June 17, 2020,¹²² that memorandum did not reinstate the 1995 memoranda. Therefore, DHS does not agree that there were any reasonable reliance interests in these previously rescinded memoranda that DHS failed to consider. DHS further disagrees that the requirement of a bona fide position in a specialty occupation is inconsistent with the 1995 memoranda, and notes that the December 29, 1995 memorandum, while discussing the itinerary requirement, which DHS is eliminating in this final rule, acknowledged the requirement of non-speculative employment. The November 13, 1995 memorandum acknowledged that requests for contracts would be appropriate "where the officer can articulate a specific need for such documentation," which is consistent with the codification of USCIS' authority at new 8 CFR

214.2(h)(4)(iv)(C) to request contracts or similar evidence where needed to establish the bona fide nature of the beneficiary's work and the minimum educational requirement to perform the duties. Further, as noted above, new 8 CFR 214.2(h)(4)(iii)(F) is consistent with current USCIS policy guidance that an H-1B petitioner must establish that employment exists at the time of filing the petition and that it will employ the beneficiary in a position in a specialty occupation.¹²³ DHS therefore does not agree that the provisions in this rule contradict previous policy or that DHS failed to properly consider reasonable reliance interests.

Comment: Some commenters, including a company, a form letter campaign, a joint submission, and a trade association, supported the NPRM's clarification that daily work assignments for the duration of the H-1B validity period are not required for non-speculative employment, and that DHS does not intend to limit H-1B validity periods based on contract, work order, or itinerary terms.

Response: DHS is not attempting to require evidence of non-speculative employment for the entire time requested in the petition. As clearly stated in the NPRM, "establishing nonspeculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period." 88 FR 72870, 72902 (Oct. 23, 2023). DHS does not propose to require employers to establish non-speculative and specific assignments for every day of the intended period of employment." In response to these comments, and to provide further clarification of the requirements with respect to establishing non-speculative employment, DHS is clarifying the regulatory text by adding, "A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition." See new 8 CFR 214.2(h)(4)(iii)(F). As stated in response to other comments, DHS is also replacing "non-speculative" with "bona fide" in this provision to add clarity.

Comment: A company noted its concern that the NPRM preamble references non-speculative employment, yet the proposed rule requires a non-speculative position. The commenter also stated that, "the NPRM confirms daily work assignments for the duration of the H-1B validity period are not required for non-speculative

¹¹⁷ 63 FR 30419, 30420.

¹¹⁸ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

¹¹⁹ See *ITServe All., Inc. v. Cissna*, 443 F.Supp.3d 14 (D.D.C. 2020).

¹²⁰ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

¹²¹ USCIS, Policy Memorandum PM-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (Feb. 22, 2018) (rescinded), <https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>.

¹²² USCIS, Policy Memorandum PM-602-0114, Rescission of Policy Memoranda (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

¹²³ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

employment.” The commenter encouraged DHS to conform the final rule’s language to the NPRM preamble, requiring “non-speculative employment” at the time of filing, reasoning that one offered position should not be required for H–1B petition approval, as the petitioner can reasonably sponsor H–1B employment for a future or contingent position. The commenter stated that sponsored U.S. employment is often the same as foreign employment for employees transferring from related entities abroad, whereas the U.S. position may be contingent on changing business, management, and contract needs. The company added that the final rule should account for additional contingencies under non-speculative U.S. employment as employers can file for these non-speculative contingent positions without harming H–1B program integrity.

Response: The regulatory text will be finalized to state: “At the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition.” Although DHS disagrees with the commenter that there is a discrepancy between the NPRM preamble referencing non-speculative employment and the proposed regulatory text requiring a non-speculative position, DHS is replacing “non-speculative” with “bona fide” to add clarity.

To determine whether the H–1B worker will perform services in a specialty occupation as required by statute, USCIS must examine the nature of the services the beneficiary will perform in the offered position. Where the proposed position is undetermined, USCIS is unable to properly analyze and determine whether the position is a specialty occupation, and the petitioner will not be able to establish the nature of the offered position. Undetermined employment where there is no defined position precludes the agency from ascertaining whether the duties of the offered position normally require the attainment of a U.S. bachelor’s or higher degree in a directly related specific specialty to qualify the position as a specialty occupation, and whether the beneficiary has the appropriate qualifications to perform those duties. Conversely, a bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position

in a specialty occupation exists within the context of its business.

Regarding the requirement for day-to-day work assignments, as stated in the NPRM, “DHS does not require a petitioner to identify and document the beneficiary’s specific day-to-day assignments.” 88 FR 72902 (Oct. 23, 2023). To make this point clear, DHS is adding the following regulatory text to new 8 CFR 214.2(h)(4)(iii)(F): “A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.” DHS acknowledges that a beneficiary’s daily work assignments may vary and that “very few, if any, U.S. employers would be able to identify and prove daily assignments for the future three years for professionals in specialty occupations.” *ITServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020). Bona fide employment under new 8 CFR 214.2(h)(4)(iii)(F) is sufficiently broad to allow for reasonable variations and changes to the beneficiary’s daily work assignments, provided those variations and changes remain consistent with the petitioner’s job description and other supporting evidence. Ultimately, what new 8 CFR 214.2(h)(4)(iii)(F) requires is for the petitioner to adequately demonstrate what duties the beneficiary will perform in the proffered position in order to establish that the beneficiary will, in fact, be employed in a specialty occupation position.¹²⁴ See *ITServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020) (“What the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.”).

DHS disagrees with the comment that an H–1B specialty occupation worker may have a petition filed for a “future or contingent” position, where “future or contingent” means that the beneficiary’s job duties are undetermined and dependent on changing business, management, and contract needs. DHS wishes to emphasize that speculative employment should not be confused with employment in a position that is contingent on petition approval, visa issuance (when applicable), or the grant of H–1B status. DHS recognizes that employment in a specific position may be actual, but contingent on petition approval, visa issuance, or the beneficiary being granted H–1B status. However, the petition approval process

should not be confused with the requirement that the beneficiary’s employment be in a bona fide position in a specialty occupation. Employment that is contingent upon petition approval should not be confused as permitting petitions for future and contingent positions that lack the specificity or detail needed to establish eligibility as a specialty occupation.

Comment: A commenter requested additional discussion on the proposed provision. An attorney writing as part of a form letter campaign stated that DHS did not provide clear guidance on what it expects beyond what is already generally submitted with H–1B petitions to establish the employment is non-speculative. The campaign voiced concern that this lack of specificity would leave the H–1B petitioner with the burden of guessing what it needs to prepare, taking up more administrative time beyond what it is already required in preparing H–1B petitions. The campaign urged DHS to define required evidence in future proposals. Similarly, a law firm requested that DHS provide a definition of “speculative employment” to provide petitioners and adjudicators with further guidance. A couple of commenters similarly stated that the non-speculative employment requirement failed to provide articulable standards against which petitioning employers can plan to provide enough evidence to predictably satisfy adjudicators. The commenters requested that, at a minimum, DHS provide further clarification for the “non-speculative position” requirement, and requested that DHS recognize that a petitioning employer can satisfy the requirement via a “wide breadth of evidence.” A joint submission and a law firm stated that the absence of guidance on what is required to establish non-speculative employment raises concerns that the regulatory provision may result in RFEs and NOIDs with open-ended requests for documents that are difficult for petitioners to provide. The joint submission said that there was a lack of explanation for how adjudicators would determine that a qualifying, “non-speculative position” exists without requiring the same evidence of “specific and nonspeculative qualifying assignments” or an “itinerary,” which the *ITServe Alliance, Inc.* court held USCIS must not require. A trade association and a business association voiced concern that the NPRM’s lack of specific guidance on acceptable documentation provides no opportunity for the regulated public to provide constructive feedback on the practicality of such documentation for employers,

¹²⁴ See *ITServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020) (“What the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.”).

and recommended that the rule include a non-exhaustive list of acceptable documentation.

Response: While DHS does not agree that the requirement of non-speculative employment lacks clarity or specificity, in response to this and several other comments, DHS is revising this provision to replace “non-speculative” with “bona fide.” A bona fide position in a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business. The agency has long held and communicated the view that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position, stating that, historically, USCIS (or the Service, as it was called at the time) has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment.¹²⁵ Examples provided in that proposed rule are also relevant here. Specifically, the 1998 proposed rule noted that the H-1B classification was not intended to allow individuals “to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts.”¹²⁶ In such cases, the actual employment would be undetermined and, therefore, speculative. By contrast, where a position is bona fide, the petitioner should be able to establish, through the submission of evidence such as evidence relating to its past employment practices and evidence relating to its employment plans for the beneficiary, that the beneficiary will, in fact, commence work in a specialty occupation immediately upon admission in H-1B classification.¹²⁷

Demonstrating bona fide employment in a specialty occupation is a basic, fundamental requirement¹²⁸ that is

derived from the statutory definition of an H-1B nonimmigrant as someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation . . .” See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), and is essential to maintaining the integrity of the H-1B program. Although the requirement of bona fide employment is longstanding, DHS acknowledges that since the issuance of USCIS Policy Memorandum PM-602-0114, “Rescission of Policy Memoranda” in July 2020, it has not always been the practice of USCIS to require petitioners to submit evidence beyond the petitioner’s own description of the position to establish that there is a bona fide position in a specialty occupation available for the beneficiary as of the start date of the requested validity period. DHS further acknowledges that codification of the requirement to establish a bona fide position in a specialty occupation may result in petitioners providing more evidence than in recent years. However, with this rule DHS is providing the transparency necessary for petitioners to meet their burden to demonstrate eligibility with the information they provide in their petitions to demonstrate the existence of a bona fide position in a specialty occupation that is available to the beneficiary. Although DHS is codifying its authority and clarifying USCIS’ current practice, the requirement of a bona fide position in a specialty occupation is not new. The evidence used to demonstrate the existence of the bona fide position in a specialty occupation will vary based on the business of the petitioner and the specific position being offered. In some cases, the nature of the petitioner’s business and the nature of the offered job will be credible without further explanation. In other cases, the evidence provided may not sufficiently explain how the petitioner, as it describes its own business, would need a worker in the offered position. Thus, the petitioner would not have met their burden of proof and would require the petitioner to explain and provide additional evidence of how it is able to offer employment in the specified specialty occupation position within the context of its business. In the later instance, for example, the petitioner could demonstrate that it has a bona fide position available through contracts, statements of work, master service agreements, end client letters, and any other documentation that shows that there is a bona fide position available on the start date requested on the petition. As explained in the NPRM, petitioners

will not be required to demonstrate non-speculative daily work assignments or document the beneficiary’s specific day-to-day assignments. 88 FR 72870, 72902 (Oct. 23, 2023). Additionally, in order to further clarify this point, DHS is revising the proposed regulatory text to explicitly state that the petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.

Moreover, because this requirement is fundamental to demonstrating eligibility for H-1B nonimmigrant classification, it is reasonable to require petitioners to provide evidence of a bona fide position in a specialty occupation.

Comment: In the case of proving non-speculative employment when a beneficiary is staffed to a third-party worksite, an individual commenter and a law firm stated that the proposed rule offers no guidance on how USCIS would adjudicate an application if the petitioner does not provide proof of specific third-party assignments for the duration of the visa period.

The commenters stated that DHS should affirm that a petitioner’s description of the beneficiary’s position may show the position is non-speculative, in line with the guidance in the 1995 Policy Memo stating that “in the case of an H-1B petition filed by an employment contractor, a general statement of the alien’s proposed or possible employment is acceptable . . . [a]s long as the officer is convinced of the bona fides of the petitioner’s intentions.” The commenters also stated that another option would be DHS clarifying that evidence of a consistent need for high-skilled workers in the given specialty may demonstrate that the position is “non-speculative,” adding that, in such circumstances, the need for the position is proven through historic evidence and satisfies the INA’s only requirement that the petitioning employer “[d]emonstrat[e] that the purported employment is actually likely to exist.” The commenters stated that, consistent with the longstanding business models IT service providers have utilized, the mere fact that the petitioning employer cannot identify at the time of filing every third-party client for whom the beneficiary would provide services does not render the offer “illegitimate”. The commenters said that it is the historic occurrence of labor shortages in the IT space and the use of IT services companies to address those needs that supports any such position’s legitimacy.

Response: As stated above, the requirement for bona fide employment derives from the statutory definition of an H-1B nonimmigrant worker as

¹²⁵ See “Petitioning Requirements for the H Nonimmigrant Classification,” 63 FR 30419, 30420 (June 4, 1998).

¹²⁶ See “Petitioning Requirements for the H Nonimmigrant Classification,” 63 FR 30419, 30420 (June 4, 1998).

¹²⁷ See “Petitioning Requirements for the H Nonimmigrant Classification,” 63 FR 30419, 30420 (June 4, 1998).

¹²⁸ *Serenity Info Tech, Inc. v. Cuccinelli*, 461 F.Supp.3d 1271 (N.D. GA) (2020) (recognizing that “[d]emonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement.”).

someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation” at INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b). 88 FR 72870, 72901 (Oct. 23, 2023). Where the proposed position is speculative, the petitioner will not be able to establish the nature of the offered position and USCIS will not be able to determine if the position is a specialty occupation. In the NPRM, DHS explained that petitioners will not be required to demonstrate non-speculative daily work assignments through the duration of the requested validity period. 88 FR 72870, 72902 (Oct. 23, 2023). This is equally true for third-party placement—new 8 CFR 214.2(h)(4)(iii)(F) will not require a petitioner to provide proof of specific third-party assignments for the duration of the requested period and, as noted above, DHS is adding that clarification to the regulatory text in this final rule. Given the discussion in the NPRM, this final rule, and the inclusion of this language in the final regulatory text, DHS believes it is clear that the bona fide employment requirement does not oblige a petitioner to “identify at the time of filing every third-party client for whom the beneficiary would provide services.” Rather, a petitioner must demonstrate, at the time of filing, availability of bona fide employment in a specialty occupation as of the requested start date. That is, the petitioner must show that the employment in a specialty occupation is “actually likely to exist for the beneficiary”¹²⁹ as of the requested start date.

DHS declines to state categorically that a description of the position will, in all cases, be sufficient to establish that a position is non-speculative and again notes that the 1995 memoranda to which the commenters cite were rescinded in 2018.¹³⁰ Further, DHS disagrees that a historic occurrence of labor shortages and consistent need for workers can act as a substitute for showing that a position is bona fide, as such general information would not necessarily establish the existence of a bona fide position with respect to a specific petitioner and beneficiary. As stated in the NPRM, speculative employment undermines the integrity

and a key goal of the H–1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. 88 FR 72870, 72901 (Oct. 23, 2023).

Comment: A trade association and a joint submission said that the non-speculative work requirement is overly broad and fails to acknowledge the challenging reality faced by modern businesses that cannot conduct precise workforce planning months in advance in a rapidly evolving economic environment.

A company and a trade association stated that the standard duration of contracts in the IT consulting industry is 6 months long; and, even if an employer had a contract for the beneficiary’s services at the time of filing, it would expire by the time the employee was able to enter the country on their initial H–1B visa. The commenters said that for this reason, establishing a requirement to show non-speculative projects over a 3-year visa period would be unworkable for petitioners. The trade association said that given the low odds of lottery selection, it is not possible for consulting companies to negotiate and secure contracts for the services of an employee that they have no guarantee of receiving.

Response: Under new 8 CFR 214.2(h)(4)(iii)(F), DHS will not require employers to establish non-speculative and specific assignments for every day of the intended period of employment. Rather, a petitioner must demonstrate, at the time of filing, availability of a bona fide position as of the requested start date. In response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, “A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.” As noted in other comment responses, DHS is also replacing “non-speculative” with “bona fide” for clarity.

As DHS discussed in the NPRM, speculative employment undermines the integrity and a key goal of the H–1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. 88 FR 72870, 72901 (Oct. 23, 2023). New 8 CFR 214.2(h)(4)(iii)(F) is consistent with current USCIS policy guidance that an H–1B petitioner must establish that employment exists at the time of filing

the petition and that it will employ the beneficiary in a specialty occupation.

Comment: A trade association said that the proposed rule’s narrow range of evidence of a non-speculative position reaches beyond statutory requirements to create unnecessary evidentiary restrictions on petitioners and employers. The commenter stated that while they recognize that the establishment of non-speculative employment does not necessarily require the demonstration of non-speculative work assignments, most adjudicators are unable to make the necessary distinction between speculative employment and speculative work assignments, particularly in cases involving third-party placements. A commenter added that the impact of the non-speculative work requirement would have negative policy consequences for American businesses, inconsistent with the Administration’s stated goals of fueling innovation in technology industries and maintaining a globally premier workforce. A trade association voiced concern that the non-speculative work requirement was extremely broad and could cause unintended negative consequences for H–1B workers.

Response: DHS disagrees with the commenter that new 8 CFR 214.2(h)(4)(iii)(F) allows for only a “narrow range of evidence” to establish that a petitioner has non-speculative employment available. In fact, new 8 CFR 214.2(h)(4)(iii)(F) does not impose any limitations on the evidence a petitioner may provide; it simply codifies the requirement, consistent with current USCIS policy, that the petitioner must establish that it has a bona fide position available as of the start date of the validity period requested on the petition. As noted in other comment responses, DHS is replacing “non-speculative” with “bona fide” to add clarity to this provision. DHS also disagrees that USCIS adjudicators will be unable to distinguish between speculative employment and speculative work assignments, as DHS stated clearly in the NPRM that petitioners will not be required to establish non-speculative and specific assignments for every day of the intended period of employment. 88 FR 72870, 72902 (Oct. 23, 2023). Rather, a petitioner must demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date. Further, as noted above, in response to stakeholder feedback, DHS is clarifying this in the regulatory text by adding, “A petitioner is not required to establish specific day-to-day

¹²⁹ *Serenity Info Tech. v. Cuccinelli* 461 F.Supp.3d 1271.

¹³⁰ USCIS, “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status,” PM–602–0151 (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>.

assignments for the entire time requested in the petition.” DHS also disagrees that the provision is “extremely broad” such that it may have unintended negative consequences for workers. While the commenters’ concern is not entirely clear, DHS recognizes that employment may be bona fide even though the beneficiary does not begin working on the requested start date. However, if DHS determines that there was a lack of a bona fide position in a specialty occupation as of the requested start date at the time of filing, or that the petitioner did not have a bona fide job offer for the beneficiary, then the petition may be denied or revoked on that basis. Finally, DHS disagrees that codifying the requirement of a bona fide position will harm American businesses. To the contrary, speculative employment undermines the integrity and a key goal of the H-1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers.

Comment: A commenter and a law firm voiced concern that DHS does not explain whether, or to what extent, it is changing positions with respect to its historical guidance on how to demonstrate bona fide employment or consider relevant reliance interests. The commenters stated that the new proposed rule is arbitrary and capricious for its failure to acknowledge and explain the departure. A few commenters said the proposed rule fails to consider or analyze any reliance interests—including those held by consulting firms whose business models have long depended in part on sourcing high-skilled foreign labor for American businesses and businesses that have relied on the H-1B program to help alleviate shortages in high-skilled domestic labor in the IT space.

Response: As stated above, the requirement of bona fide employment codified at new 8 CFR 214.2(h)(4)(iii)(F) derives from the statutory definition of an H-1B nonimmigrant worker as someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation . . .” INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). This is not a “departure,” or a new requirement but rather a codification of a longstanding requirement.¹³¹ A bona fide position in

a specialty occupation exists when the petitioner demonstrates the substantive nature of the specific position, such that a specialty occupation determination can be made, and when the petitioner demonstrates that the specified position in a specialty occupation exists within the context of its business. In response to comments and stakeholder feedback, DHS is replacing “non-speculative” with “bona fide” to add clarity to this provision. Again, DHS reiterates that this provision simply requires a petitioner to demonstrate, at the time of filing, availability of a bona fide position in a specialty occupation as of the requested start date. This is different from requiring petitioners to demonstrate specific, day-to-day work assignments for the beneficiary for the duration of the requested validity period, as may have been common practice prior to the July 2020 rescission of the 2018 Contracts and Itineraries memorandum.

DHS acknowledges that, since the issuance of the July 2020 USCIS Policy Memorandum PM-602-0114, “Rescission of Policy Memoranda”, it has not always been the practice of USCIS to require petitioners to submit documentary evidence to establish that there is a position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. As noted above, DHS is replacing “non-speculative” with “bona fide” for added clarity in the provision. The bona fide position requirement derives from the statutory definition of an H-1B worker and is generally consistent with current USCIS policy guidance that an H-1B petitioner “has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.” Specifically with respect to statutory requirements, as stated above, the requirement of a bona fide position derives from the statutory definition of an H-1B nonimmigrant worker as someone who is “coming temporarily to the United States to perform services . . . in a specialty occupation . . .” INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 88 FR 72870, 72901 (Oct. 23, 2023). Prior to the July 2020 policy memorandum, DHS (and

“The petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.”). See also “Petitioning Requirements for the H Nonimmigrant Classification,” 63 FR 30419, 30419–30420 (June 4, 1998) (proposed rule explaining that, historically, USCIS (or the Service, as it was called at the time) has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment).

previously INS) long held and communicated the view that speculative employment is not permitted in the H-1B program. Thus, DHS does not agree that codification of the bona fide position requirement at 8 CFR 214.2(h)(4)(iii)(F) impairs any reasonable reliance interests. To the extent that petitioners had any such reliance interests in the continuation of the recent practice to not require evidence of a bona fide position in a specialty occupation, DHS believes that these interests are outweighed by DHS’s interest in maintaining the integrity of the H-1B program and in achieving a key goal of the H-1B program, which is to help U.S. employers obtain the skilled workers they need to conduct their business, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers.

Comment: A company and a trade association stated that once in the country and available for work, consulting company employers may find it economically advantageous to swap out employees assigned to a given project, which the commenter said is allowed by statute and DOL regulations, but added that a non-speculative project requirement would prohibit companies from changing projects, which would impede smart financial decisions and ignore petitioning consulting companies’ long-term need for particular skill sets—focusing exclusively on the end client’s requirements for a short-term project.

Response: The statute explicitly requires that H-1B classification be approved only for positions that are specialty occupations. Although companies may find it economically advantageous to move employees around, if those employees are in H-1B status, the company must continue to comply with the relevant statutory and regulatory requirements. These requirements include demonstrating that the petitioner is offering bona fide employment in a specialty occupation position and that the beneficiary is qualified for the offered position. DHS did not propose to require non-speculative projects for the entire validity period requested. Rather as noted in the proposed rule, the petitioner must demonstrate that, at the time of filing, it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In response to stakeholder feedback, DHS is replacing “non-speculative” with “bona fide” in this provision to add clarity. This new regulation will require the petitioner to

¹³¹ USCIS, “Rescission of Policy Memoranda” PM-602-0114 (Jun. 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf (stating

specify the duties the beneficiary will be performing as of the start date of the petition, although it will not require the petitioner to identify every prospective project at the time of filing. However, if the beneficiary will be placed on projects with different minimum requirements, or with a different third party, then the new project and the new third party's requirements may impact the specialty occupation determination. The petitioner is free to place the beneficiary at a new project or new third-party site, as long as the petitioner complies with DOL and DHS requirements to file new or amended LCAs and petitions.

iii. LCA Properly Corresponds With the Petition

Comment: A company voiced general support for DHS's proposal to codify its authority to ensure the LCA supports and properly corresponds with the accompanying H-1B petition and recognized that DHS should consider the position offered and its relationship to the occupation listed in the LCA. A professional association stated that DHS should verify the accuracy of H-1B LCA information. A professional association agreed that DHS both has the authority and the obligation to ensure that any DOL-approved LCA actually supports the H-1B petition, and added that it therefore wholly supports the NPRM's addition of the proposed text. The commenter stated that for the labor certification process to serve its intended function of protecting U.S. workers, DHS must impose consequences on employers that violate it. The commenter said that particularly with respect companies that use collective bargaining agreement (CBA) wage rate, USCIS can and should be empowered to ensure that the resulting certifications truly support the petition and hold employers accountable for any false statements or misrepresentations in LCAs.

Response: DHS agrees with these commenters that it is appropriate for DHS to ensure that the LCA supports and properly corresponds with the accompanying H-1B petition and is finalizing the text proposed in the NPRM through this rulemaking. DHS acknowledges the commenter's concern about CBA wage rates and agrees that petitioners must attest to the truthfulness and accuracy of the information provided on LCAs, including the use of an appropriate wage source. If the facts presented in the H-1B petition or the information on the LCA was inaccurate, fraudulent, or includes a misrepresentation of a material fact, the petition may be denied

or, if approved, the petition approval may be revoked. *See* 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(2).

Comment: Several commenters stated that the proposed provision establishing DHS's authority and obligation to determine whether a certified LCA supports and properly corresponds with the H-1B petition, separate and apart from the DOL's power to certify the LCA, would distort the DOL regulations, and insert a substantive component over LCAs that exceeds DHS's authority. The trade associations said that USCIS lacks the expertise to evaluate the LCA and that although the preamble states that USCIS would not supplant DOL's responsibility with respect to wage determinations, USCIS could exceed its authority by reassessing DOL's determinations in the LCA. The joint submission added that the proposed regulation appears to require—or at least encourage—USCIS adjudicators to go much further than simply carrying out their authorities under existing DOL regulations by performing detailed analyses of each element of an LCA and potentially reject LCAs altogether if the adjudicator does not agree with one of the many elements of the underlying LCA. A few commenters said that the LCA requirement, as framed in the INA and implemented by DOL, is intended only to protect U.S. and foreign workers, offering grounds for recourse in case, for example, the petitioner pays the beneficiary below the prevailing wage. The commenters added that Congress did not create the LCA requirement to offer substantive proof of a bona fide position in a specialty occupation, and that such a proposal exceeds DHS's statutory mandate. Similarly, a trade association said that the INA does not authorize DHS to take any action with respect to the LCA other than confirming it “corresponds” to the petition, and that DOL has the responsibility to verify the LCA under DOL regulations. The commenter added that an LCA does not contain sufficient information to assist an adjudicator's determination of a specialty occupation, such as the job duties and educational requirements, that DOL's traditional and separate role reviewing and enforcing LCAs is already effective, and that an expansion of DHS authority to perform similar activities is unwarranted. Several commenters requested that DHS reissue the proposal or insert a statement in the final rule clarifying that USCIS can do no more regarding the LCA than simply confirm that it corresponds to the position described in the H-1B petition, and cannot undermine DOL's determination or in

any way re-adjudicate the LCA. A few commenters requested that USCIS more clearly state in the rule that the wage level in the certified LCA is not solely determinative of whether the position is a specialty occupation and that USCIS would not supplant DOL's responsibility with respect to wage determinations. One commenter said that practitioners have noted USCIS nitpicking SOC codes to deny petitions, noting that it is DOL, not USCIS, which determines questions of wage level and other matters under 20 CFR 655.705(a).

A joint submission stated that DOL solely possesses the jurisdiction to verify wage levels and representations listed in an LCA, and that there is no legitimate purpose for USCIS to investigate or otherwise examine such information if USCIS does not intend to investigate an employer's LCA practices. The commenters said that to determine whether an LCA “corresponds” with an H-1B petition, USCIS need only verify that the certified LCA and the petition at issue do not materially conflict, but added that with the proposed examination of the “wage level (or an independent authoritative source equivalent),” USCIS appears to go further than mere comparison and venture into investigations in the domain of DOL. The commenter wrote that the required wage is evident on the face of the LCA and reveals whether the certified LCA comports with the offered salary, but that the prevailing wage level itself is part of the prevailing wage determination process, which is exclusively within DOL authority. The commenter added that the prevailing wage determination is “in no way” indicative of the duties the beneficiary would perform, and an Occupational Employment and Wage Statistics (OEWS) Level 1 wage determination is wholly consistent with the definition of a specialty occupation. The commenter stated that because of this, inquiring into the wage level itself is to examine whether and how the employer properly applied DOL regulations and guidance, and it is precisely this authority that INA sec. 101(a)(H) invests in DOL.

A few commenters said that review of an LCA is limited by design, with DOL certifying an LCA so long as it is complete and not obviously inaccurate and enforcing the agreement's terms through a post-hoc complaint process. The commenters stated that, in that way, DOL recognized “that Congress . . . intended to provide greater protection than under prior law for U.S. and foreign workers without interfering with an employer's ability to obtain the H-1B workers it needs on a timely basis.” The commenters noted that DOL

regulations recognized that other agencies have discrete obligations vis-à-vis an LCA, among them being “DHS accepts the employer’s petition (DHS Form I–129) with the DOL-certified LCA attached. DHS determines whether the petition is supported by an LCA which corresponds with the petition.” The commenters added that DOL regulations further reiterate DHS’s general authority to determine whether the occupation listed, and the nonimmigrant’s qualifications satisfy the statutory requirements for an H–1B visa. The commenters stated that, under a plain reading of the regulation, and consistent with the INA’s delegation of LCA authority to DOL, DHS’s role is limited to ensuring the petition (1) is predicated on—or “is supported by”—a certified LCA; and (2) the LCA “corresponds with” the petition. However, the commenters said that the proposal adds a substantive component to DHS’s review of a DOL-certified LCA that is absent from the DOL regulation and is contrary to the INA. The commenters said that this provision represents an unexplained and unacknowledged change in policy guidance following the rescission of the 2018 Contracts and Itineraries memo and renders the provision arbitrary and capricious.

Response: DHS disagrees that ensuring that the LCA supports and properly corresponds to the accompanying H–1B petition exceeds its authority. As explained in the NPRM, DHS already has the authority under INA sections 101(a)(15)(H)(i)(b), 103(a), and 214(a)(1) and (c)(1), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1103(a), and 1184(a)(1) and (c)(1), to determine whether the LCA supports and properly corresponds with the H–1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). As further stated in the NPRM, these changes do not supplant DOL’s responsibility with respect to wage determinations. 88 FR 72870, 72903 (Oct. 23, 2023). The authority provided to DOL under INA section 212(n), 8 U.S.C. 1182(n), does not deprive DHS of authority to administer and enforce the H–1B nonimmigrant classification. Congress provided DHS with broad authority to administer and enforce the H–1B nonimmigrant classification, in addition to the authority provided to DOL to administer and enforce requirements pertaining to LCAs. See *ITServe Alliance, Inc. v. U.S. Dep’t of Homeland Sec.*, 71 F.4th 1028, 1037 (D.C. Cir. 2023) (the authorities provided to DOL under 8 U.S.C. 1182(n) “are not by their terms exclusive, so as to oust USCIS from its own authority over the H–1B petition process. And the

INA strongly suggests that the agencies’ respective authorities are complementary rather than exclusive. . . .”). As the D.C. Circuit Court of Appeals explained, INA section 103(a)(1), 8 U.S.C. 1103(a)(1), independently provides DHS with authority to administer and enforce the INA, including a petitioning employer’s compliance with the terms of an LCA. *Id.*

USCIS’ review pertains to evaluating whether the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment, sufficiently align with the information about the offered position as described in the petition. When conducting this review, USCIS officers consult DOL’s published guidance and other publicly available sources referenced in DOL’s prevailing wage determination policy guidance¹³² to determine what occupation and corresponding prevailing wage DOL certified so that USCIS can determine whether the information on the LCA is consistent with the information in the petition; however, USCIS officers would not question whether DOL properly certified the LCA.

DHS disagrees with the assertion that the rule encourages USCIS adjudicators to perform a detailed analysis of each element of an LCA or investigate an employer’s LCA practices. USCIS does not view the LCA or wage level as determinative of whether the position is a specialty occupation. Further, ensuring the LCA corresponds to the petition by comparing the information contained in the LCA against the information contained in the petition and supporting evidence is consistent with current practice. DHS also disagrees with the assertion that it is trying to impose additional requirements from the 2018 Contracts and Itineraries Memo, which was rescinded in 2020. As explained in USCIS’ June 2020 policy memorandum “Rescission of Policy Memoranda,” the petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.¹³³ If the petitioner’s

attestations and supporting documentation meet this standard, then the officer will not request additional evidence, provided all other eligibility requirements are met by a preponderance of the evidence. If the officer finds that a petitioner has not established, by a preponderance of the evidence, statutory or regulatory eligibility for the classification as of the time of filing, the officer will articulate that basis in denying the H–1B petition.

Comment: A professional association stated that USCIS’ objective with the proposed amendment to the regulation regarding LCAs is unclear, given that it “restates DOL regulations and DOL jurisdictional considerations.” A healthcare provider requested that DHS provide additional clarity around the term “properly support” in the LCA provision, so that organizations can provide documentation that would be deemed acceptable. A joint submission said that the final rule should mirror existing DOL regulations in stating that USCIS would determine “whether the petition is supported by an LCA which corresponds with the petition, [and] whether the occupation named in the [LCA] is a specialty occupation” and remove ambiguous and potentially expansive language like “properly corresponds” that appear to broaden USCIS’ scope of inquiry regarding LCAs. They further stated that the proposed rule contains no instructions for how an adjudicator should determine whether an LCA “properly corresponds” with the petition. An attorney writing as part of a form letter campaign said that it is not clear what USCIS means in its statement that it would not supplant DOL’s responsibility with respect to wage determinations, inquiring if USCIS would now assert that a position should be wage level 2 or wage level 3 when the petitioner has followed DOL guidance in determining a wage level 1 position, or if USCIS would now assert the SOC code is not correct on the LCA after the petitioner has reviewed the SOC codes and selected the one which they feel is best aligned with the position.

Response: As explained in the NPRM, when determining whether the submitted certified LCA properly corresponds with the petition, USCIS will consider all information on the LCA, including, but not limited to, the SOC code, wage level (or an independent authoritative source equivalent), and location(s) of employment. 88 FR 72870, 72903 (Oct. 23, 2023). USCIS will evaluate whether that information sufficiently aligns with the offered position, as described in the rest of the petition and supporting

¹³² See “Prevailing Wage Determination Policy Guidance,” Employment and Training Administration, Dept. of Labor (Nov. 2009), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

¹³³ See USCIS, “Rescission of Policy Memoranda,” PM–602–0114 (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

documentation. This is consistent with current practice and not intended to replace DOL's role or responsibility with respect to wage determinations. As explained in the previous response and in USCIS' June 2020 policy memorandum "Rescission of Policy Memoranda," the petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.¹³⁴ If the petitioner's attestations and supporting documentation meet this standard, then the officer will not request additional evidence, provided all other eligibility requirements are met by a preponderance of the evidence.

Material inconsistencies between the information certified on the LCA and contained in the petition and/or other supporting documentation may raise questions as to whether the petitioner has submitted all required evidence under the regulations or established eligibility by a preponderance of the evidence. For example, if the petition and other supporting documentation indicates that the beneficiary's position and associated job duties requires a wage level 2 or wage level 3 per DOL guidance, but the LCA is certified for a wage level 1 position, that may call into question whether the petition is supported by an LCA that properly corresponds to the petition or whether the offered position was accurately described in the petition. Similarly, USCIS may find a material discrepancy in cases where the SOC code on the LCA is inconsistent with the job duties as described in the H-1B petition. However, this is not the same as supplanting DOL's responsibilities because DOL does not review the information contained in the H-1B petition and supporting documentation. USCIS' review is limited to whether the information on the LCA sufficiently aligns with the offered position as described in the H-1B petition and supporting evidence, and does not in any way determine whether DOL properly certified the LCA.¹³⁵

Comment: A few commenters said the proposed rule indicates that DHS believes the LCA duplicates the preexisting itinerary requirement in its

explanation of its decision to eliminate said requirement. They said that the proposed rule's listing of the LCA provision as one designed "to ensure [a] bona fide job offer for a specialty occupation" reinforces that, consistent with DHS's position in the 2018 Policy Memo, the Department currently views the LCA as substantive proof of whether a petition identifies an H-1B qualifying position—akin to the former itinerary requirement. The commenters added that, in context, the LCA-review provision is a "backdoor" for USCIS adjudicators to reimpose a functionally identical itinerary requirement that was declared unlawful in *ITServe Alliance, Inc.* The commenters further stated that the provision suggests or does not foreclose that adjudicators may treat LCA review just like the itinerary requirement the rule eliminates, which the commenter said would be arbitrary and capricious and contrary to the INA. The commenters requested clarity on the meaning of "properly support" stating that nothing in the rule precludes USCIS from finding that an LCA does not "properly support" a petition if it fails to identify every third-party client to whom an H-1B worker might provide services throughout their tenure, risking compounding the non-speculative employment provision's "error."

Response: DHS does not agree that new 8 CFR 214.2(h)(4)(i)(B)(1)(ii) "duplicates" the itinerary requirement that is being removed in this final rule, or that new 8 CFR 214.2(h)(4)(i)(B)(1)(ii) is a "backdoor" to reimpose an itinerary requirement. As stated in the NPRM and above, new 8 CFR 214.2(h)(4)(i)(B)(1)(ii) codifies DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H-1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). As further explained in the NPRM, in determining whether the submitted certified LCA properly corresponds with the petition, consistent with current practice, USCIS will consider all the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment. 88 FR 72870, 72903 (Oct. 23, 2023). USCIS will evaluate whether that information sufficiently aligns with the offered position, as described in the entire record of proceeding.¹³⁶ This is different from the itinerary requirement, which is being removed in this final rule, and which previously required "an itinerary with the dates and locations of

the services or training." New 8 CFR 214.2(h)(4)(i)(B)(1)(ii) imposes no such requirements. Rather, this provision codifies USCIS' authority to compare the information contained in the LCA against the information contained in the petition and supporting evidence, and to deny or revoke the petition if the LCA does not properly correspond to the petition.

DHS also does not agree that this provision will require petitioners to identify every third-party client to whom a beneficiary might provide services throughout their "tenure." As explained in the NPRM and throughout this final rule, petitioners will not be required to demonstrate non-speculative or specific daily work assignments through the duration of the requested validity period. See new 8 CFR 214.2(h)(4)(iii)(F). 88 FR 72870, 72902 (Oct. 23, 2023). Similarly, petitioners will not be required to identify every third-party client to whom a beneficiary might provide services throughout the requested validity period. DOL regulations require employers to list all intended places of employment on the LCA, 20 CFR 655.730(c)(5); and DOL has further specified that a worksite should be listed as an intended place of employment "if the employer knows at the time of filing the LCA that it will place workers at the worksite, or should reasonably expect that it will place workers at the worksite based on: (1) an existing contract with a secondary employer or client, (2) past business experience, or (3) future business plans."¹³⁷ Thus, neither DOL nor DHS regulations require a petitioner to list every third-party client to whom a beneficiary might provide services throughout the requested H-1B validity period. However, there may be instances where the places of employment listed on the LCA may be relevant to determining whether the LCA properly corresponds with the petition. For example, if the petition indicates that the beneficiary will be placed at a third-party worksite in Chicago, IL, but the LCA only contains work locations in Los Angeles, CA, USCIS may issue an RFE to provide the petitioner an opportunity to explain the discrepancy and to ensure that the LCA properly corresponds to the petition and covers all work locations for the beneficiary. Further, DHS notes that a petitioner can make changes to the beneficiary's place of employment or place the beneficiary

¹³⁴ See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

¹³⁵ In reviewing the LCA, USCIS uses published DOL guidance and other publicly available sources referenced in DOL's prevailing wage determination policy guidance. See "Prevailing Wage Determination Policy Guidance," Employment and Training Administration, Dept. of Labor (Nov. 2009), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

¹³⁶ 88 FR 72870, 72902–72903 (Oct. 23, 2023).

¹³⁷ Labor Condition Application for H-1B, H-1B1 and E-3 Nonimmigrant Workers Form ETA-9035CP—General Instructions for the 9035 and 9035E, https://flag.dol.gov/sites/default/files/2019-09/ETA_Form_9035CP.pdf.

at new third-party site during the approval period, as long as the petitioner complies with DOL and DHS requirements, which may include filing new or amended LCAs and petitions as applicable.

Comment: A couple of trade associations stated that the provision to codify USCIS' ability to examine LCAs as evidence of a bona fide job offer would undermine USCIS' goal of reducing backlogs and improving efficiencies by requiring adjudicators to consider a new standard that is outside their expertise and legal purview, slowing down adjudications and resulting in more RFEs. Another trade association recommended that due to the "unnecessary" additional burden of paperwork, cost, and time on both the petitioner and USCIS, "with little to no benefit for the additional requirement as the agency looks to streamline and not further complicate the H-1B program," DHS should eliminate the proposal for USCIS to review LCAs as proof of a bona fide job offer.

Response: As discussed in the NPRM, this provision codifies DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H-1B petition. 88 FR 72870, 72902 (Oct. 23, 2023). This is consistent with current practice and not expected to create additional burdens on petitioners or USCIS adjudicators.

Comment: A professional association stated that given the complexity of the H-1B petition, the LCA provision should specify that denial or revocation of a petition due to USCIS' inability to verify facts would be limited to its inability to verify material facts rather than simply relevant facts. The commenter added that such a standard would provide necessary limits to the scope of USCIS authority and would be a wiser use of resources. An attorney stated that in the event that USCIS gives itself regulatory authority to review LCAs, USCIS should include in the final rule a requirement that USCIS, in any RFE or NOID, provide the LCA code and/or alternate wage that it believes applies to the position, and give the petitioner the opportunity to rebut the designation(s). An attorney writing as part of a form letter campaign stated that the technical changes such as replacing "shall" with "must," "application" with "certified labor condition application," and "the Service" with "USCIS," for additional clarity should not be made because the petitioner already takes the time to review DOL SOC codes and wage levels.

Response: DHS declines to make any additional changes to the LCA provision to limit USCIS' authority. As explained

in the NPRM, while the LCA, H-1B petition, and supporting documentation must be for the same position, the same position does not necessarily mean that all information describing the position must be identical. 88 FR 72870, 72903 (Oct. 23, 2023). A petitioner may supplement or clarify the record with additional information about the offered position in response to an RFE, on motion, or on appeal, and so long as the supplemental information does not materially change the position described in the H-1B petition, DHS would consider the position to be the same. Further, the technical changes are being made to add clarity to these provisions, not impose a new requirement on petitioners.

iv. Revising the Definition of U.S. Employer

Comment: A company voiced support for DHS's proposal to amend its definition of U.S. employer to align with current adjudicatory practices and court rulings. A professional association voiced appreciation for synchronizing and modernizing the definition of "employer" between USCIS and DOL for clarity, consistency, and entrepreneurship. The commenter stated that the current definition of "employer" as well as the requirement to perform only specialty occupation work, created significant hurdles for physicians who wished to start a medical practice or incorporate as a solo practitioner for locum tenens work, such as filling critical shortages or vacancies to ensure uninterrupted care to patients throughout the country. The commenter added that the changes would directly support the ability of foreign physicians to become entrepreneurs, particularly those who desire to supplement the locum tenens workforce. A legal services provider added that on top of safeguarding integrity and compliance with the H-1B program, the changes to the definition would encourage entrepreneurship and not stifle business or personal growth, and would allow beneficiary-owners to take on further duties apart from the core specialty occupation requirement that relate to owning a business.

Response: DHS agrees that the revised definition of U.S. employer better aligns the definition with current practice. As explained in the NPRM, this proposed change, which is being finalized as proposed, largely reflects USCIS' current practices since June 2020, following a court order and settlement

agreement.¹³⁸ 88 FR 72870, 72903 (Oct. 23, 2023).

v. Employer-Employee Relationship

Comment: Several commenters supported DHS's proposal to remove the reference to "an employer-employee relationship" from the definition of U.S. employer, which had previously been a reason for petition denial. A law firm said that harmonization of DOL's and USCIS' definition of the "employer-employee relationship" is welcome. A joint submission agreed with USCIS that past policies regarding the establishment of employer-employee relationships have led to significant administrative barriers and limited access to key H-1B talent.

Response: DHS appreciates the feedback. As explained in the NPRM, removing the employer-employee relationship language from the regulations promotes clarity and transparency in the regulations and supports DHS's overall commitment to reducing administrative barriers. 88 FR 72870, 72903 (Oct. 23, 2023).

Comment: An individual commenter said that the elimination of the employer-employee relationship would make the program ripe for abuse as anyone could declare themselves an employer and obtain an H-1B visa. A joint submission noted that DHS confirms that "[i]t is in DHS's interests to promote, to the extent possible, a more consistent framework among DHS and DOL regulations for H-1B, E-3, and H-1B1 petitions and to increase clarity for stakeholders," and acknowledges that USCIS past policy was inconsistent with DOL's regulatory definition of an employer, which resulted in USCIS deciding a petitioner was not an H-1B employer when DOL determined the petitioner was an employer and certified the LCA, which the commenters said increased the potential for confusion among H-1B stakeholders. The commenters said that the NPRM purports to significantly redefine DHS's definition of "employer" to exceed and conflict with DOL's regulatory definition, which would increase confusion and lead to contradictory results. The commenters stated that "by focusing on contracts with third parties to determine whether a role is or is not a specialty occupation, USCIS is inherently shifting the focus of the

¹³⁸ See *ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 19 (D.D.C. 2020) (finding that the USCIS policy interpreting the existing regulation to require a common-law employer-employee relationship violated the Administrative Procedure Act as applied and that the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) is ultra vires as it pertains to H-1B petitions).

employer-employee relationship to the contractual relationship that exists between a company and its customers.” The commenters recommended that DHS “remove the emphasis on contractual relationships as a general matter and, in particular, any reference that relates to the definition of an employer-employee relationship.”

Response: DHS disagrees that removing the reference to an employer-employee relationship from the H-1B regulations will make the program ripe for abuse. As explained in the NPRM, this change is largely consistent with current USCIS policy guidance that the petitioner needs only to establish that it meets at least one of the “hire, pay, fire, supervise, or otherwise control the work of” factors with respect to the beneficiary to meet the employer-employee relationship test. 88 FR 72870, 72904 (Oct. 23, 2023). However, since H-1B petitioners will continue to be required to submit an LCA attesting that they will pay the beneficiary, and a copy of any written contract (or summary of terms of the oral agreement) between the petitioner and the beneficiary, which typically affirms that they will hire and pay the beneficiary, the current employer-employee relationship test is usually met as a matter of complying with the other H-1B eligibility requirements. As an additional integrity measure, DHS is codifying within the definition of “United States employer” the existing requirement that the petitioner have a bona fide job offer for the beneficiary to work within the United States as well as a new requirement to have a legal presence in the United States and be amenable to service of process in the United States.

Further, DHS disagrees that removing the employer-employee relationship requirement from the definition of “United States employer” exceeds and conflicts with DOL’s regulatory definition of “employer” at 20 CFR 655.715¹³⁹ and will increase confusion. Rather, the revised definition creates a more consistent framework among DHS and DOL regulations for H-1B, E-3, and H-1B1 petitions and increases clarity

for stakeholders. As explained in the NPRM, USCIS’ previous 2010 policy guidance sometimes caused USCIS to conclude that a petitioner was not an employer for purposes of the H-1B petition even though DOL deemed that same petitioner to be an employer for purposes of the LCA. 88 FR 72870, 72904 (Oct. 23, 2023). DHS also notes that it is not shifting the focus from the employer-employee relationship to the contractual relationship that exists between a company and its customers. As explained above, codifying DHS’s authority to request contracts between the petitioner and a third party is a different provision and not intended to replace the employer-employee relationship requirement. Specifically, contracts and other similar evidence may be requested to show the non-speculative nature of the beneficiary’s position and the minimum educational requirements to perform the duties, which go to the issue of whether the offered position qualifies as a specialty occupation and whether the job offer is bona fide, not whether the petitioner otherwise qualifies as a United States employer under the previous employer-employee relationship regulatory text.¹⁴⁰

vi. Bona Fide Job Offer

Comment: An attorney writing as part of a form letter campaign voiced support for DHS’s codification in the definition of a U.S. employer of the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States. Several commenters voiced support for the clarification that a bona fide U.S. job offer includes “telework, remote work, or other off-site work within the United States” which would bring DHS’s definition of bona fide job offer in line with current U.S. employment practices. The university stated that it is important to note that many employees who work remotely may also have more flexible work schedules, such that their working hours deviate from common business hours.

Response: DHS agrees with commenters that it is important to note that a bona fide U.S. job offer includes

“telework, remote work, or other off-site work within the United States,” which may include more flexible work schedules.

Comment: An advocacy group stated that while it supports the recognition of the flexible nature of work via the proposed rule’s support for telework and remote work, DHS should ensure that the regulation does not eliminate the need for H-1B beneficiaries to complete some portion of their work in person within the United States. The commenter added that DOL’s labor certification process already establishes criteria for third-party or offsite H-1B work locations, so the proposed language could be rewritten to state that an eligible U.S. employer must have “a bona fide job offer for the beneficiary to work within the United States. The job offer may include, but should not be limited to, telework or remote work within the United States during the requested petition validity period.” A law firm stated that a definition of what constitutes “bona fide” is required. A university stated that while employees may have different types of work arrangements, the NPRM does not sufficiently address some of the complexities and challenges that may result from those arrangements. A trade association said that a bona fide job offer is a concept that is “completely absent” from DHS’s current regulation or statutorily delegated powers, which the commenter said raises the question of how this “existing requirement” sprang to life and became in the DHS’s view a binding and enforceable standard.

Response: DHS agrees with the commenters that the bona fide job offer must be in the United States. The regulatory text at 8 CFR 214.2(h)(4)(ii) clearly states that the U.S. employer in the United States has a bona fide job offer for the beneficiary to work “within the United States,” which may include telework, remote work, or other off-site work “within the United States.” By repeating “within the United States” several times throughout the provision, DHS believes it is sufficiently clear that the job opportunity must be in the United States and the work must be performed in the United States. DHS also declines to further define the term “bona fide” in the regulatory text, which is used throughout numerous immigration provisions and follows the standard definition and Latin translation of “in good faith.”¹⁴¹ Additionally, DHS does not think it is

¹³⁹ Although the commenter referenced 20 CFR 755.715, DHS assumes the intended citation is to 20 CFR 655.715 which defines “employer” as “a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including E-3 and H-1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.”

¹⁴⁰ This provision does not preclude USCIS from requesting contracts for other reasons, such as to establish eligibility of agents as petitioners, and maintenance of status. See 8 CFR 214.2(h)(2)(i)(F) (“An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.”); new 8 CFR 214.1(c)(6) (“Evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W-2 forms, quarterly wage reports, tax returns, contracts, and work orders.”).

¹⁴¹ Miriam Webster Dictionary, “Bona fide,” <https://www.merriam-webster.com/dictionary/bona%20fide>.

necessary to address various complexities and challenges that may result from different types of work arrangements. Each case will be adjudicated on its merits, and it is not possible to cover all possible types of work arrangements in this rulemaking. Regarding the assertion that a bona fide job offer is absent from DHS's regulations or statutorily delegated powers, this basic requirement derives from the statutory and regulatory requirements that the petitioner be an "importing employer" and a "United States employer" that will employ the beneficiary in a "specialty occupation." See INA sec. 214(c)(1), (i)(1); 8 CFR 214.2(h)(4)(i)(A)(1); 8 CFR 214.2(h)(4)(ii). It is also reflected in current USCIS policy guidance, which states that the petitioner must establish that "[a] bona fide job offer . . . exist[s] at the time of filing,"¹⁴² as explained in the NPRM. 88 FR 72870, 72904 (Oct. 23, 2023). This requirement, which is being codified in DHS regulations in this final rule, is also consistent with DHS's general authority under section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority. It is also consistent with section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the time and conditions of nonimmigrant admission and section 214(c) of the INA, 8 U.S.C. 1184(c), which, inter alia, authorizes the Secretary to prescribe how an importing employer may petition for nonimmigrant workers, including H-1B nonimmigrants, and the information that an importing employer must provide in the petition.

vii. Legal Presence and Amenable to Service of Process

Comment: A law firm said that the legal presence and amenable to service of process provision is "not controversial." A joint submission also

voiced support for the provision, adding that it would provide clear guidance to all employers, especially new and emerging companies, with respect to the minimum legal threshold for establishing their status as bona fide U.S. employers.

An attorney writing as part of a form letter campaign said that DHS's proposal to replace the requirement that the petitioner "[e]ngages a person to work within the United States" with the requirement that the petitioner have a legal presence and be amenable to service of process in the United States is unclear. The commenters said that while DHS is not proposing to change the requirement of an employment identification number (EIN), it is making the definition vague, voicing confusion about the term "have a legal presence." The commenters inquired whether DHS intended to allow non-U.S. employers to petition if they have a P.O. box and an EIN, or whether DHS considered how DOL would interpret this legal presence regarding the use of a P.O. box when it comes to the labor certification process where there is a physical address requirement. The commenters stated that "[i]t does not make sense to change from the current definition of 'United States employer as a person, firm, corporation, contractor, or other association, or organization in the United States.'" Additionally, an individual commenter requested that a U.S. employer should have an office and staff in the registered location, including if it is remote and hybrid within the United States and not elsewhere like offshore or outside of the United States. The commenter added that the U.S. employer should process all information in the United States and not through "group companies like for [i]nsurance," while payroll processing and benefits could be done by a vendor or third party.

Response: DHS agrees with the commenters who said that requiring the petitioner to have a legal presence in the United States and be amenable to service of process in the United States will provide clear guidance to employers with respect to the minimum legal threshold for establishing their status as eligible U.S. employers, and disagrees with the commenters who said this requirement is confusing. As explained in the NPRM, "legal presence" means that the petitioner is legally formed and authorized to conduct business in the United States, and "amenable to service of process" means that the petitioner may be sued in a court in the United States. 88 FR 72870, 72905 (Oct. 23, 2023).

To clarify, this is a new requirement at prong two of the definition of "United States employer." Overall, DHS is removing the previous requirement that the petitioner "[e]ngages a person to work within the United States" and the employer-employee relationship requirement, and is adding the requirements that (1) the petitioner have a bona fide job offer for the beneficiary to work within the United States, and (2) the petitioner has a legal presence and is amenable to service of process in the United States. DHS is still maintaining the part of the definition that a United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States.

Regarding the questions of whether, under the legal presence requirement, DHS intends to allow non-U.S. employers to petition as a U.S. employer if they have a P.O. box and an EIN or whether such employers must have a physical address/office in the United States, DHS believes that this is generally covered by the new requirement that the petitioner have a legal presence in the United States as well as the LCA requirements.¹⁴³ Ultimately, however, the answer may depend on the applicable state(s) laws where the petitioner is legally formed and authorized to conduct business in the United States. DHS declines to add additional regulatory requirements that were not proposed in the NPRM, such as requiring a physical office with staff or specifying where and by whom various business information must be processed.

12. Beneficiary-Owners

Comment: A couple of commenters expressed general support for provisions impacting entrepreneurs, noting that the proposed regulations would encourage entrepreneurs to start their own businesses and not stifle business or personal growth. One commenter said that this would be highly beneficial to the visa holder, the startup environment, and the United States; and, another commenter said this would support the entrepreneurial spirit of the United States and would help improve the economy by enabling entrepreneurs to file as H-1B petitioners. A professional association wrote that improved H-1B policies could allow

¹⁴² See USCIS, "Rescission of Policy Memoranda," PM-602-0114 (June 17, 2020); see also USCIS, Adjudicator's Field Manual (AFM) Chapter 31.3(g)(4) at 24, "H-1-B Classification and Documentary Requirements has been partially superseded as of June 17, 2020," available at <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm31-external.pdf> ("The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation."). While USCIS retired the AFM in May 2020, this example nevertheless illustrates the agency's historical interpretation.

¹⁴³ See "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act," 56 FR 61111, 61112 (Dec. 2, 1991) (explaining that the requirement to post a notice of the filing of a labor condition application at the petitioner's place of employment "obviously requires the petitioner to have a legal presence in the United States").

postdoctoral researchers to remain in the United States and “continue contributing to the U.S. innovation pipeline while cutting red tape.” Other commenters said that by giving H-1B holders the chance to pursue entrepreneurship opportunities, the proposed rule would create employment opportunities for others in the United States, move the H-1B program in a positive direction, and prevent talented individuals from leaving the United States for Canada, Australia, and their home countries. A commenter wrote that they know of people who have travelled back to their home countries to start their entrepreneurial journey because of current restrictions in the United States and that by removing entrepreneurship restrictions for such individuals, the U.S. economy would benefit from new successful companies.

An advocacy group expressed appreciation for USCIS’ exploration of policies to improve H-1B pathways for startup talent. Another commenter emphasized the prevalence of immigrants in the startup ecosystem while expressing concerns about declining U.S. innovation as the United States becomes a less attractive destination for qualified entrepreneurs compared to places like the UK, the European Union, and Canada.

An advocacy group wrote that the definition of an employer-employee relationship makes it difficult for entrepreneurs to qualify for H-1B status, which USCIS has recognized deters high-skilled foreign nationals from starting a company. While citing a report from the National Foundation for American Policy, the group emphasized that nearly two-thirds of U.S. billion-dollar companies were founded or co-founded by immigrants or the children of immigrants, representing what the U.S. economy loses when restricting foreign-born entrepreneurship.

Response: DHS appreciates the feedback from these commenters and acknowledges that there are limited pathways for entrepreneurs to come to the United States under existing regulations. The intent of the beneficiary-owner provisions is to promote access to the H-1B program for entrepreneurs, start-up entities, and other beneficiary-owned businesses while also setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity to better ensure program integrity.

Comment: Numerous commenters offered remarks in support of the measures enabling beneficiary-owners to access and participate in the H-1B program. One commenter said that the proposed H-1B eligibility requirements

“hold promise” for emerging entrepreneurs, while an advocacy group welcomed steps towards creating pathways for entrepreneurs to develop and grow businesses in the United States. An advocacy group supported the regulatory language acknowledging that beneficiary-owners are “legitimate and valid participants in the H-1B program,” and a research organization said the proposal is an improvement upon existing rules. A few commenters generally endorsed the relaxation of “unreasonable and unnecessary requirements for founders, while other commenters stated the general need to allow H-1B holders to start a business.

Numerous commenters endorsed the provision on the basis that promoting access to H-1B visas for entrepreneurs and start-up owners would foster innovation, job creation, and economic growth in the United States. A trade association supported additional pathways for entrepreneurs and founders, reasoning that their companies represent an essential part of the U.S. economy. Similarly, a joint submission described the role of beneficiary-owners in the start-up economy and ongoing barriers to innovators in the U.S. immigration system. The commenters supported the rule’s provisions allowing founders to launch and grow companies and slow the drain of start-up talent to other countries. A form letter campaign wrote that, in addition to job creation and innovation, the proposed provisions facilitating H-1B access for start-up founders would drive industry diversity and global competitiveness. A law firm added that codifying a petitioner’s ability to qualify as a U.S. employer, even when the beneficiary owns a controlling interest in the petitioner’s business, would address historical barriers for beneficiary-owned businesses in the H-1B program. The commenter wrote that the changes would encourage more innovators to utilize the program, leading to increased innovation, job creation, and new opportunities. While citing a report from the New American Economy, an advocacy group wrote that immigrant entrepreneurship is a “major economic and jobs multiplier” that keeps talent in the United States while creating employment opportunities for U.S.-born workers. The group concurred with DHS’s statement in the NPRM that if more entrepreneurs can obtain H-1B status, the United States would benefit from the creation of jobs, new industries, and opportunities. Another commenter added that entrepreneurs bring a wealth of knowledge that

contributes to the growth of various sectors, including health, technology, and finance. The commenter said that attracting global talent would encourage the creation of cutting-edge solutions, products, and services to enhance U.S. competitiveness while aligning with the principles of a dynamic and inclusive economy.

An advocacy group welcomed DHS’s efforts to acknowledge the contributions of immigrant founders in the start-up and innovation ecosystem. The advocacy group said that easing barriers for founders to come to the United States is a “net positive,” as the majority of billion-dollar start-ups have at least one immigrant founder. These companies, the advocacy group said, create U.S.-based jobs while strengthening the economy and communities. Additionally, the group said that encouraging entrepreneurs’ participation in the program would represent an important step in supporting more pathways for immigrant founders to come to the United States. A law firm remarked that “liberalizing” opportunities for founders to obtain H-1B status would increase the number of companies established by graduates of U.S. universities. A university wrote that international students often to pursue entrepreneurial ventures outside of the United States and that this proposal would create an important opportunity for international researchers to become entrepreneurs in the United States.

Commenters also supported the clarification around beneficiary-owners on the basis that it would provide increased certainty to prospective beneficiaries and other stakeholders in the H-1B program. A business association thanked DHS for including explicit regulatory authorization for entrepreneurs to obtain H-1B visas, reasoning that this approach aligns with its previous recommendations to the agency and would provide greater certainty for start-up businesses across industries. A joint submission endorsed efforts to encourage beneficiary-owner participation in the H-1B program and concurred with the NPRM’s description of problems and uncertainty affecting the entrepreneurial community. The commenters supported efforts to clarify longstanding policies and establish practices that facilitate the inclusion of entrepreneurs, founders, and beneficiary-owned petitioners in the H-1B visa program. Another joint submission and a form letter campaign also concurred that USCIS’ common-law analysis of the employer-employee relationship has been an impediment to beneficiary-owners as a result of the

legacy of the now-rescinded 2010 guidance and reasoned that the proposed change would provide much-needed clarity.

Response: DHS agrees that clarifying how the regulations apply to entrepreneurs will provide greater certainty for entrepreneurs and start-up business owners. In clarifying this policy, DHS seeks to encourage more beneficiary-owned businesses to participate in the H-1B program. As explained in the NPRM, if more entrepreneurs are able to obtain H-1B status, the United States could benefit from the creation of jobs, new industries, and opportunities. 88 FR 72870, 72905 (Oct. 23, 2023).

Comment: While expressing support for the proposed measures to provide H-1B visas to beneficiary-owners, an advocacy group encouraged DHS to ease pathways—via H-1B and other programs—for start-up founders who do not have a controlling interest in their companies to remain in the United States and grow their companies. The group reasoned that facilitating pathways only for those with controlling ownership may force founders to decide between expansion, which comes with relinquishing majority ownership, or retaining equity for visa purposes, limiting companies' contributions to the U.S. economy.

Response: There is nothing currently, or historically, in the regulations that prevents an owner with less than a controlling interest from qualifying for H-1B status. As explained in the NPRM, historically, USCIS' common law analysis of the employer-employee relationship has been an impediment for certain beneficiary-owned businesses (e.g., beneficiaries who are the sole operator, manager, and employee), to use the H-1B program. 88 FR 72870, 72905 (Oct. 23, 2023). Through the beneficiary-owner provision, DHS is clarifying its current policy and encouraging more beneficiary-owned businesses to participate in the H-1B program. By creating certain conditions—such as the majority of the time requirement and shortened validity periods—that would apply when a beneficiary owns a controlling interest in the petitioner, DHS intends to ensure that the beneficiary will be employed in a specialty occupation in a bona fide job opportunity. Limiting this framework to beneficiary-owners who have a controlling interest in their companies is meant to add integrity protections to the program and prevent these owners from abusing the H-1B program. This is not intended to hinder or impede entrepreneurs who do not have a controlling interest in their companies,

to whom the additional conditions would not apply. DHS seeks to encourage more beneficiary-owned businesses to participate in the H-1B program, regardless of whether they have a controlling interest in the petitioning business.

Comment: A few commenters voiced concern about allowing petitioners to sponsor themselves for an H-1B visa, including a commenter who generally stated that H-1B visa holders should not be allowed to have their own businesses or start-ups. A different commenter wrote without reference to any statutory provisions, or analysis thereof that “self-sponsorship” would be risky and breach H-1B law established by Congress, while another commenter expressed concerns with program exploitation associated with self-sponsored visa holders. A different commenter also expressed concern with abuse associated with the provisions allowing entrepreneurs to “self-sponsor” their H-1B visa. The commenter said that in the absence of “proper gating criteria” for beneficiary-owners, DHS would likely see an increase in “self-sponsor” petitions.

Response: DHS disagrees that the beneficiary-owner provision is ultra vires. There is nothing in the statute prohibiting a noncitizen with an ownership interest in a U.S. employer from being the beneficiary of an H-1B petition filed by that employer and the commenter did not identify any statutory provisions that preclude a beneficiary-owned business from qualifying as an employer for H-1B purposes.

Through this provision DHS is clarifying its current policy, which has been in place since 2020¹⁴⁴ when DHS rescinded its 2010 policy memorandum¹⁴⁵ explaining the common law analysis of the employer-employee relationship. However, like some commenters, DHS is also concerned with the possibility of beneficiaries exploiting the H-1B program, which is why DHS is creating certain conditions that must be adhered to when a beneficiary owns a controlling interest in the petitioner. These conditions include the requirement that the beneficiary must perform specialty occupation duties a majority of the time and shortened validity periods for the initial petition and first extension of 18 months. These restrictions are meant to act as

safeguards and to better ensure that the beneficiary will be employed in a specialty occupation in a bona fide job opportunity.

DHS disagrees with the claims that this provision amounts to “self-sponsorship” and would be contrary to statute. There is a difference between allowing a beneficiary-owned business, versus an individual acting in their individual capacity, to file a petition as a “United States employer.” As a general principle of law, a corporation is a separate and distinct legal entity from its owners or stockholders.¹⁴⁶ Therefore, even if a beneficiary is a sole owner of a business, that business may still file an H-1B petition as a “United States employer” if the business meets all the definitional elements at new 8 CFR 214.2(h)(4)(ii), *i.e.*, has a bona fide job offer of employment, has a legal presence in the United States and is amenable to service of process, has an IRS tax identification number, and, if the beneficiary has a controlling interest in the petitioner, the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H-1B petition. DHS notes that the regulatory definition of “United States employer” at 8 CFR 214.2(h)(4)(ii)—which has existed since 1991—includes “a person.”¹⁴⁷

Comment: Numerous commenters expressed support for the provision clarifying that the beneficiary may perform duties that are directly related to owning and directing the petitioner's business, as long as the beneficiary performs specialty occupation duties authorized under the petition for a majority of the time. Several commenters reasoned that the proposal would acknowledge the reality of beneficiary-owners' responsibilities outside of specialty occupation tasks and allow them to grow their businesses. For example, a law firm generally stated that the proposal reflects the duties of entrepreneurs in addition to their specialty occupation tasks, while an advocacy group said that allowing beneficiaries to perform duties outside of the scope of their specialty occupation would be critical for founders, enabling them to engage in other tasks inherent to building a startup, like seeking out investors. A

¹⁴⁶ See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980).

¹⁴⁷ See 56 FR 61112 (Dec. 2, 1991) (adding a definition of the term “United States employer” in the final rule to include “a person”); see also 57 FR 12179 (Apr. 9, 1992) (interim rule) (maintaining “a person” (but eliminating “which suffers or permits a person to work within the United States”) from the definition of “United States employer”).

¹⁴⁴ See USCIS, “Rescission of Policy Memoranda,” PM-602-0114 (Jun. 17, 2020).

¹⁴⁵ See USCIS, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements,” HQ 70-6.2.8, AD 10-24 (Jan. 8, 2010) (rescinded).

joint submission, expressing strong support for the NPRM's proposal and reasoning, similarly wrote that the flexibility would allow beneficiaries to drive business growth with confidence through responsibilities not reflected in their specialty occupation duties, such as by pitching to investors to raise funds and negotiating contracts. The joint commenters concluded that these business responsibilities are essential for maintaining the viability of companies. Likewise, another joint submission wrote that permitting beneficiaries to perform duties outside the scope of their specialty occupation would provide them with greater opportunities to grow and succeed. A professional association similarly supported agency efforts to clarify that beneficiary-owners may perform non-specialty-occupation work on a limited basis, reasoning that founders in the medical sector must perform other duties outside of direct patient care. The association said that the clarification around non-specialty-occupation work is a "reasonable and helpful modification" to ensure that physician-owners can carry out necessary administrative tasks for providing clinical care.

A joint submission expressed support for the proposed changes establishing a "majority of the time" framework on the basis that it would give clarity to economically significant start-ups and entrepreneurs and provide a workable framework for beneficiary-owners to perform their duties in startup entities and as entrepreneurs. The commenters wrote that the changes could encourage the use of specialty occupation workers in critical industries and meet USCIS' policy goals of reducing barriers to entry for startups. The commenters agreed with DHS's "commonsense explanations" around the proposed provision and wrote that the proposed framework would allow beneficiary-owners to wear the various "hats" that they may undertake. The commenters commended DHS for moving towards a framework of increased flexibility, thereby allowing entrepreneurs to consider specialty occupation workers to develop their businesses while expanding and innovating the U.S. economy. Echoing the above remarks, another law firm reasoned that the proposed approach would offer flexibility for beneficiary-owners while maintaining program requirements, striking a balance between promoting entrepreneurship and preventing misuse

of the H-1B program. Another commenter generally requested more relaxation on non-specialty occupation related duties for beneficiary-owners, reasoning that this would give more opportunities for job creation.

Response: DHS agrees with commenters that it is important to clarify that the beneficiary may perform non-specialty occupation duties that are directly related to owning and directing the petitioner's business to allow beneficiaries to drive business growth with confidence through responsibilities not reflected in their specialty occupation duties. DHS acknowledges the reality of beneficiary-owners' responsibilities outside of specialty occupation tasks and clarifies that this is permitted as long as the beneficiary performs specialty occupation duties authorized under the petition during a majority of the time. As stated in the NPRM, the goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company. 88 FR 72870, 72906 (Oct. 23, 2023). The "majority of the time" standard is also necessary to ensure that a beneficiary who is the majority or sole owner and employee of a company would still be "coming temporarily to the United States to perform services . . . in a specialty occupation" as required by INA section 101(a)(15)(H)(i)(b). Therefore, DHS declines to expand this flexibility any further.

Comment: A joint submission requested clarification on non-specialty occupation job duties for beneficiary-owners that "must be directly related to owning and directing the business" and expressed concern over potential disagreement over what are considered to be directly related to owning and directing a business. The commenters requested additional guidance as to what duties are considered to be directly related to owning and directing a business to facilitate consistent decision making.

Response: As discussed in the NPRM, DHS recognizes that, similar to other H-1B petitions, a beneficiary-owner may perform some incidental duties, such as making copies or answering the telephone. 88 FR 72870, 72905 (Oct. 23, 2023). In addition, DHS expects a beneficiary-owner would need to perform some non-specialty occupation duties when growing a new business or

managing the business. Notwithstanding incidental duties, non-specialty occupation duties must be directly related to owning and directing the business. These duties may include, but are not limited to: signing leases, finding investors, and negotiating contracts. Other examples might include developing a business plan, engaging with potential suppliers and other stakeholders, or talent acquisition. These examples are non-exhaustive and may not apply in every case. DHS does not believe that additional guidance or explanation of which duties are "directly related to owning and directing the business" is necessary because it is a fact-specific determination that will require a case-by-case determination. As stated in the NPRM, the goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company, while also ensuring that the beneficiary would still be "coming temporarily to the United States to perform services . . . in a specialty occupation" as required by INA section 101(a)(15)(H)(i)(b). 88 FR 72870, 72906 (Oct. 23, 2023). Thus, in each case, USCIS will analyze all of the job duties—specialty occupation duties and non-specialty occupation duties—which the petitioner must accurately describe in the petition along with the expected percentage of time to be spent performing each job duty, and, for extensions, the time spent performing these duties in the preceding petition's validity period, to determine whether the job would be in a specialty occupation and to determine whether the non-specialty occupation duties are directly related to owning and directing the business. If the beneficiary would spend a majority of their time performing specialty occupation duties, and if the non-specialty occupation duties are directly related to owning and directing the business, then the position may qualify as a specialty occupation.

DHS emphasizes that nothing in this final rule would change DOL's administration and enforcement of statutory and regulatory requirements related to LCAs, including requirements concerning the appropriate prevailing wage and wage level when the proffered position involves a combination of occupations. See 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I.

For example, in some cases the petition might involve a combination of occupations that can affect the petitioner's wage obligation, as detailed in DOL's wage guidance.¹⁴⁸ Generally, when an H-1B employer requests an optional prevailing wage determination from DOL, the National Prevailing Wage Center will assign to the position the occupational code that has the higher of the prevailing wages amongst the combination of occupations. Under this final rule, a petitioner may be authorized to employ a beneficiary-owner in a combination of occupations, provided that the petitioner pays the required wage, consistent with existing DOL wage guidance, even when the beneficiary-owner is performing non-specialty occupation duties as authorized by USCIS in accordance with this final rule.

Comment: A joint submission expressed appreciation for the clarification that beneficiary-owners may seek concurrent H-1B employment with multiple qualifying specialty occupation roles as long as the "majority of the time" framework applies to those situations. An advocacy group similarly supported DHS's clarification that beneficiary-owners are not prohibited from engaging in concurrent employment. A commenter expressed that H-1B beneficiary owners should be able to form a C corporation while working with their current employer. A different commenter suggested an H-1B beneficiary could be employed by a Fortune 500 company and own a firm, enabling H-1B visa holders to have a regular job while having the opportunity to engage in entrepreneurial activities. The commenter also suggested an initial "filter" to allow concurrent employment only for limited companies, such as Fortune 500 companies and those that work with the Federal Government.

Response: DHS agrees with the commenters that it is helpful to petitioners to clarify that beneficiary-owners may seek concurrent H-1B employment with multiple qualifying

specialty occupation roles as long as the "majority of the time" framework applies to those situations where the beneficiary spends time working in the beneficiary-owner position. While a beneficiary may be able to form and hold a controlling interest in a business, whether organized as a C corporation or another type of legal entity, the beneficiary would generally not be authorized to work for that business until authorized to do so (e.g., upon approval of a petition filed by that business or, if eligible for H-1B portability, upon the filing of an H-1B petition by that business). As explained in the NPRM, the beneficiary-owner provision does not preclude the beneficiary from being authorized for concurrent employment with two or more entities (including another entity where the beneficiary is also an owner with a controlling interest) so long as each entity has been approved to employ the beneficiary in a specialty occupation and the individual otherwise satisfies all eligibility requirements. 88 FR 72870, 72905 (Oct. 23, 2023). Therefore, under these circumstances, an H-1B beneficiary could seek authorization to work for a business in which they have a controlling interest while concurrently working for another employer authorized to employ the beneficiary as an H-1B nonimmigrant. However, DHS disagrees that initial "filters" or limitations are necessary, such as limiting concurrent employment to working for Fortune 500 companies or companies that work with the Federal Government. The commenter did not explain the purpose such restrictions would serve and there is nothing to suggest that restricting the eligibility of beneficiary-owners in this way would enhance program integrity or otherwise be beneficial to the H-1B program.

Comment: Several commenters expressed support for limiting the validity period for initial petitions and extensions to 18 months. For example, a commenter acknowledged the practicality of the cautionary rules for a shorter visa extension.

Response: DHS agrees that it is important to add certain safeguards to prevent program abuse and is limiting the first two validity periods to 18 months each as a safeguard against possible abuse or fraud.

Comment: Numerous commenters expressed opposition to the proposed 18-month validity period for initial petitions and extensions. A commenter stated that this provision will enhance exploitation and outsourcing and that having "no string attached" before an 18-month visa is granted is a long time

to inflict substantial damage, while another commenter suggested that the 18-months validity period is too short for new start-ups and businesses to become profitable and generate employment for U.S. citizens. Another commenter said that there should be no minimum investment since there are other programs available (like EB-5) to those start-ups, and it would discourage other individuals from contributing to the U.S. economy. An advocacy group requested further clarification as to how individuals would continue to invest in the economy when their initial stay is limited to 18 months and how entrepreneurs may obtain permanent residency in the United States through the H-1B program.

A commenter said that the 18-month validity period would not reduce fraud but would discourage other potential entrepreneurs since they would have little negotiation power when seeking venture capital. An advocacy group wrote that the 18-month validity period is unnecessary and said that start-ups often take long periods of time to become profitable; requiring founders to renew their visas frequently would impair them when securing investors. An advocacy group said it would be detrimental to an H-1B visa holder if they had to leave the United States to renew their visa, and even more detrimental if they were simultaneously filling a specialty role at their companies, making it impossible to secure funding for their start-up. An attorney reasoned that if all other H-1B requirements remain the same for beneficiary-owners, the limiting measure is unnecessary and would create an administrative burden on the agency by requiring more frequent adjudications and increasing processing times. The attorney also stated that the areas of potential fraud that the 18-month limit would protect against are not identified. Another joint submission stated that the 18-month validity period places an undue burden of unnecessary oversight on beneficiary-owned entities which detrimentally impacts their operations, and that the validity period does not prevent fraudulent H-1B petitions. The commenters in the submissions reasoned that the 18-month limit would be expensive, since an initial petition can cost up to \$4,960. One of the joint submissions additionally noted that there are other visa categories available to entrepreneurs and the 18-month limit would cause the H-1B visa to be less attractive and could cause unneeded stress to founders, entrepreneurs, and petitioners. A research organization

¹⁴⁸ DOL, "Round 3: Implementation of the Revised Form ETA-9141 FAQs" at 1 (July 16, 2021) (When there is a combination of occupations, the SOC code with the highest wage is assigned.), <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWC%20Round%203%20Frequently%20Asked%20Questions%20-%20Implementation%20of%20Revised%20Form%20ETA-9141.pdf>; DOL, "Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs Revised November 2009" at 4 (If the employer's job opportunity involves a combination of occupations, the National Prevailing Wage Center should list the relevant occupational code for the highest paying occupation.), https://www.flcdatcenter.com/download/npwhc_guidance_revised_11_2009.pdf (last visited Oct. 3, 2023).

stated that limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions is not feasible for a nonprofit entity or a nonprofit research organization that must obtain approval by the IRS.

A business association wrote that the 18-month validity period would adversely affect small businesses that have less resources to comply with the H-1B program's requirements and that there are already sufficient tools and guardrails in place to combat fraud. The association also stated that competing firms that have no beneficiary ownership would only need to apply for an H-1B worker once, while the beneficiary owned firm would have to petition twice as many times during the same period. A different commenter stated that limited validity period would actually discourage founders from focusing on innovating and founding companies since the H-1B renewal process is time-consuming, expensive, and adds instability for founders. A couple of commenters reasoned that the 18-month validity period would be burdensome, have unnecessary costs, and would generate more petitions for the agency to adjudicate. A professional association recommended that only the initial H-1B visa be limited to 18 months and that any subsequent filings should be granted up to the full 3-year limit. A joint submission stated that early-stage companies have the least available bandwidth for effective compliance and any additional legal and compliance costs would be a burden unique to startups with an immigrant founder or key early hire.

In light of the above concerns, some commenters proposed alternative validity periods for beneficiary owners. For example, commenters suggested that a standard 36-month validity period should be applied, reasoning that an across-the-board reduction in the validity period would severely impact founders' ability to innovate, experiment with new technologies, and secure investment. The commenters also said that the change to the validity period could encourage start-up founders to go to other countries. A commenter stated that a longer visa period and fewer renewals would improve the regulatory process for startups and recommended that the H-1B program follow the 30-month period for the International Entrepreneur Parole (IEP) pathway which allows a longer timeline to support success. A joint submission also noted that the 30-month timeline for IEP would make it a more attractive option for entrepreneurs, deterring them from the

H-1B process. A couple of commenters mentioned that the limitation of the initial visa length and first renewal to 18 months is far too restrictive and should be retained at 3 years.

Response: DHS understands that filing petitions more frequently may cause an administrative burden. However, DHS disagrees that limiting the initial and first extension validity period to 18 months is unnecessary; rather, it is an important safeguard against possible abuse or fraud. As stated in the NPRM, while DHS sees a significant advantage in promoting the H-1B program to entrepreneurs, DHS believes that guardrails for beneficiary-owner petitions are necessary to mitigate the potential for abuse of the H-1B program. 88 FR 72870, 72906 (Oct. 23, 2023). Limiting the first two validity periods to 18 months each will allow DHS adjudicators to review beneficiary-owned petitions more frequently, and limiting the nature of non-specialty occupation duties that may be performed will deter potential abuse and help maintain the integrity of the H-1B program. DHS selected 18 months for the first two validity periods as a balance between promoting entrepreneurship and maintaining program integrity. As an additional clarification, while a beneficiary's initial stay is limited to 18 months, they may request an extension for an additional 18 months, and additional extensions for up to 3 years after that, for a maximum total of 6 years (unless eligible for an exception to the 6-year period of authorized admission limitation) like other H-1B workers. Further, DHS did not propose a minimum investment amount for beneficiary owners and is not adding one through this rulemaking.

Comment: A few commenters suggested that DHS clarify rules for beneficiary-owner petitions, suggesting additional clarification around who is qualified to start a business, the type of businesses allowed, and who can sponsor themselves for an H-1B visa. A joint submission noted that the NPRM preamble explained that controlling ownership interest means "the beneficiary owns more than 50 percent of the petitioner or [] the beneficiary has majority voting rights in the petitioner,"¹⁴⁹ but expressed concern that "controlling interest" lacks a precise regulatory definition in the proposed rule. The joint commenters suggested that DHS codify the definition within the regulations to ensure clarity as to which beneficiary-owners would be subject to this framework, rather than

defining this in future USCIS Policy Manual guidance. The commenters recommended that the definition of "control" align with the alternatives provided in the L-1 intracompany nonimmigrant visa category (e.g., at least 50 percent ownership; 50 percent ownership in a 50-50 joint venture with equal control and veto power, and less than 50 percent ownership with a controlling interest).

Response: DHS agrees that additional clarification would be beneficial in the regulatory text and is clarifying in new 8 CFR 214.2(h)(9)(iii)(E) that "controlling interest" means that the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner. Whether the beneficiary has majority voting rights in the petitioner will depend on the bylaws and other governing documents of the petitioning entity (e.g., if there are preferred shares that give certain owners greater voting rights than other owners with common shares), but it will generally reflect who controls the direction and management of the petitioning entity, including decisions pertaining to the employment of executives, which could include the beneficiary-owner's employment. DHS declines to adopt definitions from the regulations relating to the L-1 nonimmigrant classification as those regulations relate to establishing a qualifying relationship for purposes of establishing eligibility for L-1 classification and may not readily apply in the context of a beneficiary-owner. Further, beneficiaries may still qualify as H-1B nonimmigrants even where they do not have a controlling ownership interest in the petitioner.

Comment: Another commenter suggested that USCIS clarify the definition of "owner" and "control," reasoning that these terms are not clear in the context of nonprofit organizations. Specifically, the commenter said that DHS did not provide clarity regarding for-profits and nonprofits and how sole ownership of a nonprofit would function under the proposed rule. The commenter warned that this lack of clarity could lead to confusion and the inconsistent application of the proposed regulations. Additionally, a research organization expressed concern that DHS failed to distinguish between nonprofit and for-profit corporations and their structures. The commenter said that if owning a "controlling interest" is interpreted as ownership of stock or shares, the proposed rule would not apply to a noncitizen sole director of a nonprofit corporation that does not issue capital stock or shares for ownership. The

¹⁴⁹ 88 FR 72870, 72905.

commenter requested that DHS expand the definition to include sole directors who incorporate a nonprofit or nonstock corporation as a United States employer with an EIN, and suggested a new definition.

A couple of commenters expressed concern that the proposed provisions and requirements related to “controlling interest” do not account for high-growth companies at the later stages of the startup lifecycle during which an entrepreneur “will typically hold smaller ownership stakes in the company.” Specifically, a joint submission said that, at this later stage, the owner’s stake shrinks as the start-up sells equity to investors. The commenters wrote that the LCA wage requirements force many entrepreneurs to take on entry-level roles, as start-ups have limited cash reserves to pay market-rate salaries for CEO and other C-Suite roles. Additionally, the commenters reasoned that maintaining equity ownership provides greater economic benefit to owners compared with taking a higher salary. Thus, the joint commenters encouraged DHS to create a process allowing early-stage, high-growth entrepreneurs to hold CEO or other C-Suite titles while protecting against fraud and abuse. The commenters concluded that immigration processes need to account for start-up growth, reasoning that incentivizing entrepreneurs to maintain their equity stake to benefit from the regulations would disincentivize job creation.

Response: As explained in the NPRM, DHS is setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity to better ensure program integrity. 88 FR 72870, 72906 (Oct. 23, 2023). These proposed conditions will apply when a beneficiary owns a controlling interest, meaning that the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner. DHS is specifically addressing situations where a potential H-1B beneficiary owns a controlling interest in the petitioning entity and is not imposing any restrictions regarding who is qualified to start a business, or the type of businesses allowed to petition for a beneficiary-owner.

With respect to non-profit organizations, DHS recognizes that, in some cases, a beneficiary might not be able to establish a controlling interest in a non-profit organization, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner. However, the non-profit entity may still petition for

the beneficiary as an H-1B nonimmigrant worker even where the beneficiary does not possess a controlling interest. Thus, DHS does not believe it is necessary to revise the provisions relating to beneficiary-owners to account for non-profit organizations.

With respect to “high growth companies” where a potential beneficiary-owner may hold a smaller ownership in the company, DHS notes that the beneficiary-owner provisions would apply where the beneficiary has majority voting rights in the petitioner. Further, the entity may still file an H-1B petition on behalf of the beneficiary where the beneficiary does not possess a controlling interest in the petitioning entity. Therefore, DHS does not believe it is necessary to make changes to the beneficiary-owner provisions in response to this comment.

Comment: A few commenters suggested additional measures to address fraud and abuse related to beneficiary-owned H-1B petitions. For example, a law firm proposed that when a company files an initial petition for a beneficiary-owner, it must submit a detailed business plan, and when the company files an extension on behalf of the beneficiary-owner, it must explain the progress made on the achievement of the goals specified in the business plan. While expressing concerns with program abuse by beneficiary-owned H-1B petitioners, another commenter suggested that beneficiary-owners should be required to pay the same wages to a minimum of five U.S. citizens in the company and should not be allowed to have H-1B holders constitute more than 10 percent of the company’s workforce. Another commenter suggested that the beneficiary-owners provisions should be complemented with increased site visits, with up-front penalties for those violating the program requirements. To deter program fraud, a commenter proposed that entrepreneurs receive a 2-year Employment Authorization Document (EAD) before applying for an H-1B visa, based on the company’s performance. The commenter suggested that success could be measured through capital raised, U.S. citizens employed, jobs created, and revenue, and there could be lower thresholds for non-technology startup companies to avoid skewing applications towards the technology sector.

Response: DHS declines to adopt these additional measures. DHS believes that the conditions discussed in the proposed rule for when the beneficiary owns a controlling interest in the petitioning entity are sufficient to help

ensure program integrity. These conditions include the requirement that the beneficiary will perform specialty occupation duties authorized under the petition a majority of the time, that, notwithstanding some incidental duties, non-specialty occupation duties must be directly related to owning and directing the petitioner’s business, and limiting the validity period for the initial petition and first extension of such a petition to 18 months each. DHS also notes that this final rule contains a number of provisions that are intended to enhance the integrity of the H-1B program, including provisions on the bona fide job offer requirement, third-party placement and site visits, and that these integrity provisions will be applicable to all H-1B petitions, including those involving beneficiary-owners. However, some of the suggestions, such as expressly requiring a beneficiary-owned petitioner to employ a certain number of U.S. citizens, raise a certain amount of capital, or provide proof of accomplishments towards the business plan, may be too restrictive especially during a new business’s beginning stages when resources may be scarce and exact business plans may change. DHS also recognizes that different endeavors may have different capital or personnel needs, and therefore, setting minimum investment or staffing requirements may be too restrictive.

Comment: Several commenters discussed concerns with wage requirements for beneficiary-owners. Specifically, commenters requested that DHS provide additional flexibility to beneficiary-owners in the context of DOL’s prevailing wage requirements. One such commenter reasoned that many startups by beneficiary-owners with majority ownership may not see positive cash flow for a long period of time, which makes it challenging for owners to both adhere to wage requirements and make investments to grow their business. A couple of different commenters, echoing this concern, suggested that the prevailing wage requirements “should be relaxed” and instead the beneficiary-owner’s credentials and expertise should be prioritized in the formative years of a practice. The commenter reasoned that such an approach would encourage entrepreneurs with specialized knowledge to develop their businesses and contribute to the U.S. economy. A different commenter said that the LCA requirements would complicate the proposed revisions for beneficiary owners, as startup founders would be bound to a high base salary despite

needing 2 to 3 years to become self-funded. Similarly, another commenter expressed concern that the rule does not go far enough to address challenges faced by H-1B entrepreneurs, such as minimum salary requirements. Thus, the commenter urged DHS to consider exempting H-1B entrepreneurs from the minimum salary requirements, suggesting an exemption period during the first 2 years of operation. The commenter also proposed that beneficiary-owners should demonstrate financial viability through alternative means, such as secured funding commitments or detailed business plans. The commenter reasoned that these measures would strengthen the H-1B program and encourage the creation of businesses that would contribute to long-term economic prosperity in the United States. Additionally, a joint submission wrote that the LCA wage requirements force many entrepreneurs to take on entry-level roles, as startups have limited cash reserves to pay market-rate salaries for CEO and other C-Suite roles.

Response: DHS emphasizes that nothing in this final rule changes DOL's administration and enforcement of statutory and regulatory requirements related to LCAs, including requirements concerning the appropriate prevailing wage. See 8 U.S.C. 1182(n); 20 CFR part 655, subparts H and I. DHS does not have the authority to alter statutory requirements or DOL regulations related to LCAs, including requirements concerning the required wage, and cannot provide any exceptions to beneficiary-owners who are unable to adhere those requirements. Further, the beneficiary-owner provisions in this final rule aim to promote access for H-1B entrepreneurs while setting reasonable conditions to help ensure program integrity. DHS believes that allowing reduced wages for beneficiary-owners, even if lawful, would pose a significant risk to H-1B program integrity. Petitioners must pay the required wage, consistent with all statutory and regulatory requirements.

Comment: Some commenters proposed additional flexibilities for beneficiary-owners. For example, a commenter suggested additional flexibility criteria for startups to allow them to adapt to changing product-market fit or satisfying market demand. A trade association proposed additional flexibilities through reduced hiring costs and application fees for legitimate U.S. startups. Finally, a commenter suggested that beneficiary-owners should not be included under the H-1B cap.

Response: DHS declines to provide additional flexibilities for beneficiary-owners. The commenter did not specify any particular flexibility that would allow petitioners to adapt to changing product-market fit or better satisfy a strong market demand, but to the extent that the commenter is suggesting, for example, a relaxation of requirements relating to amended petitions or maintenance of status, DHS declines to provide any special accommodations for beneficiary-owners with respect to these requirements. When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 CFR 214.2(h)(2)(i)(E). A change in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act is a material change. Thus, where there is a material change, USCIS must determine whether the beneficiary will continue to be eligible for H-1B classification under the materially changed conditions. This is true whether or not the beneficiary owns a controlling interest in the petitioner, thus DHS declines to provide any special flexibility for beneficiary-owners with respect to the amended petition requirements. Similarly, beneficiaries, including beneficiary-owners, are required to abide by the terms and conditions of admission or extension of stay, as applicable. For H-1B nonimmigrants, this includes working according to the terms and conditions of the H-1B petition approval on which their status was granted and not engaging in activities that would constitute a violation of status, such as working without authorization.

While commenters included additional suggestions regarding reducing filing fees and not including beneficiary-owners in the cap, DHS is not adopting these suggestions but notes that the USCIS Fee Schedule Final Rule provided reduced fees for nonprofits and small employers for certain applications and petitions.¹⁵⁰ DHS further notes that Congress—not DHS—sets the annual 85,000 H-1B cap as well as the general parameters for cap exemption. See INA sec. 214(g)(1), (5).

¹⁵⁰ See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 89 FR 6194, 6208 (Jan. 31, 2024) (explaining that businesses with 25 or fewer full-time equivalent employees will pay a \$300 Asylum Program Fee instead of \$600, and half of the full fee for Form I-129, but nonprofits will pay \$0).

13. Site Visits

Comment: A few commenters, including individual commenters, expressed general opposition to the proposed change in the site visit provision without providing additional rationale. An individual commenter stated that site visits are burdensome on businesses. An individual commenter expressing opposition to the site visit provision commented that site visits are a "violation of represented parties" per the Model Rule of Professional Conduct 4.2, and USCIS is attempting to "surprise" applicants into sharing incriminating information.

Response: As noted in the proposed rule, site visits are important to maintain the integrity of the H-1B program and to detect and deter fraud and noncompliance with H-1B program requirements. 88 FR 72870, 72907 (Oct. 23, 2023). Cooperation with these visits is crucial to USCIS' ability to verify information about employers and workers, and petitioner's compliance with the terms and conditions of the H-1B petition. Although DHS recognizes that site visits can be a burden for petitioners, and take time for USCIS to perform, this rule does not increase the number of site visits or create any new site visit programs. Rather the rule is further clarifying the scope of the visits and consequences of noncompliance with a site visit.

The commenter addressing "Model Rule of Professional Conduct 4.2" did not provide context or the text of such rule. To the extent that the commenter is referring to the rules of representation from the American Bar Association, DHS notes that those rules are not applicable to USCIS officers. However, USCIS officers ask permission to speak to a represented individual before proceeding without a representative present. If the represented individual wants their representative present, they can call them and have them present telephonically or request the site visit be rescheduled to occur when the representative is available. USCIS will generally honor such request to reschedule, but if the representative is not present at the agreed upon time and location, or the individual repeatedly requests to reschedule in an apparent attempt to avoid compliance with the site visit review, it is in the officer's discretion to determine if the entity or individual is not complying with this provision by seeking to not cooperate in the site inspection.

Comment: A few individual commenters expressed general support for site visits without providing additional rationale, with some

specifically encouraging site visits at consulting firms. An individual commenter generally remarked that the site visit provision would enhance program transparency, accountability, and integrity. An advocacy group expressing appreciation for USCIS' authority to conduct site inspections urged USCIS to mandate site visits for certain employers, especially when employees are employed at third party work locations. The advocacy group also recommended "pre-adjudication site checks" for petitioners that depend on H-1B employees.

Response: DHS agrees that site visits are an important part of ensuring transparency, accountability, and the integrity of the H-1B program. However, DHS did not propose in the NPRM to make site visits mandatory for specific petitioners and declines to do so at this time. Site visits are determined by a number of factors, including both random visits and those predicated on the existence of risk factors or fraud indicators.

Comment: While expressing support for site visits, several commenters stated that USCIS should give employers the opportunity to rebut, provide additional information, or resolve questions raised during site visits prior to arriving at an adverse determination. A couple of these commenters noted that this would be in the best interest of H-1B beneficiaries. Similarly, a trade association suggested USCIS clearly detail the process it will follow after determining a failure or refusal to cooperate. The trade association stated that there are situations in which USCIS' inability to verify facts during a site visit does not necessarily equate to a petitioner intentionally refusing to cooperate, such as a third party misunderstanding. A company suggested that petitioners be able to arrange additional site visits or interviews to address an initial failure or refusal to cooperate, thus codifying a current practice among Fraud Detection and National Security Directorate (FDNS) officers. A legal services provider recommended that the site visit provision require USCIS to provide specific details to petitioners in the form of a report to address issues identified during an inspection. A trade association requested USCIS implement a system that decreases the frequency of site visits for employers that repeatedly demonstrate compliance.

Response: As is current practice and captured in existing regulations, USCIS will generally not revoke an approval or deny a petition based on information from a site visit or inability to verify facts based on a lack of cooperation at

a site visit without first giving the petitioner the opportunity to rebut and provide information on their behalf. See 8 CFR 103.2(b)(16), 214.2(h)(10) and (11). There may be instances where information from a pre-adjudication site visit or the inability to verify facts based on a lack of cooperation at a pre-adjudication site visit could result in the denial of the petition without additional notice to the petitioner, if the information uncovered or the inability to verify facts was derogatory information of which the petitioner was aware. DHS declines to add specific regulatory text concerning this issue, as site visits and subsequent adjudicative actions will continue to be governed by existing practice and existing regulations at 8 CFR 103.2(b)(16) and 214.2(h)(10) and (11) which govern the notice requirements. Petitioners will therefore generally have the opportunity to resolve issues that may arise during the site visit, including those identified by commenters. DHS declines to use a specific form to report issues that arise during a visit. Rather, USCIS officers will continue to issue NOIDs or NOIRs that provide sufficient derogatory information and details for the petitioner to respond to. DHS further notes that it is not a national practice for FDNS officers to always arrange additional site visits or interviews to address an initial failure or refusal to cooperate. However, it is in the officer's discretion to allow such a request, and if a petitioner is otherwise cooperative and requests to schedule a follow-up visit, FDNS may allow such a request.

USCIS determines the frequency of site visits based on a number of factors, including random selection as part of the ASVVP. Although USCIS officers make efforts to reduce duplicative visits, DHS notes that each petition stands alone and information that is petition specific, such as the job location and duties, would not have been previously verified. As such, the successful completion of a prior site visit is not indicative that future problems will not exist.

Comment: A trade association requested that USCIS clarify in the NPRM what actions constitute a refusal or failure to comply with USCIS site visits. A law firm also suggested that USCIS clarify the expectations and process for site visits under the proposed rule, including establishing a standard timeframe between site visits and any subsequent actions taken, and subjecting any revocations to appeal. The law firm added that revocations should be based on a "'clear and convincing evidence' standard." Lastly, the law firm emphasized the importance

of collecting the names and title of any interviewees during site visits to ensure full transparency on the record.

Response: As discussed in the proposed rule, DHS's goal is to provide transparency to the compliance review process so that entities and individuals subject to those processes understand that USCIS' inability to verify pertinent facts, including for failure to cooperate, may result in denial or revocation of the approval of a petition. 88 FR 72870, 72908 (Oct. 23, 2023). With this rule, DHS is codifying its existing authority and clarifying the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections. To "fully cooperate" in this context means that entities will comply with the scope of the reviews, including: granting access to the premises, to include the employer's place of business and any site where the work is performed, making a representative of the petitioner or employer available for questions, submitting or allowing review of pertinent records, providing access to workers and allowing interviews with such employees to take place in the absence of the employer or employer's representative and at a location mutually agreed to by the employee and USCIS officers, which may or may not be on the employer's property.

As described in the proposed rule, a petitioner or employer failing or refusing to cooperate "could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner's representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review human resources records pertaining to the beneficiary. Failure or refusal to cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the information requested within the time period specified, or did not respond to a written request for information within the time period specified."

DHS declines to add "within the reasonable time specified" to the regulations regarding site visit compliance and cooperation. USCIS issuance of notice and adjudicative decisions is already governed by existing regulations at 8 CFR 103.2(b)(16) and 214.2(h)(10) and (11). These regulations do not include a timeframe within which USCIS must issue a notice or decision. The amount of time that lapses between when a site visit takes place and when a notice or

decision is issued can vary depending on the specific facts of the case. Such factors could include time for additional USCIS fact finding or additional time for petitioners to reschedule a visit or respond with requested documentation. As such, DHS will not limit USCIS' ability to take action on a petition simply because a specific amount of time has lapsed since a site visit was undertaken. If USCIS officers need to request additional information from petitioners after the site visit, the deadline for submitting such information will be provided to the petitioner in writing. Additionally, per 8 CFR 214.2(h)(12), revocation on notice under 8 CFR 214.2(h)(11)(iii) of an H-1B petition's approval may be appealed to the Administrative Appeals Office.

DHS declines to add a new standard of proof for revocations after site visits, as it remains the petitioner's burden to demonstrate eligibility for H-1B classification by a preponderance of the evidence. If USCIS is unable to verify pertinent facts required to demonstrate the petitioner's eligibility and continued compliance with the terms and conditions of the petition, and the petitioner does not overcome these findings and demonstrate eligibility by a preponderance of the evidence, then the petition's approval would be rightly revoked. The authority of USCIS to conduct on-site inspections, verifications, or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct. See 8 CFR 103.2(b).¹⁵¹ Moreover, USCIS has the authority to administer and enforce the INA, including provisions pertaining to the H-1B nonimmigrant classification. See INA 103(a)(1) and (3).¹⁵²

Regarding the request to collect names and titles of any interviewees, DHS notes that USCIS officers keep records of the individuals with whom they speak. To the extent practicable, USCIS seeks to protect the privacy of workers when using the information they have

provided to support any adjudicative decision. However, USCIS must also adhere to 8 CFR 103.2(b)(16)(i), which states that for any decision based on derogatory information unknown to the petitioner, the petitioner will be advised of this and offered an opportunity to rebut the information, and to the extent that this information is necessary for the petitioner to respond to and rebut any identified deficiencies, USCIS will disclose that information in the notice of intent to deny or notice of intent to revoke.

Comment: A law firm expressing support for the use of site visits to ensure program integrity noted that FDNS officers should be limited to inspecting whether the H-1B worker is: located where they are supposed to be per the LCA and visa petition, doing the work represented in the petition, and being compensated according to the petition. The law firm added that any data beyond these points are not appropriate to collect (e.g., the H-1B filing history of the petitioner). Similarly, a legal services provider urged USCIS to limit the scope of site visits to not include "any other records" or "any other individuals" that the investigating official deems pertinent. A company recommended that employers or third parties should be able to refuse government representatives access to certain facilities or records for "reasonable business purposes." Similarly, the same company remarked that the NPRM should limit the types of documentation that can be requested in a compliance review in order to protect sensitive business information.

Response: DHS declines to further limit the types of documents that can be reviewed or requested as part of the USCIS verification efforts. The purpose of a USCIS site visit is to verify the information provided by the petitioner, confirm that eligibility for the petition approval has been demonstrated by a preponderance of the evidence and to ensure that the beneficiary is or will be employed in accordance with the terms and conditions of the petition. The language of the new regulations makes clear that USCIS officers will limit their review to pertinent information, which includes information that was provided by the petitioner, material to eligibility, or needed to make a determination on continued compliance with the terms and conditions of the petition. This universe of information will vary according to the specific petition being reviewed. Because DHS does not limit the evidence used by petitioners to demonstrate eligibility and compliance with the terms and conditions of the petition, DHS likewise will not limit the

types of evidence that may be requested by USCIS officers, as long as such evidence is pertinent to their inquiry.

Concerning disclosure of "sensitive business information," when requested evidence contains sensitive business information, the petitioner may redact or sanitize the relevant sections to provide a document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. Although a petitioner may always refuse to submit confidential commercial information if they believe it is too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial if alternative evidence is insufficient to establish eligibility. *Cf. Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977) (in refusing to disclose material and relevant information that is within his knowledge, the respondent runs the risk that he may fail to carry his burden of persuasion with respect to his application for relief).

Comment: A trade association stated that the proposed rule lacks a "reasonableness standard" and allows officials to request information or documentation at their discretion, even if it is not pertinent to the petition at hand; the trade association remarked that petitioners that resist potentially unnecessary lines of questioning could be deemed non-cooperative and have the petition in question, as well as others, unfairly revoked. The trade association also commented that the lack of a reasonableness standard creates a vague and indefinite time period for petitions to undergo review following site visits, which could hinder employers' ability to hire employees and perform work.

Response: As noted in the proposed rule, site visits may include review of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-1B program. See new 8 CFR 214.2(h)(4)(i)(B)(2). DHS declines to add any additional "reasonableness standard," as the new regulations sufficiently limit the universe of information that could be addressed in a site visit to that which is pertinent to eligibility and continued compliance with the terms and conditions of the petition. Further,

¹⁵¹ "In evaluating the evidence, 'the truth is to be determined not by the quantity of evidence alone but [also] by its quality.'" See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989)).

¹⁵² See also INA 235(d)(3), 8 U.S.C. 1225(d)(3) (authorizing "any immigration officer" . . . "to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of [the INA] and the administration of [DHS]").

although USCIS follows up on site visits as soon as practicable, DHS will not add any timeframe requirement for those actions, as each case will be different, and could involve return visits at the petitioner's request that would be unnecessarily limited if a timeframe for action was implemented. It is also unclear how USCIS' timeline after a site visit would limit a petitioner's ability to hire and perform work, as there would be no impact until adjudicative action is taken and such action would be preceded by a NOID or NOIR.

Comment: An advocacy group expressed opposition to the proposed changes to site visit policy, writing that it would give officers excessive authority to enter businesses or homes without prior notice and potentially invalidate many visas if one individual does not, or cannot, comply with requests. The advocacy group added that this power could be used to intimidate immigrant populations, who may be more wary of scams and fraud.

Response: DHS notes this rule does not change the way that site visits are conducted and does not extend USCIS' authority to conduct site visits beyond what is already allowed in statute and regulations. The purpose of a site visit is to verify the information that was provided in the petition with review of an accurate and unrehearsed view of the work being performed. As such, site visits are generally unannounced. However, as part of the site visit program, USCIS officers do not enter businesses or homes without permission. USCIS officers carry identification that can be confirmed and as noted above, interviewees may request that the petitioner or representative join an interview telephonically or in person, or reschedule for a time where the representative can be present. As stated previously, failure or refusal to cooperate with a site visit may result in denial or revocation of the approval of any petition for workers who are or will be performing services at the location or locations that are a subject of inspection or compliance review. See new 8 CFR 214.2(h)(4)(i)(B)(2).

Comment: A professional organization urged USCIS to amend 8 CFR 214.2(h)(4)(i)(B)(2)(i) and redefine "inability to verify facts" to "inability to verify material facts," and "compliance" to "substantial compliance" when referring to the adjudication of the petition and compliance with H-1B petition requirements. The organization proposed additional amendments to 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(2), suggesting that DHS

change "inaccurate" to "materially inaccurate."

Response: DHS notes that the commenter refers to 8 CFR 214.2(h)(4)(i)(B)(2)(i) but quotes language from 8 CFR 214.2(h)(4)(i)(B)(2)(ii), and as such our response is in reference to 8 CFR 214.2(h)(4)(i)(B)(2)(ii). DHS declines to add "material" to the new regulation at 8 CFR 214.2(h)(4)(i)(B)(2)(ii) because the regulation already states that the petition may be denied or an approval revoked if USCIS is unable to verify facts related to the adjudication of the petition and compliance with H-1B petition requirements. Consistent with the language of the regulation, USCIS officers will limit their review to pertinent information, which includes information that was provided by the petitioner, is material to eligibility, or is needed to make a determination on continued compliance with the terms and conditions of the petition. DHS likewise declines to add "substantial" to this language because DHS is interested in the petitioner's continued compliance with all conditions and requirements of the H-1B petition.

DHS also declines to amend 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(2). The grounds of denial and revocation regarding inaccurate statements work in conjunction with the certifications on the petition, H-1B registration, temporary labor certification, and labor condition application, which all require the petitioner or employer to certify that the information contained in those submissions is true and accurate. Inaccuracies in these submissions that may not by themselves be material to eligibility can raise doubts as to the accuracy and veracity of the overall submission. Such inaccuracies would also violate the certifications signed by the petitioner or employer. As such, inaccurate information and statements made as part of these submissions, which are required precursors to or part of the petition filing, may be a sufficient ground for denial or revocation of an approved petition. These provisions are intended to enhance program integrity, and DHS believes that amending them as suggested by commenters would introduce ambiguity and narrow their application in a manner that would contradict their purpose. Therefore, USCIS will retain the text of 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(2) as it was finalized in "Improving the H-1B Registration Selection Process and Program Integrity," 89 FR 7456 (Feb. 2, 2024).

Comment: Multiple commenters asked USCIS to provide notice to an employer or their attorney of record

prior to a site visit. Several commenters requested that company representatives be present during and facilitate H-1B beneficiary interviews with USCIS, with a trade association remarking that this would deter scams. A couple of these commenters, including an advocacy group and a company, noted that the employer's presence could be at the employee's request.

Response: USCIS site visits are intended to be an unrehearsed view of an employer's business and the beneficiary's work. As such, DHS will not require that notice be given to employers or representatives prior to any site visit. DHS likewise declines to require that employer representatives be present at the interview of beneficiaries or other individuals with pertinent facts. However, any individual being interviewed by USCIS officers may request the presence of their employer or their representative. The employer or representative may join the visit in person, telephonically, or request that an interview be rescheduled.

DHS recognizes that workers providing information to USCIS officers during interviews can place the worker in a precarious position, but each individual will have their own preference as to whether or not to have their employer or representative present. USCIS will not ignore the individual's preference or request that the employer or their legal representative be present.

Comment: A joint submission of attorneys commented that language in the NPRM noting that the presence of employers at inspection interviews can induce a chilling effect on H-1B employees is misplaced, as unannounced government inspections are more likely to induce such a chilling effect in employees. The joint submission further expressed concern that while the NPRM included language allowing such interviews to be conducted "at a neutral location agreed to by the interviewee and USCIS away from the employer's property," the stress associated with potential visa revocation reduces a worker's comfort with voicing their true preference.

Response: DHS disagrees with the commenters' assertions. Providing an employee the option to speak without the employer or employer's representative is important to ensuring the employee feels free to discuss concerns with USCIS. For example, an H-1B beneficiary who is not being paid the required wage by the petitioner may be more comfortable discussing this outside the presence of the employer. Although DHS appreciates that participating in site visit interviews can

be stressful for beneficiaries, allowing each individual the choice of whether to be interviewed either with or without their employer present allows individuals to participate in the interview at their greatest possible comfort level. DHS cannot presume to know each individual's preference.

DHS understands that interviews by government officials can be an intimidating experience and that the outcome could impact the interviewees' immigration status. Interviews may also provide H-1B beneficiaries with an avenue to report fraud and abuse by unscrupulous employers, which is harmful to U.S. workers and H-1B beneficiaries. The proposed rule balances DHS's interest in maintaining the integrity of the H-1B program with interests of the petitioners and beneficiaries.

Comment: Several commenters expressed concern with the proposed provision to expand site visits to employees' homes. While expressing support for USCIS' authority to conduct site visits to maintain the integrity of the H-1B program, multiple commenters urged USCIS to state that site visits would happen at the workplace or another location whenever possible, even for remotely working beneficiaries, but not at an employee's residence, due to safety and privacy concerns. A few of these commenters, including a business association, a joint submission and a trade association, stated that workers should be able to decline site visits at their home without it resulting in an adverse determination. The commenters provided sample language recommendations on the subject for incorporation into the final rule.

A company expressed opposition to conducting site visits at worker residences without the support of the employer, stating that pertinent information such as duties, working conditions, wages, and qualifications can be verified at a company facility, while an employee's language, culture, or personal barriers may hinder efforts to glean compliance information at the employee's home and potentially lead to an unfair "refusal to comply" finding. A couple of companies urged USCIS to limit site visits to the workplace to reduce the risk of scams on H-1B beneficiaries. An individual commenter stated that site visits at employee residences would be an additional burden on employees.

Several commenters stated that if site visits must occur at a beneficiary's home, workers should receive significant prior notice. A professional association added that beneficiaries should receive the option of a pre-

arranged live video interaction rather than being required to allow government representatives to enter their home. An advocacy group similarly remarked that employees should be able to coordinate the "timing, location and manner" of an interview.

An attorney suggested that the proposed provision could have a chilling effect on H-1B workers, as they may forgo remote work opportunities due to privacy concerns regarding home visits. The attorney therefore recommended that USCIS clarify if a site visit to a home office would require access beyond the physical workspace or the company-issued computer.

Response: DHS declines to add a requirement that employees be given notice prior to a site visit at their residence. As noted, the purpose of a site visit is to verify the information that was provided in the petition with review of an accurate and unrehearsed view of the work being performed. As such, site visits are generally unannounced. DHS further declines to otherwise restrict the ability of USCIS officers to visit and interview employees at their assigned work location, including if it is the employee's residence. To do otherwise would create a loophole wherein any petitioner may exempt themselves from their evidentiary burden simply by locating workers at their residences. DHS appreciates the additional considerations that individuals might have when granting access to their home, but DHS finds that the ability to visit and interview at work sites is so integral to ensuring the integrity of the H-1B program, that it outweighs those considerations. Additionally, DHS notes that USCIS officers currently routinely visit individuals' residences in compliance visits for H-1B and a variety of other benefit requests, and as such, this is not a new activity for USCIS. As noted above, any time USCIS officers conduct a site visit or interview, the officers will request the individuals' permission to undertake the visit and interview, and if the individual is represented and wishes to have their representative present, they may ask their representative to join telephonically or reschedule the visit at a later time. USCIS officers also carry official identification which they will display to those being interviewed, regardless of where the interview is being conducted. If a beneficiary is unsure of the authenticity of the identification or whether the officer is acting in their official capacity, FDNS officers can provide supervisory contact information to verify their identities and

official nature of the inquiry. With regards to the areas of a residence that might be accessed, USCIS officers would need only to access the work area and any portion of the residence that must be accessed to reach the work area.

Comment: Several commenters, remarking specifically on third party facilities and records, stated that a third party employee's refusal or failure to speak with FDNS officers, grant them access to facilities, lead them to the correct worker, or permit them to review records, should not lead to a finding of noncompliance for the petitioner as petitioners are not responsible for third party actions. The company and a law firm added that inaccurate adverse findings from such situations can lead to significant consequences for businesses, and DHS should notify petitioners ahead of third party site visits so that petitioners can facilitate cooperation. The advocacy group expressed concern that this would have repercussions for H-1B visa holders, who could have their visa revoked due to third party noncompliance. Similarly, a couple of commenters urged USCIS to notify petitioners of planned visits to third party work locations, in the event that the third party does not communicate to the petitioner that a site visit occurred. Additionally, a law firm said that the third-party placement provision could create at least two difficulties for both the FDNS officer and the service provider in the case of site visits, including that the receptionist for the building owned by the end-client may have no knowledge of the presence of a contractor employee who is working remotely most of the time and that the service provider has no control over who the end-client may grant access to its premises. The end-client receptionist may deny admission to the FDNS officer. The commenter recommended that in this case, the FDNS officer should not automatically infer that the petition is fraudulent. A joint submission urged USCIS to protect petitioners and beneficiaries with regard to third party placements, such that findings regarding unaffiliated on-site H-1B beneficiaries employed by a third party do not impact the petitioner or beneficiaries that are not the subject of the visit. A trade association remarked that the proposed provision could be invoked unfairly, as requiring third parties to provide evidence in support of another employer's petition could be used to "argue a joint-employer relationship exists," even when one does not. An advocacy group expressed concern towards employees at third party sites being asked to share sensitive

information about individuals that are not their direct employees, adding that it is unreasonable to impose this potential liability on them.

Response: As noted in the NPRM, DHS is clarifying that an inspection may take place at the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including the beneficiary's home, or third-party worksites, as applicable. 88 FR 72870, 72907 (Oct. 23, 2023). DHS's ability to inspect various locations is critical because the purpose of a site inspection is to confirm information related to the petition, and any one of these locations may have information relevant to a given petition that cannot be ascertained by only visiting the petitioner's headquarters. The work performed by the beneficiary is a key element of H-1B eligibility and as such, the worksite is pertinent. There is no requirement that a petitioner place the beneficiary at a third-party location; however, if a petitioner chooses to petition for a beneficiary that is placed at a third-party location, it remains the petitioner's burden to demonstrate eligibility, meet all requirements of the H-1B petition, and employ the H-1B worker consistent with the terms of the approved petition. To allow otherwise would create an exemption wherein placing a beneficiary at a third party would allow a petitioner to circumvent the requirements of the H-1B program by rendering the beneficiary outside the scope of the compliance review process. The language of this rule makes clear the responsibilities of both the petitioner and any third-party client and such transparency will allow all parties to make decisions regarding their level of cooperation with full knowledge of the potential implications of a lack of cooperation.

As previously noted, the purpose of a site visit is to observe an unrehearsed version of the beneficiary's work, the petitioner's organization, and the operations of a third-party, if applicable. As such, site visits are generally unannounced and DHS declines to add a requirement to notify petitioners before third-party sites are visited. However, petitioners can inform third-party clients of the possibility of a site visit for any H-1B worker that is placed at a third-party location, so that the third-party client can be prepared for how to handle a visit and cooperate during the visit. Moreover, the petitioner will be given notice of any deficiency identified before USCIS takes any adjudicative action based on the results of a site visit to a third-party location. Further, if USCIS is unable to

verify pertinent facts to confirm eligibility and compliance with the terms and conditions of the H-1B petition, including due to noncooperation at a third-party work site, USCIS may consider those findings beyond the petition that was subject to the site visit, if those findings call into question whether other petitions that list the same worksite demonstrate eligibility and continued compliance. However, as noted, USCIS generally will not take any adjudicative action based on site visit findings on any petition without providing the petitioner with notice and the opportunity to rebut the findings.

Regarding concerns that cooperation during a site visit at a third-party site could render the third party to assume some liability or be considered a joint employer, DHS notes that USCIS currently undertakes site visits at third party locations and the commenters have provided no evidence that such a problem exists under the current site visit process. This rule is not increasing or changing the parameters of site visits, but rather is adding transparency about the potential consequences of non-cooperation if USCIS is unable to verify pertinent facts about the petition. It is unclear how cooperation with a USCIS site visit, including providing information about a beneficiary's work for a third-party client, would create a joint employer relationship where one does not already exist under applicable laws. Likewise, it is unclear how providing information concerning a beneficiary that is placed at a third-party worksite would indicate that the third-party client was assuming any liability beyond what exists currently in the business relationship with the petitioner, and the commenter does not elaborate or provide any examples of such a concern. If third-party clients or petitioners are concerned about such liability, this rule provides the transparency for what both parties can expect with regards to site visits and consequences, and petitioners and third-party clients are welcome to utilize this information to structure their relationships in a way that would alleviate these concerns.

Comment: A few organizations stated that audit and enforcement powers for the H-1B program should lie with DOL; a research organization supported the need for site visits, citing statistics on fraud uncovered in FDNS inspections, but clarified that an agency focused on labor standards should conduct them. A few commenters expressed that the site visit provision oversteps USCIS' authority, writing that site visits or inspections should fall within the

purview of Immigration and Customs Enforcement (ICE). Similarly, a research organization urged DHS to rescind its policy memorandum *Guidelines for Enforcement Actions in or Near Protected Areas*, stating that no "robust worksite enforcement" can take place while ICE is constrained by that memo.

Response: DHS disagrees with commenters who claim that H-1B site visits should be conducted only by DOL. Both USCIS and DOL have important roles to play in the oversight of the H-1B program. USCIS officers conduct verification and compliance reviews, including on-site verifications to ensure eligibility for petition approval and compliance with the terms and conditions of the H-1B petition filed with USCIS. The focus of these reviews is on information that is needed by USCIS to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-1B program. Such information goes beyond the labor standards overseen and enforced by DOL. The occurrence of a review by another agency does not absolve the employer of its responsibility to cooperate with USCIS verification and compliance reviews, including on-site inspections. It remains the petitioner's burden to demonstrate eligibility for the benefit sought.¹⁵³

DHS further disagrees with the assertion that conducting site visits oversteps USCIS' authority and that such visits should be conducted by ICE. As noted in the NPRM, USCIS has the authority to conduct site visits under INA sections 103(a), 214(a), 235(d)(3), and 287(b), 8 U.S.C. 1103(a), 1184(a), 1225(d)(3) and 1357(b); sections 402, 428, and 451(a)(3) of the HSA, 6 U.S.C. 202, 236, and 271(a)(3); and 8 CFR 2.1. As noted in the NPRM, USCIS has the authority to conduct site visits under INA sections 103(a), 214(a), 235(d)(3), and 287(b), 8 U.S.C. 1103(a), 1184(a), 1225(d)(3) and 1357(b); sections 402, 428, and 451(a)(3) of the HSA, 6 U.S.C. 202, 236, and 271(a)(3); and 8 CFR 2.1. 88 FR 72870, 72906 (Oct. 23, 2023). USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that the petitioner is in compliance with all laws

¹⁵³ See INA sec. 291, 8 U.S.C. 1361; *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 549 (AAO 2015) ("It is the petitioner's burden to establish eligibility for the immigration benefit sought."); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012) ("In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.").

before and after approval of such benefits. Importantly, USCIS inspections, verifications, and compliance reviews are not enforcement actions, but are rather conducted for the purpose of information gathering to ensure that entities remain in compliance with the terms and conditions of the H–1B petition that was filed with USCIS.

Regarding the mentioned policy memorandum, USCIS does not anticipate that the requirements of that memorandum would interfere with the activities of USCIS officers conducting on-site inspections in a way that would limit their ability to interview pertinent individuals. To the extent that the commenter is discussing only the impact of the memo on ICE, that is outside the scope of this rule.

Comment: A few commenters stated that the site visit provision and the possibility of arriving at an adverse determination following a site visit denies petitioners and beneficiaries due process under the law. A joint submission of attorneys further clarified that authorizing site inspections without the presence of the employer or their representatives violates employees' due process rights.

Response: As noted above, any represented individual may request that their legal representative be present during an interview. This could be accomplished by the representative joining the interview in person or telephonically or requesting to have the interview rescheduled to a later time when the representative could be present. Furthermore, as previously stated, no denial or revocation for USCIS' inability to verify pertinent facts from a site visit would occur without the petitioner first being given notice of USCIS' finding of noncompliance and an opportunity to rebut such a finding in compliance with 8 CFR 103.2(b)(16). Furthermore, as previously stated, no denial or revocation for USCIS' inability to verify pertinent facts from a site visit would occur without the petitioner first being given notice of USCIS' finding of noncompliance and an opportunity to rebut such a finding in compliance with 8 CFR 103.2(b)(16).

Comment: A few commenters expressed concern that the proposed site visit provision is unlawful under the Homeland Security Act of 2002 (HSA), writing that the HSA authorizes USCIS for adjudicative functions only and not investigative or interrogative functions. The commenters also remarked that the NPRM also violates E.O. 12988, as the site visit provision does not minimize litigation, provide a clear legal standard, or reduce burdens.

The joint submission of attorneys added that INA sec. 235(d)(3) does not authorize USCIS to conduct site visits, but rather “to ‘administer oaths . . . and consider evidence of or from any person’” without an administrative subpoena; the commenters also noted that in the case of neglect or refusal to respond to a subpoena during a site visit, the correct course of action is to involve any court of the United States.

Response: As discussed in detail above, DHS disagrees with commenters' assertion that it lacks legal authority to conduct on-site inspections through the USCIS Fraud Detection and National Security (FDNS) Directorate. The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. The Secretary of Homeland Security is authorized to administer and enforce the immigration laws. INA sec. 103(a); 8 U.S.C. 1103(a).¹⁵⁴ USCIS also has the “authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357 and under 235(d) of the INA, 8 U.S.C. 1225(d).”¹⁵⁵ Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines “immigration officer” to include a broad range of DHS employees including immigration agents, immigration inspectors, immigration officers, immigration services officers, investigators, investigative assistants, etc. As duly appointed immigration officers, FDNS officers may question noncitizens based on the authority delegated by the Secretary of Homeland Security. Furthermore, 8 CFR 287.8 specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question anyone so long as they do not restrain the freedom of the person they are questioning.

The Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are “especially important pieces of evidence.”¹⁵⁶ These

investigations and reports that result from them help ensure that *adjudicative* decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.¹⁵⁷

14. Third-Party Placement (Codifying Policy Based on *Defensor v. Meissner* (5th Cir. 2000))

Comment: Numerous commenters voiced general support for the third-party placement provision on the grounds that it would increase accountability, decrease fraud, and protect American workers. An advocacy group voiced support for DHS's efforts to reduce fraud in the H–1B program and to “ensure that petitioners are not circumventing specialty occupation requirements,” by making it clear that the work an individual performs for a third party must be in a specialty occupation and that the work for the third party is subject to the same oversight as direct employers. An individual commenter stated that USCIS should “tie the requirements to the end client.” A research organization also voiced support for considering the “third-party job” as the relevant job for “specialty occupation” determination.

An attorney writing as part of a form letter campaign cited *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), and the example provided in the NPRM describing an employee who is placed full time by the petitioner in a third party organization, rather than merely providing a service to the third party on behalf of the petitioner. The attorney said that in such a scenario, it is reasonable to rely on the third party's requirements for the position and to require petitioners to include information about the third party's requirements. The campaign supported the third-party placement provision as consistent with the adjudication of H–1B petitions that involve placement of an employee at a third party for a substantial part of their employment following *Defensor*.

Response: DHS agrees with the commenters that this provision will help clarify H–1B eligibility requirements and maintain H–1B program integrity, specifically by ensuring that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. In

¹⁵⁴ Additionally, pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law.

¹⁵⁵ See Delegation 0150.1(II)(S).

¹⁵⁶ *Matter of P. Singh*, 27 I&N Dec. 598, 609 (BIA 2019).

¹⁵⁷ *Mestanek v. Jaddou*, 93 F.4th 164, 172 (4th Cir. 2024) (holding in the context of marriage fraud in the I–130 immigrant petition context that “[i]n allocating USCIS a set of nonexhaustive functions, Congress did not intend to hamstring USCIS's ability to fulfill the statutory mandate to investigate cases before adjudicating them.”).

Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000), the court recognized that, if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H-1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. Therefore, DHS agrees that, at times, it is reasonable to rely on the third party's minimum requirements rather than those of the employer responsible for placement.

Comment: A couple of individual commenters voiced general opposition to the provision, stating "USCIS seeks to eliminate staffing companies from the (H-1B) visa category."

Response: DHS disagrees that the third-party placement provision will eliminate staffing companies from the H-1B visa program. As stated in the NPRM, the third-party placement provisions are consistent with longstanding USCIS practices and are intended to clarify that, where a beneficiary is staffed to a third party, USCIS will look to that third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. 88 FR 72870, 72908 (Oct. 23, 2023). This will help ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. The rule does not prohibit staffing companies, or other third-party arrangements, from participating in the H-1B program. Rather, the rule clarifies the circumstances under which it is reasonable for USCIS to consider the requirements of the third party as determinative of whether the position is a specialty occupation.

Comment: Several commenters called the third-party placement provision confusing for petitioners and adjudicators and said that it creates the risk of arbitrary and inconsistent enforcement, with higher rates of RFEs and NOIDs. The commenters said that the "staffing" versus "providing services" distinction is novel and lacks foundation in law and historical practice. The commenters, along with an advocacy group and a trade association stated that the distinction between "staffing" and "providing services" could easily be misinterpreted by adjudicators such that every time an H-1B professional is placed at a third-party company, the adjudicator would

want to look at what is required for similar roles at that company. Several of these commenters said, for example, that adjudicators might mistakenly conclude that the third party does not normally require a degree or its equivalent for the beneficiary's position simply because it does not require so from less-skilled employees within its own workforce, relying on foreign talent on H-1B visas to satisfy its needs for higher-skilled labor. The advocacy group voiced concern that the provision would require IT services companies to prove they provide services and not "staffing," given the significant distinction in requirements proposed for the two types of firms. Another law firm voiced concern that the binary distinction between an H-1B "service provider" versus a "staffed worker" who becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, with the commenter saying that, in practice, H-1B workers are integrated in the end-client's organizational hierarchy on a "continuum."

Response: DHS disagrees that the provision "lacks foundation in law or historical practice." As stated in the NPRM, this provision is generally consistent with longstanding USCIS practice and is also consistent with the decision in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). 88 FR 72870, 72909 (Oct. 23, 2023). This provision is consistent with the statute and relevant to determining whether the beneficiary will be employed in a specialty occupation.

DHS also disagrees that the distinction in new 8 CFR 214.2(h)(4)(i)(B)(3) between a beneficiary being staffed to a third party and providing services to a party is unclear or that it will lead to inconsistent adjudications. As explained in the NPRM, a beneficiary who is "staffed" to a third party becomes part of that third party's organizational hierarchy by filling a position in that hierarchy, even when the beneficiary technically remains an employee of the petitioner. 88 FR 72870, 72908 (Oct. 23, 2023). By contrast, DHS explained that, for example, a beneficiary would be providing services to a third-party where they were providing software development services to that party as part of the petitioner's team of software developers on a discrete project, or where they were employed by a large accounting firm providing accounting services to various third-party clients. In these examples, the beneficiary is not "staffed" to the third-party because the third-party does not have employees within its

organizational hierarchy performing those duties in the normal course of its business and does not have a regular, ongoing need for the work to be performed. USCIS will make the determination as to whether the beneficiary would be "staffed" to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances. As is consistent with current practice, USCIS will review documentation in the petition including the petitioner's description of the services to be provided to determine if there are indications that a beneficiary is filling an otherwise permanent position at the third-party rather than simply providing services or work on a discrete project for that third party. In USCIS's experience, it is rare that a beneficiary is staffed to a third party rather than providing services for them.

Comment: A trade association voiced concern over the case-by-case approach and the limited examples provided to determine whether a beneficiary is "staffed" to a third party which the commenter said leaves ambiguity and makes it challenging to predict how USCIS will treat a particular scenario and what documentation would be necessary to establish that a beneficiary is not "staffed." The commenter said that in the current business environment, companies often outsource tasks without integrating external service providers into their organizational structure, and the dynamics of collaboration and separation of roles are often not explicitly detailed in the contracts governing the relationship between entities. The commenter said that in such a scenario, it is unclear how USCIS would distinguish between staffing arrangements and the provision of services, placing an excessive burden not only on employers but also on USCIS in the form of increased RFEs.

Response: DHS disagrees with the commenters. USCIS will assess and weigh all relevant aspects of the relationships between the different entities receiving the beneficiary's services. If the beneficiary will work for a third party and become part of that third party's organizational hierarchy by filling a position in that hierarchy, the beneficiary will be considered "staffed" to the third party. In this scenario, the actual work to be performed by the beneficiary must be in a specialty occupation based on the requirements of the third party. Alternatively, in a scenario where a beneficiary provides services to various third-party clients on discrete projects or is merely providing services to various third-party clients without becoming a part of a third

party's regular operations, the third-party provision would not apply.

DHS does not anticipate an increase in RFEs since this provision is consistent with long-standing USCIS practice. In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), the court recognized that, if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H-1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. This result would be the opposite of the plain purpose of the statute and regulations, which is to limit H-1B visas to positions that require specialized education to perform the duties.

Comment: A joint submission stated that the reference to third-party staffing arrangements and their job descriptions is not legally relevant to a petition to employ a specialty occupation worker. The commenters said that a "bedrock principle" of the H-1B program is that the merits of a petition should be considered based on the circumstances of the specific job offer that is extended to the beneficiary in that petition and that the placement of a worker at a third-party location is not directly connected or correlated to that third-party's hiring practices. The commenters stated that businesses purchase professional services from other businesses specifically because they are unable to perform such services internally, citing the example, among others, of a thoracic surgeon performing ambulatory surgeries for a sister hospital where that specialty does not exist. The commenters said that there is no need for a reference to a specific third-party's job descriptions as they are unlikely to be related to the facts of the petition, adding that such a reference would confuse adjudicating officers and result in inconsistent adjudications that are unsupported by the statutory guidelines.

Response: DHS disagrees with the comment that "third-party staffing arrangements and their job descriptions are not legally relevant to a petitioner's filing to employ a specialty occupation worker." However, DHS agrees that "the merits of a petition should be considered based on the circumstances of the specific job offer." For purposes of clarification, DHS has provided an explanation of the difference between a petitioner who provides services in a specialty occupation to a third party and a petitioner who provides staffing to a third party where the beneficiary will become part of that third party's

organizational hierarchy by filling a position in that hierarchy. DHS defines "staffed" to mean that the beneficiary would be contracted to fill a position in the third party's organization. Using the commenter's example, where a thoracic surgeon performs ambulatory surgery services for a sister hospital, USCIS generally would not consider the requirements of the third-party sister hospital as determinative of whether the position is a specialty occupation, provided that there is no vacant permanent position for an ambulatory surgeon in the third party's organization, the beneficiary's services are specialized, individualized, or otherwise outside the normal operations of the sister hospital, or the beneficiary is not considered to be filling a position in the third party's organization.

Comment: A company stated that it is unclear how DHS would determine whether a beneficiary has become "part of the third party's organizational hierarchy" and what specific indicators would be used to make this determination, other than to assert that it would take into consideration "the totality of the relevant circumstances," and that it is unknown whether DHS plans to consider the source of pay, employee benefits, work equipment, work schedules, and work location for the contract worker. The commenter said that it appears that DHS plans to focus primarily on supervisory and reporting relationships within the third-party organizational hierarchy and consequently, would not be able to distinguish staffing from contract service positions.

The joint submission said that there is no clear explanation in the preamble or the proposed regulatory language of what "filling a position" in the organizational hierarchy of a client means or what parameters apply, voicing concern that it is not clear how USCIS would ensure that adjudicators flesh out the distinction between a staffing arrangement and the provision of services consistently to determine which party should be called upon to state the degree requirements.

Response: DHS acknowledges that there are differences between staffing companies and corporate entities with which another entity has engaged for the delivery of specialty occupation services. To provide additional clarity, USCIS considers factors such as the nature of the petitioning entity's and receiving third party's normal business activities, the general services provided by the involved parties, the work that the beneficiary will perform, and the organizational structure of the petitioning entity and receiving third

party.¹⁵⁸ This does not generally include analyzing the source of pay, employee benefits, work equipment, work schedules, and work location for the contract worker. Rather, USCIS would typically consider evidence such as master services agreements, statements of work, letters from end clients, organizational charts, staffing descriptions, and company descriptions to determine if the beneficiary will become part of that third party's organizational hierarchy by filling a position in that hierarchy.

For example, an IT consulting company specializes in software development and has been contracted to provide services to a third-party real estate company to develop a software program that meets the real estate company's specific needs. In assessing whether the position qualifies as a specialty occupation, although the petitioning entity will provide services to a third party, it would not be reasonable to look to the real estate agency's (third party's) degree requirements as determinative of whether the work to be performed will be a specialty occupation. The petitioning IT consulting company normally offers software development services, and the real estate agency's normal business hierarchy does not include software developers. In this scenario, because the beneficiary will perform services in software development, not real estate, USCIS would look to the petitioner's degree requirements as determinative of whether the work to be performed at the real estate agency will be a specialty occupation.

In another example, the AAO has found that where an end-client is familiar with and normally employs personnel in the proffered position (e.g., the client needs supplemental contracted personnel to augment their regular staff), the client likely possesses the knowledge of what duties the beneficiary would engage in, and the requirements in which to perform those responsibilities.¹⁵⁹ This is a scenario in which the duties and the qualifications to perform in the proffered position as required by the third party entity where the beneficiary would actually perform their work would be controlling. In such

¹⁵⁸ See, e.g., *In re 31014012*, 2024 WL 3667879, at *2 (AAO May 6, 2024) ("The nature of a petitioner's business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. See *Defensor*, 201 F.3d 384.").

¹⁵⁹ *In re 5037859*, 2019 WL 6827396 (AAO Nov. 7, 2019).

a case, USCIS may request additional evidence to determine the requirements for the position and to confirm whether the beneficiary will be staffed to the end client such that the end-client's requirements would control.

Comment: A couple of commenters said that the proposed third-party placement provision would lead to administrative burdens for petitioning employers and their clients, with a trade association and a law firm stating that it would be difficult for the sponsoring employer to obtain such documentation from a client. One of the individual commenters, along with a business association, also stated that the provision would be arbitrary and capricious because it disregards established departmental policy without explanation and lacks evidentiary support. The individual commenter specifically cited text from a 1995 Policy Memo: "The submission of [contracts between the employer and the alien work site] should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation" and "[t]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts." The commenter said that under the proposed rule—and unlike the *Defensor*-based scheme—adjudicators would be required to decide in every case involving third-party placements whether the beneficiary would be "staffed" to or merely "provide services" to a third party, contradicting the 1995 Policy Memo. The commenter, along with a law firm, said that the provision would also be arbitrary and capricious due to lacking adequate justification. The commenter, along with the business association said that DHS's concern that petitioners are circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party is "rank speculation." The commenters added that DHS "offers no explanation" as to why it is concerned that some employers might "impos[e] token requirements" and fails to justify the burden this provision would impose on all contractors who utilize the H-1B visa program and their clients.

Response: DHS disagrees that the third-party placement provision would lead to administrative burdens for petitioning employers and their clients. Petitioners should be able to provide evidence of the third party's requirements for the beneficiary's

position through documents that are generated in the normal course of the relationship (e.g., a Master Services Agreement or statement of work) or are reasonably obtainable from the third party (e.g., a letter from the client). Documents showing the third party's requirements for the position will only be necessary in cases where the beneficiary is being staffed to the third party. DHS also disagrees that the third-party provision is "arbitrary and capricious" and that it disregards established departmental policy without explanation. To the contrary, this provision is consistent with longstanding USCIS practice.¹⁶⁰ Further, in *Defensor v. Meissner*,¹⁶¹ the Fifth Circuit Court of Appeals recognized that if only the petitioner's requirements are considered, then any beneficiary with a bachelor's degree could be brought to the United States in H-1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. In the instance of an employer imposing token degree requirements on its employees while having no valid reason, a degree requirement alone is insufficient to establish that the beneficiary will be employed in a specialty occupation. Instead, USCIS must look to the duties that the beneficiary will perform, and the requirements of the end-client to which the beneficiary is being staffed, as relevant and determinative as to whether the beneficiary's position will be in a specialty occupation.

DHS notes that the November 13, 1995 memorandum referenced by the commenter, entitled "Supporting Documentation for H-1B Petitions," was rescinded by the 2018 memorandum "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."¹⁶² Although the 2018

¹⁶⁰ See, e.g., *In re 5037859*, 2019 WL 6827396 (AAO Nov. 7, 2019) ("The scenario in *Defensor* has repeatedly been recognized by Federal Courts as appropriate in determining which entity should provide the requirements of an H-1B position and the actual duties a beneficiary would perform.") (citing *Altimetrik Corp. v. USCIS*, No. 2:18-cv-11754, at *7 (E.D. Mich. Aug. 21, 2019); *Valorem Consulting Grp. v. USCIS*, No. 13-1209-CV-W-ODS, at *6 (W.D. Mo. Jan. 15, 2015); *KPK Techs. v. Cuccinelli*, No. 19-10342, at *10 (E.D. Mich. Sep. 16, 2019); *Altimetrik Corp. v. Cissna*, No. 18-10116, at *11 (E.D. Mich. Dec. 17, 2018); and *Sagarwala v. Cissna*, No. CV 18-2860 (RC), 2019 WL 3084309, at *9 (D.D.C. July 15, 2019)).

¹⁶¹ See *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

¹⁶² USCIS, Policy Memorandum PM-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (Feb. 22, 2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157>

memorandum was itself rescinded by the "Rescission of Policy Memoranda" memorandum published on June 17, 2020,¹⁶³ that memorandum did not reinstate the 1995 memoranda.

Comment: A trade association stated that the provision would create confusion among adjudicators and would prompt extensive and burdensome RFEs and NOIDs, increasing inefficiency and unnecessary expense for employers and USCIS. The commenter said that the level of discretion left to adjudicators in determining whether an H-1B worker has been staffed or is merely a service provider creates a high risk that the third-party placement provision would be applied to placements that do not involve staff augmentation, causing employment bottlenecks for U.S. companies and leaving work unfulfilled. The commenter said that third-party companies rely on H-1B workers to perform high-skilled information technology services that their existing workforces cannot provide. The commenter said that the high cost and risk created by the proposal ignores business realities and fails to account for the difficulty petitioners would have in obtaining cooperation from end-clients who have little to no experience with the H-1B process, and adding that the new end-client validation requirements are inconsistent with the principles of H-1B sponsorship which requires the petitioner to makes attestations of the specialty occupation role under penalty of perjury, not the end client. The commenter stated that the LCA along with the information and documentation provided by the petitioning employer should be sufficient.

Response: DHS disagrees that this provision will cause confusion among adjudicators, resulting in unnecessary RFEs and the misapplication of this provision. Adjudicators are accustomed to reviewing the duties of a proposed position in conjunction with the nature of the petitioning entity's business practices, including additional information relating to any relevant third parties. This provision is not a change, but rather codifies longstanding practice with respect to determining eligibility in cases involving third-party placement.

DHS also disagrees that this provision is "inconsistent with the principles of H-1B sponsorship." It has always been

Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

¹⁶³ USCIS, Policy Memorandum PM-602-0114, Rescission of Policy Memoranda (June 17, 2020), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf.

the petitioner's burden to establish eligibility for the benefit sought. As the commenter states, "it is the petitioning employer that makes attestations of the specialty occupation role under penalty of perjury." Therefore, it is not evident how a petitioner can attest to or certify that a position will be a specialty occupation or comply with DOL labor condition application requirements if the beneficiary will essentially become part of another entity's organization and that third party entity is unwilling or unable to provide specific information about the minimum requirements for the position that the beneficiary will be staffed to fill. Moreover, most petitioners should be able to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (e.g., a master services agreement or statement of work) or are reasonably obtainable from the third party (e.g., a letter from the end client).

Comment: An individual commenter said that the third-party placement provision represents a "major change" in the way that USCIS deals with third-party placements and that the provision is singling out staffing companies. The commenter stated that the provision for staffing companies to prove job requirements would place the staffing company in an impossible position if the end customer is unwilling to provide the necessary information. The commenter also noted that there may be difficulty in obtaining necessary documents where there are second and third level staffing companies in between the petitioner and the end customer. The commenter added that end customers may "want no involvement" with attesting to the requirements for the positions, stating that these end customers have concerns over joint employment liability. The commenter also expressed concerns with respect to petitioners providing fraudulent documentation when documentation from a third party cannot be obtained.

Response: DHS disagrees that this provision will prevent staffing companies from establishing eligibility for H-1B specialty occupation workers. Further, if the petitioner seeks to staff the beneficiary to a third party but is unable to demonstrate the type of work the beneficiary will perform for the third party, it is unclear how the petitioner would be able to establish eligibility for the H-1B petition. Again, it remains the petitioner's burden to establish eligibility for the benefit sought. Petitioners should be able to provide evidence of the third party's

requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (e.g., a master services agreement or statement of work) or are reasonably obtainable from the third party (e.g., a letter from the client). Further, DHS clarifies that this rule does not address joint employment liability and this is not relevant to USCIS's determination for H-1B specialty occupation employment. It is also unclear how providing evidence documenting the work to be performed and the requirements for the position would impact joint employment liability in other contexts any more so than the nature of the contracted work itself.

Comment: A trade association said that its members employ H-1B transfers and places them with end clients to complete project teams—referred to as "staff augmentation"—where multiple IT/engineering professionals, including H-1B workers, are placed with a client to complete a time sensitive, complex project. The commenter said that DHS is attempting to create a distinction where there is often no difference in the nature of the work being performed and added that there is no reason why U.S.-based IT staffing firms should be subject to different requirements than firms employing a different business model. The commenter said that the fundamental and only question should be whether the petitioner is performing work that satisfies the specialty occupation requirement. Similarly, a couple of individual commenters and a company stated that the proposed provision ignores the petitioning companies' long-term term need for particular skill sets and focuses exclusively on the end client's requirements for a short-term project when determining if a position is in a specialty occupation. A law firm said that the provision would be fundamentally incompatible with the IT consulting industry's business model, and that DHS's failure to acknowledge that the rule would upend the IT services industry and upset related reliance interests is arbitrary and capricious. The commenter said that the provision would have negative policy consequences for American businesses, inconsistent with the goals of fueling innovation in technology industries spaces and maintaining a globally premier workforce.

Response: DHS disagrees with the commenters' allegations that it is attempting to create a distinction where there is often no difference in the nature of the work being performed. There is a distinction between a beneficiary who

merely provides services to a third party, and a beneficiary who fills a position within a third party's organizational hierarchy. In the former scenario, the petitioner may be better positioned to know the actual degree requirements for the beneficiary's work, whereas in the latter scenario, the third party may be better positioned than the petitioner to be knowledgeable of the actual degree requirements for the beneficiary's work. Thus, in the latter scenario, it is reasonable for USCIS to consider the requirements of the third party as determinative of whether the position is a specialty occupation.

DHS also disagrees with the comments that this provision would be fundamentally incompatible with the IT consulting industry's business model. While IT staffing firms may have to provide additional evidence in some cases, they are still subject to the same fundamental requirement of demonstrating that the beneficiary will perform work in a specialty occupation. See INA sec. 101(a)(15)(H)(i), 8 U.S.C. 1101(a)(15)(H)(i). It is exactly for this reason why DHS is codifying the third-party provision to clarify the circumstances when USCIS will consider a third party's requirements. The third-party provision is intended to ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements that are not relevant or applicable to the proffered position. This provision will help preserve the intent and purpose of the H-1B statute and regulations, which is to limit H-1B visas to positions that require specialized education, or its equivalent, to perform the duties, and theoretical and practical application of a body of highly specialized knowledge.

DHS reiterates that the third-party provision does not eliminate the use of IT staffing companies in the H-1B program. As noted above, consistent with current practice, USCIS will review documentation in the petition to determine if there are indications that a beneficiary is filling an otherwise permanent position at the third-party rather than simply providing services or work on a discrete project for that third party. In USCIS's experience, it is rare that a beneficiary is staffed to the third party rather than providing services for them. If the beneficiary is staffed to a third party the petitioner would need to provide evidence of the third party's requirements for the beneficiary's position through documents that are generated in the normal course of the relationship (e.g., a master services agreement or statement of work) or are reasonably obtainable from the third

party (e.g., a letter from the client). Further, since this provision is consistent with longstanding USCIS practice, DHS does not believe there is a related reliance interest involved.

Comment: A trade association and a law firm said that USCIS' "reliance" in the NPRM on *Defensor* is "misplaced." According to the commenters, the *Defensor* court treated the client as a co-employer, whereas the H-1B regulations contemplate only the petitioner as the employer. The commenters said that as *Defensor* involved a staffing agency for nurses that contracted H-1B nurses to hospitals, there is a "critical distinction" between the nurses in *Defensor* and a software engineer providing services to the client rather than being staffed to the client. Similarly, a legal services provider said that *Defensor* involved an H-1B petitioner whose purported education requirement exceeded what was normal for the occupation in the industry at that time and exceeded what the third-party normally required, which the commenter said should be distinguished from a position where the employer's requirement is consistent with the normal requirements for the occupation. The commenter expressed concern that in all cases involving end-clients, USCIS will request evidence that the client normally requires a bachelor's degree, regardless of the position or the type of third-party relationship. The commenter said that *Defensor* is well-settled case law, and that proposed provision is unnecessary and likely to lead to more RFEs and thus more work for USCIS.

Response: DHS disagrees that USCIS' reliance in the NPRM on *Defensor* is misplaced. *Defensor* is settled case law and establishes guidelines regarding the educational requirements that are most relevant in assessing whether a position is a specialty occupation in a petition involving a third-party placement. The third-party provision is intended to codify and clarify the *Defensor* analysis so that it is clear such analysis will only apply in situations where the beneficiary will be contracted to fill a position in a third party's organization. Contrary to the commenter's claim, this provision will not apply to every petition involving an end-client and the agency will not always request evidence of the end client's requirements. This provision is intended to codify existing USCIS practice and DHS does not anticipate that it will increase RFEs. Consistent with current practice, USCIS will make the determination as to whether the beneficiary will be "staffed" to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances.

DHS acknowledges that the fact pattern in *Defensor* may be distinguishable from many other third-party placement scenarios, including those discussed above by the commenters. Nevertheless, reliance on *Defensor* is appropriate because this case illustrates the relevance of third-party requirements for the beneficiary's position, in addition to the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. The court explained that, if only the petitioner's requirements are considered, any beneficiary with a bachelor's degree could be brought to the United States in H-1B status to perform non-specialty occupation work, as long as that person's employment was arranged through an employment agency that required all staffed workers to have bachelor's degrees. *Defensor*, 201 F. 3d at 388.

Comment: A few commenters stated that the *Defensor* court's analysis that "it was not an abuse of discretion to interpret the statute and regulations so as to require [the staffing agency] to adduce evidence that the entities actually employing the nurses' services required the nurses to have degrees, which [the staffing agency] could not do" depended on its view that the hospital was a common-law "employer" under the regulations, which the commenters said was removed in the proposed rule. The commenters said that, unlike the adjudicators who have been relying on *Defensor* for more than two decades, the case offers no guidance on how USCIS should decide whether a consulting firm is "staffing" H-1B workers to third parties versus "providing their services," which the commenters said is an entirely different question from the existence of an employment relationship under common law. The individual commenter cited legal commentators who have "rightfully" asked whether USCIS would "understand the distinction between the nurse in *Defensor*, who filled an identical role as the hospital's own nursing staff, "and a software engineer providing services to the client rather than being staffed at the client."

Response: DHS disagrees that the proposed rule includes a new standard without adequate explanation. The requirement that the beneficiary is coming to work in a specialty occupation has been and continues to be the main consideration when making H-1B specialty occupation determinations. DHS looks to *Defensor* as relevant in certain circumstances where a beneficiary will be staffed to a

third party. In *Defensor*, the court found that the evidence of the client companies' job requirements is critical if the work is performed for entities other than the petitioner. However, simply being placed at a third party does not always make that third party's requirements determinative. DHS has provided examples in its NPRM and in this rule to help differentiate when a third party's requirements would be more relevant than the petitioner's.

Comment: A few individual commenters requested that USCIS grant H-1B visas only to direct employers and not staffing companies. Similarly, another individual commenter recommended that there not be any third-party placement allowed at all under the H-1B program. Another individual commenter requested that third-party employers be required to do paperwork similar to an LCA or an H-1B petition for accountability purposes.

Response: DHS declines to adopt the suggestion to prohibit staffing companies and employees placed at third party worksites from utilizing the H-1B program, or to subject third party employers to additional paperwork similar to an LCA. DHS is finalizing changes to improve the integrity of the H-1B program, applicable to staffing companies and other H-1B petitioners, such as codifying DHS's authority to conduct site visits and clarifying that refusal to comply with site visits may result in denial or revocation of the petition, codifying its authority to request contracts, requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date, ensuring that the LCA properly supports and corresponds with the petition, and revising the definition of "United States employer" and adding a requirement that the petitioner have a legal presence and be amenable to service of process in the United States. These changes combined address the integrity and fraud concerns raised by the commenters, and will help maintain accountability and insight into employer practices, specifically with respect to the H-1B program, by providing additional measures to identify noncompliance and detect and deter fraud within the H-1B program.

Comment: Several commenters urged DHS to remove the third-party placement provision, indicating that in most circumstances, the petitioning employer's requirements will govern H-1B adjudications. A couple of trade associations and a joint submission recommended that USCIS solicit further feedback from stakeholders on provisions relating to third-party

placement. The trade associations added that the provision, as written, would undermine other provisions in the proposed rule that seek to reduce government and private-sector burdens and bring clarity to the H-1B process. The trade associations added that the lack of clarity regarding the rules for adjudication for third-party employers would leave USCIS susceptible to legal challenges under the Administrative Procedure Act, incurring additional costs for the government and uncertainty for the public.

Response: DHS disagrees that the third-party provision undermines other provisions in this rule or elsewhere, or that the provision will interfere with reducing burdens for the government and private sector. Further, DHS declines to remove the third-party placement provisions or solicit further feedback on it. As explained in responses to other comments, this provision is generally consistent with long-standing USCIS practice and codifies current case law. In codifying this practice and providing numerous examples both in the NPRM and in the responses to comments above, DHS aims to provide additional clarity on this provision.

Comment: A law firm recommended that the adjective “educational” should precede the word “requirements” in the sentence within the proposed rule, requesting that DHS clarify that it is the third party’s requirements, not the petitioning employer’s requirements, that are most relevant if the beneficiary will be staffed to a third party. The commenter said that the third-party’s educational requirements for the position is reliable, while the third party’s experience and skill set requirements are “notoriously” unreliable. The commenter stated that it is a common practice for recruiters to describe the ideal or dream candidate while rarely describing their employers’ actual experience and skill set requirements for the position.

Response: DHS declines to adopt the commenter’s suggestion to add the word “education” before the word “requirements” in the regulatory text. The word “requirements” is intended to include requirements in addition to education, which may include experience or training relevant to the proffered position, and may be relevant in assessing eligibility, including whether the proffered position qualifies as a specialty occupation.

Comment: A law institute cited third-party placements of H-1B workers as a “common feature” in H-1B fraud, defeating the purpose of H-1B program as a means to provide labor when U.S.

workers are not available. The commenter stated that as long as DHS permits third-party placement of H-1B workers, DHS is not serious about reducing abuse in the H-1B program. Similarly, a union requested that staffing companies be barred from the H-1B program.

Response: As stated in the NPRM, the third-party placement provisions are consistent with longstanding USCIS practice and are intended to clarify that, where a beneficiary is staffed to a third party, USCIS will look to that third party’s requirements for the position, rather than the petitioner’s stated requirements, in assessing whether the proffered position qualifies as a specialty occupation. 88 FR 72870, 72908 (Oct. 23, 2023). This will help ensure that petitioners do not circumvent specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. DHS did not propose to eliminate third-party placement arrangements, and notes that such placements are permissible under the INA.¹⁶⁴ As explained throughout this rule, DHS is finalizing a number of provisions intended to enhance the integrity of the H-1B program including by (1) codifying its authority to request contracts; (2) requiring that the petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (3) ensuring that the LCA supports and properly corresponds with the petition; (4) revising the definition of “United States employer” by codifying the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States as of the requested start date and adding requirements of legal presence and amenability to service of process in the United States. Therefore, DHS declines to make changes in response to these comments.

15. Other Comments on Program Integrity and Alternatives

Comment: Several commenters generally discussed concerns related to misuse of the H-1B program and emphasized the need to uphold the integrity of the program. For example, a professional association noted unemployment rates for recent college graduates, and stated that the proposed rule revisions “do not set enforcement consequences should the [] business cut

corners to hire foreigners instead of Americans.” The commenter further stated that DHS “should focus on employing unemployed and underemployed Americans before employing non-citizens.” A union stated that DHS should unambiguously state that it is illegal to replace a U.S. worker with an H-1B guestworker under any circumstances, whether directly or through secondary displacement.

Response: DHS appreciates the commenters’ concerns about preserving the integrity of the H-1B program. With respect to the comments about recruiting or hiring U.S. workers before utilizing H-1B workers, DHS notes that the INA does not require a traditional labor market test for the H-1B program, and therefore, there is no specific requirement for a U.S. employer to first recruit U.S. workers before opting to hire H-1B workers instead of U.S. workers. Instead, Congress required U.S. employers seeking to utilize the H-1B program to obtain a certified LCA, attesting that the employment of H-1B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Further, Congress specifically subjected certain petitioners (H-1B dependent employers and willful violators) to additional attestations, including that they did not and will not displace a U.S. worker and that they have taken good faith steps to recruit U.S. workers in the United States before filing the LCA.¹⁶⁵

Comment: A joint submission recommended that USCIS clarify the requirement that the H-1B petition be non-frivolous. The commenters elaborated that “non-frivolous” should be defined consistently with the tolling provision of INA sec. 212(a)(9)(B)(iv) for foreign nationals who do not accrue unlawful presence after their Form I-94 expires if there is a timely filed, non-frivolous extension or change of status pending, or for H-1B portability when a non-frivolous H-1B change of employer petition is filed under INA sec. 214(n).

Response: The term “non-frivolous” is well-understood and currently exists within multiple regulations. See 8 CFR 214.2(h)(2)(i)(H)(1)(ii). DHS notes that

¹⁶⁴ See, e.g., INA sec. 212(n)(1)(F), 8 U.S.C. 1182(n)(1)(F) (prescribing certain requirements and obligations pertaining to non-displacement when an H-1B worker will be performing duties at the worksite of another employer).

¹⁶⁵ See INA sec. 212(n)(1)(E), (G), 8 U.S.C. 1182(n)(1)(E), (G). These attestation requirements apply only to H-1B dependent employers, as defined in INA section 212(n)(3), 8 U.S.C. 1182(n)(3). H-1B dependent employers are not subject to these additional requirements, however, if the only H-1B nonimmigrant workers sought in the LCA receive at least \$60,000 in annual wages or have attained a master’s or higher degree in a specialty related to the relevant employment. See INA sec. 212(n)(1)(E)(ii) and (n)(3)(B), 8 U.S.C. 1182(n)(1)(E)(ii) and (n)(3)(B).

the term “frivolous,” means that there is no arguable basis in law and fact, and believes this term is generally understood and sufficiently clear.¹⁶⁶ Therefore, DHS declines to separately define “non-frivolous” in this rule. USCIS will continue to review each filing on its own merits, on a case-by-case basis, according to the facts presented.

G. Request for Preliminary Public Input Related to Future Actions/Proposals

16. Use or Lose

Comment: An advocacy group recommended that beneficiaries be permitted a minimum 6-month timeframe after being issued an H-1B visa to enter the United States and begin working in accordance with the terms of such visa, with a provision for exceptions in compelling situations (e.g. family illness/death). Additionally, the commenter recommended providing students with 1 year due to the uncertainty surrounding finishing coursework and research. The commenter also recommended 6 months for local petitioners. A couple of companies urged DHS to structure any use or lose system such that unused H-1B numbers can be reassigned.

A few commenters, including associations and companies, recommended continued engagement with stakeholders to determine the best way to ensure that the limited number of H-1B cap-subject visas are used for bona fide job opportunities, adding that there are several legitimate reasons why there may be a delay in the beneficiary commencing employment. Several commenters stated that DHS fails to acknowledge some legitimate reasons for delays, including individuals who are already in the United States under another nonimmigrant visa category who may choose to delay commencing their H-1B employment. Another commenter recommended providing petitioning employers with the option to notify DHS that the employee is currently working under a different status and will eventually switch to H-1B.

A company and a joint submission said that the frequency of “speculative employment” is likely not as pervasive as expressed in the NPRM, and therefore, the solutions suggested by DHS are not required. For example, a couple of companies said that focusing on consular processing data may have been misplaced, as the majority of H-1B

cap petitions do not request consular processing.

A trade association noted that while the data in Table 9 of the NPRM, which shows data on H-1B cap-subject petitions that selected consular processing into the United States, may be correct, DHS failed to acknowledge the causal relationship between government action/inaction and the percentage of employees who had entered the United States within 6 months of the validity date. For example, according to the commenter, average processing times for H-1B petitions in 2017 were over one year, guaranteeing that employees would not be available for the beginning of the validity period. The commenter stated that this problem was exacerbated by staffing decreases at USCIS in 2017 and COVID-19. The commenter noted that Table 10 of the NPRM, which shows data on H-1B beneficiaries who went through consular processing, who arrived more than 90 days after their DOS visa validity start date, also failed to acknowledge impacts of COVID-19.

A joint submission expressed opposition to the use or lose provision. The commenters said that the proposed beneficiary-based registration system is “a less burdensome and more effective measure to increase H-1B cap usage,” negating the need for a use or lose provision. Additionally, the commenters stated that post-approval use or lose mechanisms would be overbroad, burdensome, and would not deter bad actors.

A research organization inquired why DHS proposed having employers report by a set deadline when DHS already possesses this information, as demonstrated in Tables 9 and 10, which show data on H-1B cap-subject petitions that selected consular processing into the United States and data on H-1B beneficiaries who went through consular processing, who arrived more than 90 days after their DOS visa validity start date, respectively. The commenter suggested that DHS should systematically check which petitions are associated with workers who have not entered the country after 90 days or 6 months. Additionally, the commenter reasoned that without punitive action beyond revocation of such petitions, the use or lose provision would not deter fraud. The commenter suggested that DHS review public documents from Federal lawsuits where visa-ready and travel-ready strategies were discussed by executives, and then audit firms with large numbers of H-1B workers who have not come to the United States, as well as firms with H-1B workers who

have left the United States and not returned in over 30 days. Finally, the commenter stated that the proposed solution would require employers to self-report such fraud.

Response: In the NPRM, DHS stated that it wants to ensure that the limited number of H-1B cap-subject visas and new H-1B grants that are statutorily available each fiscal year are used for non-speculative job opportunities. 88 FR 72870, 72909 (Oct. 23, 2023). DHS further stated that it is looking for the most effective ways to prevent petitions for speculative H-1B employment from being approved, and to curtail the practice of delaying H-1B cap-subject beneficiary’s employment in the United States until a bona fide job opportunity materializes. DHS is not making any final regulatory changes as a result of the request for comments in the NPRM, but will take into consideration the input provided by commenters as it continues to research and consider the feasibility, benefits, and costs of various options to achieve its stated goals.

17. Beneficiary Notification

Comment: A trade association requested clarification on the agency’s policy goals regarding beneficiary notification. The association expressed an interest in discussing potential solutions that would balance the government’s objectives without placing an undue burden and risk on petitioners.

Response: As explained in the NPRM, DHS is exploring ways to provide H-1B and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf, including receipt notices for a petition to extend, amend, or change status filed on their behalf. 88 FR 72870, 72913 (Oct. 23, 2023). Enabling Form I-129 beneficiaries to verify their own immigration status could improve worker mobility and protections. DHS is not making any final regulatory changes as a result of the request for preliminary input in the NPRM, but will take into consideration the input provided by commenters as it continues to research and consider the feasibility, benefits, and costs of various options to achieve its stated goals.

Comment: A few commenters expressed support for the proposal to notify beneficiaries of USCIS actions taken on petitions filed on their behalf. One of these commenters expressed appreciation for the proposal and stated that it did not anticipate any substantial additional costs associated with the proposed change, as most large employers provide H-1B employees with USCIS notices as part of standard

¹⁶⁶ According to Black’s Law Dictionary, “frivolous” means lacking a legal basis or legal merit; manifestly insufficient as a matter of law.

procedure. A company highlighted the importance of allowing the option of electronic notification and considering a petitioner's reasonable attempts to contact a former employee as reasonable compliance with the regulations. A trade association urged DHS to change the regulations to afford beneficiaries the chance to respond to any allegation that could affect their status. An advocacy group remarked that beneficiaries who are located in the United States must rely on petitioners to provide them with their Form I-94 Arrival-Departure Record, while beneficiaries who are outside of the United States receive this information or documentation directly. As such, the commenter recommended that the Department communicate with both the beneficiary as well as petitioner. A legal services provider suggested that USCIS should use its premium processing electronic notification system to provide receipt notices and approval notices by email to petitioners, beneficiaries, and attorneys. The commenter also stated that the use of an email system would save the agency administrative time, costs, and other expenses by eliminating the need to mail physical copies of documents to parties.

A few commenters cited the Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) recommendation in response to USCIS' request for preliminary public input on ways to provide beneficiaries with notice of USCIS actions taken on petitions filed on their behalf. A union cited the Ombudsman recommendation and urged DHS to implement it, stating that all information pertaining to an employee's visa process should be accessible and available in real-time to each employee. The commenter reasoned that only providing such information to the employer leaves employees vulnerable to exploitation. A research organization expressed their support for notifications to be sent to H-1B and other nonimmigrant workers and stated that there was ample time and opportunity to include a provision in the final rule to address this issue. The organization suggested that notifications could be sent directly to beneficiaries through text and via WhatsApp, making information more accessible to workers. A group of Federal elected officials agreed that petitioners should provide notices to beneficiaries and also encouraged DHS to include a provision requiring beneficiary notification in the final rule. The commenters cited the CIS Ombudsman recommendation and further reasoned that there would be no

significant cost or burden since the agency already sends notification to the petitioning employer.

A joint submission said that DHS's policy suggestion appears to be in response to the CIS Ombudsman recommendation and expressed support that beneficiaries receive direct notification. Thus, the commenters suggested the following:

- USCIS modify its online portal, akin to the U.S. CBP online system for obtaining Form I-94, allowing beneficiaries to access their status information directly;
- Interested beneficiaries create a MyUSCIS account to which USCIS could upload documentary information accessible to the beneficiary;
- USCIS send a copy of the notice to the beneficiary at the address listed in the Form I-129; and
- USCIS email notification to the beneficiary's email address listed in the Form I-129.

Response: In the NPRM, DHS stated that it was seeking preliminary public input on ways to provide H-1B and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. 88 FR 72870, 72913 (Oct. 23, 2023). As indicated in the NPRM, the feedback was sought to inform potential future action, and DHS did not propose a particular approach in the NPRM. Therefore, DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will take into consideration the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

H. Other Comments on the Proposed Rule

Comment: Some commenters, including joint submissions, a trade association, professional associations, a research association, and a company, cited research on labor shortages of STEM professionals, projected growth, and additional labor needs as general support for the need to modernize the H-1B program. The commenters stated that foreign STEM talent is necessary for the U.S. economy and current immigration policies negatively impact the ability to attract and retain talent. A trade association said that immigration policies must enable firms to hire global talent when the number of U.S.

engineering graduates does not meet demand.

Response: DHS shares the commenters concern with ensuring that immigration policies support the United States and U.S. employers in attracting and retaining foreign STEM talent and filling labor needs across all industries.

Comment: Some commenters included remarks regarding the exploitation of noncitizen and U.S. workers through the H-1B program. An advocacy group and a research organization remarked that H-1B visa holders are not necessarily working in highly technical fields and stated that they tend to hold "ordinary skills" that are abundantly available in the U.S. labor market. Additionally, the commenters expressed that companies are exploiting the program by paying foreign workers below market levels, which in turn drives down wages of American workers.

Response: The H-1B program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge and at least a bachelor's or higher degree in the specific specialty, or its equivalent. See INA secs. 101(a)(15)(H)(i)(b) and 214(i), 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1184(i). Therefore, DHS disagrees with the commenters' assertion that H-1B nonimmigrants tend to work in fields that are not highly technical or hold "ordinary skills."

With respect to wages, per DOL regulations at 20 CFR 655.731, an employer seeking to employ an H-1B worker in a specialty occupation must attest on the LCA that it will pay the H-1B worker the higher of either the prevailing wage for the occupational classification in the geographic area of intended employment or the actual wage paid by the employer to individuals with similar experience and qualifications for the specific employment in question. H-1B petitions for a specialty occupation worker must include a certified LCA from DOL, and failure to comply with DOL LCA requirements may impact eligibility.

Comment: A research organization said that there are several structural and programmatic flaws with the H-1B program. For example, the organization said that employers are not required to recruit U.S. workers before hiring H-1B workers. Additionally, the commenter said that employers can legally underpay H-1B workers and that there is evidence that DOL is failing to enforce the requirement to pay H-1B workers the "actual wage" they pay U.S.

workers. The same commenter also expressed that H-1B workers are exploited and lack job mobility to leave these underpaying jobs, due to recruitment fees and the inability to self-petition for an H-1B visa. Finally, the commenter stated that outsourcing companies use the H-1B program to offshore jobs, replace U.S. workers with underpaid H-1B workers, and ultimately degrade the labor standards for skilled workers. A union made similar statements, citing several sources. The commenter urged DHS to pursue “bolder structural changes” to the H-1B program instead of “tinkering at the edges” of the program.

Response: DHS acknowledges the general concerns that some unscrupulous employers abuse the H-1B visa program. To prevent fraud and abuse and strengthen H-1B program integrity, DHS is finalizing this rule, which: (1) codifies DHS’s authority to request contracts; (2) requires that an H-1B petitioner establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the requested start date; (3) ensures that the LCA supports and properly corresponds with the petition; (4) revises the definition of “United States employer” by codifying the existing requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States as of the requested start date, consistent with current DHS policy, and adds a requirement that the petitioner have a legal presence and be amenable to service of process in the United States; (5) clarifies that beneficiary-owners may be eligible for H-1B status, while setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity; (6) codifies USCIS’ authority to conduct site visits; (7) clarifies that refusal to comply with site visits may result in denial or revocation of the petition; and (8) clarifies that, if an H-1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party’s organization, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. DHS disagrees with the suggestion that these changes are not significant. These changes strike an appropriate balance between improving program integrity without being unduly onerous to H-1B employers.

DHS also recognizes the commenters’ concerns regarding what they perceive as structural flaws in the H-1B program. However, DHS is unable to make the types of structural changes to

fundamentally change the H-1B program the commenters suggested. For example, as noted above in this preamble, the statute generally does not require a labor market test for the H-1B program, and therefore, there is no general statutory requirement for an H-1B petitioner to first recruit U.S. workers before opting to hire H-1B workers instead of U.S. workers.

Comment: Some individual commenters stated that DHS needs to address current backlogs before moving forward with additional applications. A different individual commenter said that many H-1B employees are on these temporary visas due to backlogs, not by personal choice. A trade association encouraged USCIS to continue to explore actions that would reduce backlog and costs, such as reinstituting the “Known Employer” Initiative. An advocacy group expressed concern that changes, such as redefining “specialty occupation,” increasing requirements for third-party employers, and expanding the authority of investigators to conduct site visits could increase backlogs.

Response: DHS is committed to reducing backlogs for all immigration benefit requests. However, it is unclear to which backlogs the commenters referred. H-1B petitions have historically been adjudicated within a median processing time of 0.2 to 4.7 months depending on whether they were filed with a premium processing request.¹⁶⁷

In terms of the Known Employer (KE) pilot, USCIS made the decision to end the KE pilot in 2020, based on a combination of operational, technical, and regulatory issues.¹⁶⁸ The lengthy process of clearing KE predeterminations, combined with no discernible time savings for USCIS during the adjudication of petitions using the KE process, meant that time savings were negligible. While reducing the paperwork burden for the agency and petitioners was one of the goals, such a reduction was not observed in any meaningful way because of the low participation rate from most participants. Developing a permanent

¹⁶⁷ DHS, USCIS, Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year 2019 to 2024 (up to Feb. 28, 2024), <https://egov.uscis.gov/processing-times/historic-pt> (last visited Apr. 8, 2024) (showing that the 2024 median processing time for premium-processed H-1B petitions was 0.2 months, and for non-premium-processed H-1B petitions was 2.6 months).

¹⁶⁸ DHS, USCIS, Trusted Employer Program Fiscal Year 2022 Report to Congress (Aug. 11, 2022), <https://www.dhs.gov/sites/default/files/2022-09/USCIS%20-%20Trusted%20Employer%20Program.pdf>.

KE program of similar design would divert resources away from current technology development priorities, add complexity to operations by creating additional petition ingestion processes, create differing adjudication processes, require additional personnel, and require the creation of additional electronic systems that would need to be maintained.

DHS further declines to make changes to this final rule owing to concerns that strengthening the integrity of the H-1B program may cause adjudication delays that increase backlogs. While DHS aims to eliminate backlogs and improve program efficiency, DHS must also balance the need to address fraud and abuse in the H-1B program.

Comment: An advocacy group said that the final rule should address USCIS’ legal opinion issued after the enactment of Public Law 114–113. The commenter recommended that the fee for H-1B petitions should be extended to all employers. According to the commenter, the increased revenue would fund the entry/exit system, per the statute. Another commenter suggested additional fees for premium processing. A different commenter said that increasing fees or higher taxes on companies with a substantial H-1B workforce could be a deterrent to using the program. A company said that H-1B fees have gone towards programs that support growth of the domestic technology workforce. The commenter recommended continued funding for these programs by USCIS and encouraged DOL to reopen the “H-1B One Workforce” and the “Apprenticeships: Closing the Skills Gap” grant programs, or open similar grant programs.

Response: DHS declines to adopt the commenters’ suggestions concerning fees and funding, as such suggestions are beyond the scope of this rulemaking. DHS notes that it also issued an NPRM on June 6, 2024, proposing changes to the regulations and applicability of the Public Law 114–113 fee to better ensure that the entry/exit system is fully funded.¹⁶⁹

Comment: A law firm said that they look forward to USCIS issuing guidance and training to ensure adoption of these provisions. An advocacy group urged quick implementation of the updated provisions related to the registration process, deference, and clarified eligibility for entrepreneurs and cap-exempt organizations. Similarly, some individual commenters urged quick

¹⁶⁹ See “9–11 Response and Biometric Entry-Exit Fee for H-1B and L-1 Visas,” 89 FR 48339 (June 6, 2024).

implementation of the proposed rule. A trade association recommended further clarification regarding the effective date of the rule as it relates to the impact of the upcoming H-1B cap season and the then-proposed increases in fees. The association emphasized the need for USCIS to coordinate the implementation of these two rules, carefully considering their combined impact on petitioners and beneficiaries.

Response: DHS appreciates the commenters' concerns about the timely implementation of this final rule. As with all final rules, DHS will ensure that adjudicators receive any necessary guidance and training in a timely manner to properly adjudicate the forms that this final rule will affect. This final rule will be effective January 17, 2025, and will apply to petitions filed on or after that date. DHS published a final rule to make changes to the registration process, including beneficiary-centric selection, on February 2, 2024 (89 FR 7456), and those changes went into effect for the registration period for the FY 2025 cap season.

Comment: A joint submission cited research and "urged Congress to find common ground on high-skilled immigration and border reform and reduce critical STEM talent gaps by recapturing unused visas, creating a startup visa for entrepreneurs, exempting advanced graduates in STEM fields from green card caps, and eliminating outdated and arbitrary per-country caps on green cards that no longer track to economic need." A couple of individual commenters urged USCIS to lobby Congress for further enhancements to professional immigration policy. A couple of individual commenters urged USCIS to lobby Congress for further enhancements to professional immigration policy.

Response: DHS will not make responsive changes to this final rule to address these suggestions, as such suggestions are beyond the scope of this rulemaking. DHS will continue to support requests from Congress for technical assistance with legislative proposals.

Comment: A professional association recommended maintaining or reducing the number of visas due to increased unemployment rates. The commenter reasoned that more Americans are qualified for the positions that employers need to fill, and prioritizing the hiring of Americans would decrease unemployment, homelessness, crime, and mental health issues.

Response: DHS declines to adopt the commenter's suggestions concerning visa numbers, as such suggestions

would require a legislative change and as such, are beyond the scope of this rulemaking.

I. Out of Scope

DHS received many comments that were unrelated to the proposed revisions in the NPRM. Many of these comments would require congressional action or separate regulatory action by DHS. Other comments suggested revisions within the purview of DOL or other departments and agencies. Although DHS has summarized the comments it received below, DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. Comments from the public outside the scope of this rulemaking concerned the following issues:

Numerous commenters discussed the immigrant visa process and backlog. These comments included the following:

- General concerns about the immigrant visa backlog for those adjusting status via an approved employment-based immigrant visa petition;
- Requests that USCIS provide an EAD and advance parole document to those with an approved Form I-140;
- Requests to remove the per-country cap on immigrant visas;
- Requests to not count dependents of principal immigrant visa beneficiaries when determining immigrant visa usage;
- Suggestions to clear the current immigrant visa backlogs.
- Requests to remove delays within the immigrant visa process;
- A comment that increasing cap exemptions without expanding immigrant visa numbers would exacerbate backlog issues and be unfair to H-1B workers currently waiting for an employment-based immigrant visa number to become available in the United States;
- Several commenters provided suggestions related to the statutory H-1B cap, such as:
 - Requests to increase the H-1B cap or exempt certain groups of individuals, unrelated to the proposed revisions to cap exemptions (including requests to "prioritize" specific groups);
 - Requests to eliminate the H-1B cap altogether;
 - Requests to lower the H-1B cap.
 - A request that additional cap exemptions be provided for H-1B positions in U.S. AI programs, citing articles detailing the importance of foreign born talent for AI innovation. An individual commenter generally stated that cap exemptions should be provided

for graduates working in STEM fields or AI, as well as entrepreneurs. Similarly a company requested that DHS work with Congress to consider increasing the H-1B visa cap and exempt STEM fields from the H-1B cap.

Several commenters suggested that USCIS bar or place a cap on prospective beneficiaries from certain countries, including:

- Implementing a country cap for H-1B;
- Banning certain countries from the H-1B program;
- Introducing a new visa classification for countries like India and China.

Some commenters provided remarks related to DOL rulemakings and DOL authorities, including:

- Recommendations that the prevailing wage be adjusted;
- A suggestion that employers must file multiple LCAs for H-1B employees who work a hybrid schedule involving work from home and on-site elements;
- A suggestion that DHS change its procedures to ensure that LCAs for an H-1B petition are submitted no earlier than 6 months before the start date of intended employment, thus ensuring consistency between H-1B application processes and LCA validity;
- A suggestion that DHS promulgate a new H-1B wage methodology rule through DOL.

Several commenters provided remarks on dependents or derivatives of H-1B visa holders, such as:

- Comments and concerns related to H-4 visas;
- Recommendations to implement protections for dependents who age out of their immigration status and/or eligibility for an immigrant visa;
- Removing dual intent from H-1B visas.

Several commenters discussed topics related to F-1 OPT and Curricular Practical Training (CPT) programs outside the scope of the rule, including:

- General comments related to the F-1 visa program;
- Requests to add additional oversight to or end the OPT system;
- A request that F-1 OPT interns/volunteers of 501(c)(3) organizations not be treated as "employees," and allow them to be charged a fee/tuition;
- A request that USCIS promulgate regulations to extend H-1B cap gap benefits to F-1 students seeking to apply for the O-1B classification, reasoning that recent graduates pursuing arts careers would benefit from extended OPT;
- A request that USCIS extend the provision allowing OPT students who are in the cap-gap to travel before their

H-1B effective date, reasoning that they may also need to travel for personal or professional reasons prior to their H-1B status taking effect;

- Requests to give additional time for non-stem OPT individuals to find a sponsorship;
- A comment that extending the cap-gap for OPT students would help “weed out” the issue of Day 1 CPT schools; and
- A suggestion that USCIS work with labor agencies to ensure workers have adequate protection against retaliation when they exercise collective bargaining rights and that USCIS should take proactive measures to prevent threats by employers of nonimmigrant visa holders.

Several Commenters discussed program integrity and made suggestions to improve it that were outside the scope of the rulemaking, including:

- Requests to improve immigration policy overall, including congressional immigration reform;
- Requests for companies to receive harsher punishments when they violate H-1B rules or other labor laws along with clarity on how they would be prosecuted;
- A request for transparency as to how companies are using the H-1B program, so that there can be public scrutiny as to which companies may be abusing it;
- A commenter recommended revisions to support the integrity of the program, including:
- Require petitioners to remain in good standing with Federal, State, and local laws;
- Prohibit part-time and concurrent employment for H-1B visa holders.

Finally, numerous commenters offered remarks on other topics outside the scope of the proposed rule, including:

- Requests to make it mandatory for entities to provide evidence that they were unable to find qualified individuals in the United States for positions before using the H-1B program;
- Requests for domestic renewal of visas;
- Request to add additional grace period if an H-1B holder loses employment;
- Requests for investigations and more oversight of IT and consulting firms;
- Requests to allow H-1B employees to change employers;
- Requests for changes to the maximum period of stay in H-1B status and changes to the calculation of the maximum period of stay (eliminating recapture of time spent outside the U.S.);

- A comment that cap-exempt entities should be required to disclose any Federal spending that is related to the job listed in I-129 filings or if the beneficiaries’ work at a secondary employer is federally funded. The commenter added that cap-exempt positions should include strong worker protections to promote the public interest and allow for labor mobility of petitioners, require Level 3 or 4 wages, and prohibit outsourcing companies from placing H-1B beneficiaries at cap-exempt employers;

- Recommendations that DHS modernize H-1B licensure requirements, reasoning that the current regulations requiring H-1B licensing are impractical since licensing requirements vary by State and occupation;

- A suggestion for a three-phase modernization process, which would involve a five percent cap on non-U.S. citizens at any company while providing training to U.S. citizens; conducting an audit of H-1B employers whose employees were selected for a position over U.S. citizens, and if no suspicious activity was found, then H-1B holders could be permitted to apply for residency after 5 years;

- A request that DHS provide concrete status protections to noncitizen workers that report potential company abuse of the system, since workers often have the most knowledge and evidence of petitioner efforts to offer speculative employment;

- A suggestion that foreign labor recruiters should be prohibited from charging fees to workers;
- A request for clarification regarding “when a beneficiary is considered counted towards the cap;”

- A few individual commenters recommended the following:
- Raise the minimum wage for H-1B workers to \$150,000;

- Require employers to certify that there are not American workers available for the position;

- Require Employers to pay 10 to 15 percent of their total H-1B payroll expenses into a fund that would be used to train and educate American students;

- Prohibit H-1B dependent companies from requesting additional H-1B visas without hiring more Americans;

- Prohibit companies who reported layoffs from using H-1B for the next 2 years;

- Add a provision that would convert all contractors to full time after 90 days, similar to provisions implemented by the Illinois DOL;

- Emphasize that each F-1 student can only submit one H-1B application at a time.

J. Statutory and Regulatory Requirements

1. Administrative Procedure Act

Comment: While expressing support for DHS’s effort to improve the H-1B program, a few commenters including trade associations, an advocacy group, and an individual commenter urged the Department to incorporate the concerns, suggestions, and expertise of the regulated community, such as the higher education and legal industries. A research organization remarked that DHS should provide a public analysis of the program change impacts and their scale at the NPRM stage. The commenter noted that under the Administrative Procedure Act, the public should have the opportunity to understand and comment on the proposed change after reviewing a detailed analysis. A trade association expressed concern that USCIS has decreased engagement with regulated industry, and suggested that increasing engagement with industry would improve compliance and trust in the system. A business association similarly requested that USCIS host listening sessions with stakeholders and publish additional **Federal Register** notices.

Response: DHS provided sufficient analysis of the impacts of the proposed rule in the NPRM published in the **Federal Register** on October 23, 2023 (88 FR 72870), and provided a 60-day period for the public to provide comments on the proposed rule. In finalizing this rulemaking, DHS has considered all of the concerns and suggestions made in each comment and incorporated changes, where appropriate. DHS disagrees that USCIS has decreased engagement with the regulated public. Rather, USCIS regularly conducts public engagements on the national and local level on a variety of topics, including topics related to the H-1B program.

Comment: A company expressed support for the decision to seek public input on the proposed rule. A couple of commenters remarked that the proposed changes should be subject to a ballot measure, in order to effectively engage U.S. citizens. A couple of commenters also expressed concern that many people may not be aware of the proposed rule or its comment period. An individual commenter expressed that only citizens should be involved in the public participation process. An individual commenter expressed concern that the purpose of the comment period is minimized if review and finalization of the rule takes several years.

Response: This final rule complies with the Administrative Procedure Act. DHS provided notice to the public by issuing a proposed rule in the **Federal Register** on October 23, 2023 (88 FR 72870). USCIS also announced publication of the proposed rule on its website.¹⁷⁰ DHS accepted public comments on the proposed rule through December 22, 2023, a period of 60 days. Submission of comments was not limited to U.S. citizens, and DHS notes that there is no basis for such limitation. With respect to the commenter's concerns regarding the passage of time from the publication of the NPRM and the comment period to the issuance of the final rule, DHS notes that this rulemaking has proceeded on a fast schedule given the breadth and complexity of the issues covered; within a year from the closing of the comment period, DHS has issued two final rules addressing the proposals contained in the NPRM.¹⁷¹

2. Comments on the Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)

Comment: An individual commenter, expressing support for the proposed rule, said that while the proposed changes may lead to the costs outlined in the summary of costs and benefits, the long-term benefits to the H-1B program including robustness, fairness, and transparency would outweigh these costs.

Response: DHS agrees that this rule will provide significant long-term benefits to the H-1B program.

Comment: An attorney remarked that by extending OPT, the proposed rule would have negative economic impacts such as deflecting employment opportunities from U.S. workers and suppression of wages. To support this, the commenter provided several statistics on employment in the United States from a Center for Immigration Studies report, a 2016 National Academy of Sciences study, and an article from the Washington Examiner.

Response: Regulatory impact analyses completed by USCIS regularly consider two competing scenarios in which employers are or are not assumed to be able to find reasonable labor substitutes such as U.S. workers to perform work. Treating each scenario as equally likely, USCIS would describe the impact of policies that result in increased labor supply as partly a transfer of wages from hypothetically willing and able U.S. workers—whether actively seeking

employment or not—to the foreign workers, and partly a benefit to employers or consumers from foreign workers performing work that otherwise could not be completed without significant training and search costs. From these analyses, USCIS observes that replacement costs are significant, often prohibitively so for higher skilled and higher-wage positions.¹⁷² With regard to this rule's provision granting up to six additional months employment authorization to a foreign student who has already worked one or more years for an employer and who has already been approved for an H-1B visa, the commenter's baseline assumption that employers would hire other U.S. workers for this gap period between training and employment is unreasonable and not supported by the general discussion in the sources cited. USCIS sought public comment on estimates of the population expected to benefit from the expansion of cap-gap, but no commenters provided information on this or evidence of how students working between graduation and the start of H-1B work deflects employment opportunities for other reasonable labor substitutes.

Comment: A few commenters including a joint submission of attorneys, a trade association, and a company commented that the NPRM's estimate of a 1.08-hour burden for site visits split evenly between the H-1B beneficiary and their supervisor is an underestimate, as other internal or third-party personnel such as human resources and legal are often involved. The commenters also stated that the statistics the NPRM presents relating to noncompliance and fraud are inaccurate, both because the NPRM does not provide raw data about the instances categorized as noncompliant or fraudulent, and because in some cases the NPRM conflates noncompliance with fraud.

Response: The average 1.08-hour burden is based on a calculation from data provided by the USCIS Fraud Detection and National Security Directorate. See 88 FR 72870, 72945 (Oct. 23, 2023). DHS acknowledges that the duration of individual site visits varies. The commenter noted that, in addition to beneficiaries and their supervisors, various parties such as in-house and third-party counsel may spend time preparing for a site visit. While noting that the 5-year average burden increased to 1.09 hour when adding data for FY 2023, DHS declines to further increase the estimate of an average site visit. DHS notes that the

Form I-129 burden captures the estimated time to gather, prepare, attach, and submit required documentation related to beneficiary's employment. The Form I-129 instructions also note that DHS may verify any information submitted to establish eligibility through methods including “making unannounced physical site inspections of residences and locations of employment.” While some petitioners may elect to have additional managers, legal counsel, or executives prepare for or participate in a site visit, DHS believes that the methodology in the NPRM reasonably estimates the additional resources for the site visit provision and declines to estimate the opportunity cost of time for these additional parties.

Comment: An individual commenter expressed concern that the proposed rule would disproportionately impact small nonprofits, due to having fewer resources to comply with the new requirements. The commenter urged USCIS to mitigate impacts on small nonprofits.

Response: DHS acknowledges that a high percentage of entities impacted by this rule are small but notes that the net impacts of the final rule result in cost savings.

Comment: A company remarked that the 10-year net impact of the proposed rule is justified given that it would result in greater robustness and equity in the H-1B program. The company added that the benefits of the program include mitigating deterrents to working or studying in the United States, which would increase talent in student and employment pools, leading to advancements in research and technology.

Response: DHS agrees with the commenter that the benefits of this rule justify the costs.

K. Severability

All of the provisions of this rule are severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance. Specifically, DHS intends that the provisions which streamline requirements for the H-1B program such as revising the regulatory definition and criteria for a “specialty occupation”; clarifying that “normally” does not mean “always” within the criteria for a specialty occupation; and clarifying that a position may accept a range of qualifying degree fields as sufficient to qualify for the position, although there must be a direct

¹⁷⁰ <https://www.uscis.gov/newsroom/news-releases/dhs-issues-proposed-rule-to-modernize-the-h-1b-specialty-occupation-worker-program>.

¹⁷² See 89 FR 24655.

relationship between the required field(s) and the duties of the position all be severable from one another and from all of the other provisions in this rule. In addition, DHS intends that the provision clarifying when an amended or new petition must be filed due to a change in an H-1B worker's place of employment, the provisions addressing USCIS' deference policy, the provision requiring that evidence of maintenance of status to be included with the petition if a beneficiary is seeking an extension or amendment of stay, and the provision eliminating the itinerary requirement, impacting all H classifications, as well as that allowing petitioners to amend requested validity periods where the requested validity expires before adjudication all be severable from one another. None of these provisions are dependent on one another and can function independently if any are invalidated. In the severability clause at new 8 CFR 214.2(h)(33), DHS has identified the second level paragraphs (for example, paragraph (h)(2)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.1 and 214.2 that are not being impacted by this final rule.

IV. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders (E.O.) 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has designated this final rule a "significant regulatory action" as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this final rule.

1. Summary of Changes From NPRM to Final Rule

As discussed in the preamble, the purpose of this rulemaking is to

modernize and improve the regulations governing the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures.

Following careful consideration of the public comments received, this final rule adopts the provisions proposed in the NPRM, with revisions as described above relating to *Specialty Occupation Definition and Criteria, Bar on Multiple Registrations Submitted by Related Entities, Contracts, Bona fide employment, and Beneficiary-Owners*.

DHS analyzed two baselines for this final rule, the no action baselines and the without-policy baseline. The primary baseline for this final rule is the no action baseline. For the 10-year period of analysis of the final rule DHS estimates the annualized net cost savings of this rulemaking will be \$333,835 annualized at 2 percent. DHS also estimates that there will be annualized monetized transfers of \$1.4 million from newly cap-exempt petitioners to USCIS and \$38.8 million from other employees to F-1 workers, both annualized at a 2 percent discount rate. Table 1 provides a more detailed summary of the final rule provisions and their impacts.

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Table 1. Summary of Provisions and Impacts of the Final Rule

Final Rule Provisions	Description of the Final Change to Provisions	Estimated Costs/Transfers of Provisions	Estimated Benefits of Provisions
1. Specialty Occupation Definition and Criteria	☐ DHS codifies and clarifies the specialty occupation standard, including by: - codifying the “directly related” requirement in the definition and criteria, and clarifying this as meaning “a logical connection” - codifying current practice that a generalized degree is not sufficient - codifying current practice that a position may allow for a range of qualifying degree fields.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: None ☐ Without-Policy Baseline: Petitioners may have taken time to provide job descriptions or other evidence of a specialty occupation. DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: There may be transparency benefits due to this change. ☐ Without-Policy Baseline: None DHS/USCIS – None
2. Amended Petitions	☐ DHS clarifies when an amended or new H-1B petition must be filed due to a change in an H-1B worker’s place of employment.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None	Quantitative: Petitioners - ☐ DHS estimates the total annual cost savings to petitioners will be \$385,559 (undiscounted) DHS/USCIS - ☐ None Qualitative: Petitioners –

		DHS/USCIS – ☐ None	DHS/USCIS – ☐ None
3. Deference	☐ DHS codifies and clarifies its existing deference policy.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ No-Action Baseline: None ☐ Without-Policy Baseline: DHS estimates the total annual cost savings to petitioners will be \$308,836 (undiscounted) DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: None ☐ Without-Policy Baseline: None DHS/USCIS – ☐ None
4. Evidence of Maintenance of Status	☐ DHS clarifies that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay.	Quantitative: Petitioners - ☐ None	Quantitative: Petitioners - ☐ None

		DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ None	DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ DHS anticipates that codifying and providing clarification of the requirements for maintenance of status requests will at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner’s time. DHS/USCIS – ☐ This will in turn reduce the added burden on adjudicators associated with receiving, responding to, and adjudicating RFEs and NOIDs, and decrease the number of RFEs and NOIDs
5. Eliminating the Itinerary Requirement for H Programs	☐ DHS eliminates the H programs’ itinerary requirement.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None	Quantitative: Petitioners - ☐ DHS estimates the total annual cost savings to petitioners will be \$653,162 (undiscounted). DHS/USCIS - ☐ None

		DHS/USCIS – ☐ None	Qualitative: Petitioners – ☐ This may benefit petitioners who have beneficiaries at alternative worksites and petitions filed by agents. DHS/USCIS – ☐ None
6. Validity Expires Before Adjudication	☐ DHS allows H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically will happen if USCIS deems the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ Increased cost of receiving an RFE and spending time to review it. USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H-1B petition and USCIS from having to intake and adjudicate another petition. ☐ Reduced cost of filing new petition.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ This change may save the petitioners the opportunity cost of time and the fee to file an additional form. DHS/USCIS – ☐ None

		DHS/USCIS – ☐ None	
7. H-1B Cap Exemptions	☐ DHS is revising the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. ☐ DHS is revising the definition of “nonprofit research organization”, “governmental research organization” and “non-profit or tax exempt organization”	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ Affected petitioners will avoid the cap lottery and \$215 H-1B Registration Fee but may choose to incur additional I-129 fees to file a petition that would not have been possible if not selected in the cap lottery. ☐ Additional cost savings on ACWIA fees associated with initial cap-subject petitions are possible. DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ Affected petitioners may benefit from greater access to high skilled talent. ☐ Increase in population of research organizations eligible for cap exemption. DHS/USCIS – ☐ None
8. Automatic Extension of Authorized Employment “Cap-Gap”	☐ DHS is revising the automatic cap-gap extension end date from October 1 to	Quantitative: Transfers -	Quantitative: Petitioners -

	April 1 of the fiscal year for which H-1B status is being requested.	☐ Transfer payments of \$38.8 million from other employees to F-1 workers	☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ This change may benefit petitioners and students, as the automatic extension end date from October 1 to April 1 of the relevant fiscal year will avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have experienced over the past several years. DHS/USCIS – ☐ None
9. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position	☐ DHS is codifying USCIS' authority to request contracts, work orders, or similar evidence.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: None ☐ Without-Policy Baseline: Petitioners may have taken time to	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: There may be transparency benefits due to this change.

		find provide contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. DHS/USCIS – ☐ None	☐ Without-Policy Baseline: None DHS/USCIS – None
10. Beneficiary-Owners	☐ DHS is codifying a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner.	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ Petitioners for beneficiary-owned businesses may experience costs associated with limiting the validity period of extensions. DHS/USCIS – ☐ None	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ This change may benefit H-1B petitions for entrepreneurs, start-up entities, and other beneficiary-owned businesses. DHS/USCIS – None
11. Site Visits	☐ DHS is modifying the H-1B regulations to codify its existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.	Quantitative: Petitioners - ☐ Failure to cooperate during site visits or other compliance reviews may result in denial or revocation of any petition for workers performing services at the location or locations that are a	Quantitative: Petitioners - ☐ None DHS/USCIS - ☐ None

		subject of inspection or compliance review. Such action, in turn, may result in opportunity costs of time to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.09 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. ☐ Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. ☐ DHS estimates the total annual cost of the H-1B worksite inspections to be \$704,886 (undiscounted) for this rule. DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ None	Qualitative: Petitioners – ☐ None DHS/USCIS – ☐ USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. ☐ Existing USCIS enforcement activities will be more effective by additional cooperation from employers.
12. Third-party placement (Codifying <i>Defensor</i>)	☐ In this provision, when the beneficiary will be staffed to a third party,	Quantitative:	Quantitative:

	USCIS will look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.	Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: None ☐ Without-Policy Baseline: Petitioners may have taken time to demonstrate that the worker will perform services in a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty. DHS/USCIS - ☐ None	Petitioners - ☐ None DHS/USCIS - ☐ None Qualitative: Petitioners – ☐ No-Action Baseline: There may be transparency benefits due to this change. This provision will improve program integrity. ☐ Without-Policy Baseline: None DHS/USCIS – ☐ None ☐

In addition to the impacts summarized above, and as required by

OMB Circular A–4, Table 2 presents the prepared accounting statement showing

the costs and benefits that will result in this final rule.¹⁷³

Table 2. OMB A-4 Accounting Statement (\$ millions, FY 2023)
Time Period: FY 2024 through FY 2033

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation
BENEFITS				
Monetized Benefits	N/A			Regulatory Impact Analysis (RIA)
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	DHS anticipates that codifying and providing clarification of the requirements for maintenance of status applications will at least render some RFEs and NOIDs unnecessary; therefore, may save the petitioner’s time. In addition, these changes will improve the integrity of the H-1B program by preventing certain abuses. DHS will change the automatic extension end date from October 1 to April 1 of the relevant fiscal year to avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have been experiencing over the past several years.			RIA
COSTS				
				RIA
Annualized monetized costs (2%)	-\$0.3			
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	Changes to the site visit provision may affect employers who do not cooperate with site visits who will face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with			RIA

¹⁷³ OMB, Circular A–4 (Sept. 17, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_

drupal_files/omb/circulars/A4/a-4.pdf (last viewed June 1, 2021).

	program requirements, however, and notes that those that do not could experience significant impacts due to this rule. DHS expects that the rule will hold certain petitioners more accountable for violations, including certain findings of labor law and other violations.	
TRANSFERS		
Annualized monetized transfers: From newly cap-exempt petitioners to USCIS	(2%) 1.4	RIA
Annualized monetized transfers: From other employees to F-1 workers in the form of compensation	(2%) 38.8	RIA
Miscellaneous Analyses/Category	Effects	Source Citation
Effects on State, local, or Tribal governments	None	RIA
Effects on small businesses	None	RIA
Effects on wages	None	None
Effects on growth	Aside from the reduction in transfers from not having to pay the registration fee, petitioners that qualify under the cap exemptions will also benefit from not having to wait for H-1B cap season to commence employment. This may allow approved petitioners to have their H-1B workers commence employment earlier, prior to the beginning of the fiscal year on October 1.	RIA

BILLING CODE 9111-97-C**2. Background**

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures. Some of the provisions will narrowly impact other nonimmigrant classifications.

3. Costs, Transfers, and Benefits of the Final Rule**viii. Specialty Occupation Definition and Criteria**

In response to commenters' concerns, DHS is modifying the definition of specialty occupation. After carefully

considering the comments, DHS is not finalizing the proposed regulatory text of "[t]he required specialized studies must be directly related to the position," as this language may be misread as stating that USCIS would only consider a beneficiary's specialized studies. The "directly related" requirement is, however, being retained in the definition of "specialty occupation" and in the criteria.

DHS is also adding regulatory text to clarify the level of connection needed to meet the "directly related" requirement by adding the sentence, "directly related means that there is a logical connection between the degree, or its equivalent, and the duties of the position," to the regulatory text. Further, DHS is adding a reference to the "duties of the position" to the prior sentence about allowing a range of qualifying degree

fields to assure stakeholders that this practice has not changed.

To address commenters' various concerns about not relying on degree titles, DHS is removing the references to "business administration" and "liberal arts." These changes recognize that title of the degree, alone, is not determinative and that titles may differ among schools and evolve over time.

DHS is also making some minor, non-substantive revisions to 8 CFR 214.2(h)(4)(iii)(A), which include: changing the word "are" to "is" in 8 CFR 214.2(h)(4)(iii)(A)(4); revising 8 CFR 214.2(h)(4)(iii)(A)(2) from "United States industry" to "industry in the United States"; and revising 8 CFR 214.2(h)(4)(iii)(A)(2) and (3) by adding "to perform the job duties for" rather than just the word "position".

Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to provide position descriptions or other evidence of connection between a degree, or its equivalent, and the duties of the position.

ix. Amended Petitions

DHS is clarifying when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment. Specifically, this rule will clarify that any change of work

location that requires a new LCA is itself considered a material change and therefore requires the petitioning employer to file an amended or new petition with USCIS before the H-1B worker may perform work under the changed conditions.

This change will clarify requirements for H-1B amended petitions by codifying *Matter of Simeio Solutions, LLC*¹⁷⁴ and incorporating DOL rules on when a new LCA is not necessary. DHS estimates that this change will save petitioners filing amended petitions 5 minutes for each petition (0.08 hours).

USCIS received a low of 64,385 amended petitions in FY 2019, and a

high of 77,255 amended petitions in FY 2023. Based on the 5-year annual average, DHS estimates that 71,141 petitioners file for an amended petition each year shown in Table 3. DHS does not know if all of these amended petitions are due to a change in an H-1B worker's place of employment. Because of this, DHS cannot estimate how many of these new and amended petitions will benefit by consolidating existing requirements and providing clearer regulatory text pertaining to when a petitioner must submit an amended or new petition with or without a new LCA.

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Table 3. Form I-129 H-1B Classification Amended Petitions, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023

Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total	Percentage of Form I-129 H-1B filed with Form G-28
2019	17,039	47,346	64,385	74%
2020	21,081	51,480	72,561	71%
2021	19,124	46,494	65,618	71%
2022	20,239	55,648	75,887	73%
2023	23,340	53,915	77,255	70%
5-year Total	100,823	254,883	355,706	72%
5-year Annual Average	20,165	50,977	71,141	72%

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), CLAIMS3 and ELIS databases, May 23, 2024.

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from this change. Table 4

presents the lower and upper bound number of petitions filed annually for amended petitions and for new

petitions, which corresponds to a range of 10 to 90 percent.

Table 4. Estimated Annual Number of Form I-129 H-1B Petitions that Are New or Amended

	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated Annual Amended Petitions	71,141	7,114	64,027
Source: USCIS analysis			

Using the lower and upper bounds of the estimated annual population for the petitioners who will file amended petitions, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting

information by multiplying the estimated time burden savings for those filing an amended petition (5 minutes or 0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively.

In order to estimate the opportunity costs of time for completing and filing an H-1B amended petition DHS assumes that a petitioner will use an HR specialist, an in-house lawyer, or an outsourced lawyer to prepare an H-1B

¹⁷⁴ See USCIS, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," PM-602-0120

(July 21, 2015), https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_

Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.

amended petition.¹⁷⁵ DHS uses the mean hourly wage of \$36.57 for HR specialists to estimate the opportunity cost of the time for preparing and submitting the H-1B amended petition.¹⁷⁶ Additionally, DHS uses the mean hourly wage of \$84.84 for in-house lawyers to estimate the opportunity cost of the time for preparing and submitting the H-1B amended petition.¹⁷⁷

DHS accounts for worker benefits when estimating the total costs of compensation by calculating a benefits-to-wage multiplier using the BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full

opportunity cost per petitioner, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, retirement, etc.¹⁷⁸ DHS multiplied the average hourly U.S. wage rate for HR specialists and in-house lawyers by 1.45 to account for the full cost of employee benefits, for a total of \$53.03¹⁷⁹ per hour for an HR specialist and \$123.02¹⁸⁰ per hour for an in-house lawyer. DHS recognizes that a firm may choose, but is not required, to outsource the preparation of these petitions and, therefore, presents two wage rates for lawyers. To determine the full opportunity costs of time if a firm hired an outsourced lawyer, DHS multiplied the average hourly U.S. wage rate for lawyers by 2.5 for a total of \$212.10 to

approximate an hourly cost for an outsourced lawyer to prepare and submit an H-1B amended petition or LCA.¹⁸¹

DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 5 shows that the total annual cost savings will range from \$77,111 to \$694,006. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this, DHS estimates the average cost savings from this provision to be \$385,559.

¹⁸¹ Calculation: $\$84.84 * 2.5 = \$212.10$ total wage rate for an outsourced lawyer.

The DHS analysis in "Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," 83 FR 24905 (May 31, 2018), <https://www.federalregister.gov/documents/2018/05/31/2018-11732/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2018-numerical-limitation-for-the>, used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

The DHS ICE rule "Final Small Entity Impact Analysis: 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'" at G-4 (Aug. 25, 2008), <https://www.regulations.gov/document/ICEB-2006-0004-0922>, also uses a multiplier. The methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule.

¹⁷⁵ USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimated costs. However, USCIS understands that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these amended petitions.

¹⁷⁶ See BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 13-1071 Human Resources Specialists," <https://www.bls.gov/oes/2023/may/oes131071.htm> (last visited August 23, 2024).

¹⁷⁷ See BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2022, 23-1011 Lawyers," <https://www.bls.gov/oes/2023/may/oes231011.htm> (last visited August 23, 2024).

¹⁷⁸ The benefits-to-wage multiplier is calculated as follows: $(\text{Total Employee Compensation per hour})/(\text{Wages and Salaries per hour})$ $(\$45.42 \text{ Total Employee Compensation per hour})/(\$31.29 \text{ Wages and Salaries per hour}) = 1.45158 = 1.45$ (rounded). See BLS, Economic News Release, "Employer Costs for Employee Compensation—December 2023," Table 1. "Employer Costs for Employee Compensation by ownership [Dec. 2023]," https://www.bls.gov/news.release/archives/ecec_03132024.htm (last visited Aug. 21, 2024). The Employer Costs for Employee Compensation measures the average cost to employers for wages and salaries and benefits per employee hour worked.

¹⁷⁹ Calculation: $\$36.57 * 1.45 = \$53.03$ total wage rate for HR specialist.

¹⁸⁰ Calculation: $\$84.84 * 1.45 = \$123.02$ total wage rate for in-house lawyer.

Table 5. Estimated Annual Cost Savings to Form I-129 H-1B Petitioners				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost Savings
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	1,992	0.08	\$53.03	\$8,451
In-house lawyer	5,122	0.08	\$123.02	\$50,409
Outsourced lawyer	5,122	0.08	\$212.10	\$86,910
Total Average - Lower Bound	7,114			\$77,111
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	17,928	0.08	\$53.03	\$76,058
In-house lawyer	46,099	0.08	\$123.02	\$453,688*
Outsourced lawyer	46,099	0.08	\$212.10	\$782,208*
Total Average - Upper Bound	64,027			\$694,006
Total Cost Savings Average				\$385,559
Source: USCIS analysis				
*Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average (\$50,409 + \$86,910)/2 = \$68,660 + \$8,451 = \$77,111 and (upper bound) Average (\$453,688 + 782,208)/2 = \$617,948 + \$76,058 = \$694,006. The total cost savings is the average of the lower and upper bound average totals = (\$77,111 + \$694,006)/2 = \$385,559.				

x. Deference to Prior USCIS Determinations of Eligibility in Requests for Extensions of Petition Validity

DHS is codifying and clarifying its existing deference policy at amended 8 CFR 214.1(c)(5). Deference has helped promote consistency and efficiency for both USCIS and its stakeholders. The deference policy instructs officers to consider prior determinations involving the same parties and facts, when there is no material error with the prior determination, no material change in circumstances or in eligibility, and no new material information adversely impacting the petitioner's, applicant's, or beneficiary's eligibility. This provision is codifying the deference policy¹⁸² dated April 27, 2021. Relative

to the no-action baseline there are no costs to the public. The benefit of codifying this policy is that there may be some transparency benefits to having the policy in the CFR. Relative to a without-policy baseline petitioners may need to take time to familiarize themselves with those changes made in the 2021 deference policy memo. The provision applies to all nonimmigrant classifications for which form I-129 is filed to request an extension of stay (*i.e.*, E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, and TN nonimmigrant classifications). The deference policy had been in effect since 2004 but was rescinded in 2017 until 2021, when it was reinstated in the USCIS Policy Manual. After USCIS

rescinded deference in 2017, the number of RFEs and denials increased.

Table 6 shows the number for Form I-129 RFEs filed for an extension of stay or amendment of stay, that are requesting a continuation of previously approved employment or a change in previously approved employment from FY 2019 through FY 2023. USCIS received a low of 8,381 RFEs for Form I-129 classifications in FY 2023, and a high of 43,435 RFEs for Form I-129 classifications in FY 2020. Based on a 5-year annual average, 26,192 petitioners who filed for an extension of stay or amendment of stay are requesting a continuation of previously approved employment or a change in previously approved employment receive an RFE for Form I-129 per year.

¹⁸² See USCIS, "Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity, Policy Alert," PA-

2021-05 (April 27, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual->

<updates/20210427-Deference.pdf> (last visited on Mar. 23, 2023).

Table 6. Total Form I-129 Receipts Filed for an Extension of Stay or Amendment of Stay, That Are Requesting a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, FY 2019 Through FY 2023

Reported Fiscal Year	RFE Count	Non-RFE Count	Total
2019	42,071	122,435	164,506
2020	43,435	142,617	186,052
2021	23,447	138,933	162,380
2022	13,624	126,603	140,227
2023	8,381	116,515	124,896
5-year Total	130,958	647,103	778,061
5-year Annual Average	26,192	129,421	155,612

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.
 Note: FY19-22 RFE counts and Non-RFE counts fluctuated nominally since the Mar. 13, 2023 query presented in the NPRM. Fluctuations of this magnitude in USCIS Administrative Data are common and do not materially affect the analysis.

DHS will codify the deference policy that applies to the adjudication of a petition. Relative to a without-policy baseline, this change could affect the number of RFEs that USCIS sends for Form I-129. USCIS estimates that there may be a reduction in RFEs, as officers adjudicating a Form I-129 involving the same parties and the same underlying facts will typically be able to defer to a

prior approval, given there is no new material information or a material error. The reduction in RFEs may save time and make the overall process faster for petitioners and USCIS.

Table 7 shows the number of Form I-129 receipts, submitted concurrently with a Form G-28, filed for a continuation of previously approved employment or a change in previously

approved employment, and requesting an extension of stay or amendment of stay, on which USCIS issued an RFE. Based on the 5-year annual average, DHS estimates that 20,049 petitioners who received an RFE filed with a Form G-28 and 6,142 petitioners who received an RFE filed without a Form G-28.

Table 7. Form I-129, Petition for a Nonimmigrant Worker Receipts Filed for an Extension of Stay or Amendment of Stay, That Are Requesting a Continuation of Previously Approved Employment or a Change in Previously Approved Employment, with an RFE Submitted Concurrently with Form G-28, FY 2019 Through FY 2023

Fiscal Year	Form I-129 Receipts Received without Form G-28	Form I-129 Receipts Received with Form G-28	Total Form I-129 Receipts Received with RFE	Percentage of Form I-129 filed with Form G-28
2019	13,450	28,621	42,071	68%
2020	9,132	34,303	43,435	79%
2021	3,883	19,564	23,447	83%
2022	2,300	11,324	13,624	83%
2023	1,947	6,434	8,381	77%
5-year Total	30,712	100,246	130,958	77%
5-year Annual Average	6,142	20,049	26,192	77%

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.

DHS conducted a sensitivity analysis to estimate the number of petitions that may benefit from codifying and

clarifying its existing deference policy. Table 8 presents the lower and upper bound number of petitions filed

annually for amended petitions and for new petitions, which corresponds to a range of 10 to 90 percent.

Table 8. Estimated Number of Form I-129 Petitions with RFEs

	Petitioners	Lower Bound (10%)	Upper Bound (90%)
Estimated RFE Petitions	26,192	2,619	23,572
Source: USCIS analysis			

Using the lower and upper bounds of the estimated annual population for the petitioners who may no longer have to provide duplicative data, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting duplicative information by multiplying the estimated time burden to gather information 10 minutes

(0.167 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Table 9 shows that the total annual cost savings due to the

codifying and clarifying its existing deference policy will range from \$61,772 to \$555,900. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be \$308,836.

Table 9. Estimated Annual Cost Savings to Form I-129 Petitioners due to Codifying and Clarifying the Deference Policy

	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost Savings
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions (Lower Bound)				
HR specialist	602	0.167	\$53.03	\$5,331
In-house lawyer	2,017	0.167	\$123.02	\$41,438
Outsourced lawyer	2,017	0.167	\$212.10	\$71,444
Total Average - Lower Bound	2,619			\$61,772
Upper Bound				
Estimated Number of Petitions (Upper Bound)				
HR specialist	5,422	0.167	\$53.03	\$48,017
In-house lawyer	18,150	0.167	\$123.02	\$372,880*
Outsourced lawyer	18,150	0.167	\$212.10	\$642,886*
Total Average - Upper Bound	23,572			\$555,900
Total Cost Savings Average				\$308,836
Source: USCIS analysis				
* Note: DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average $(\$41,438 + \$71,444)/2 = \$56,441 + \$5,331 = \$61,772$ and (upper bound) Average $(\$372,880 + \$642,886)/2 = \$507,883 + \$48,017 = \$555,900$. The total cost savings is the average of the lower and upper bound average totals $= (\$61,772 + \$555,900)/2 = \$308,836$.				

xi. Evidence of Maintenance of Status

DHS is clarifying current requirements and codifying practices concerning evidence of maintenance of status at 8 CFR 214.1(c)(1) through (7). Primarily, DHS seeks to clarify that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary's stay.

This change will list examples of additional evidence types that petitioners may provide but will not limit petitioners to those specific evidence types. The form instructions further state that if the beneficiary is employed in the United States, the petitioner may submit copies of the beneficiary's last two pay stubs, Form W-2, and other relevant evidence, as

well as a copy of the beneficiary's Form I-94, passport, travel document, or Form I-797. This change may decrease the number of RFEs and NOIDs by clearly stating what types of supporting documentation are relevant and clarifying that petitioners should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional information.

This may benefit petitioners by saving them the time to review and respond to RFEs and NOIDs.

DHS is codifying into regulation the instructions that, when seeking an extension or amendment of stay, the applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or amendment request was filed. Additionally, DHS will remove the sentence: “Supporting evidence is not

required unless requested by the director.” *See* amended 8 CFR 214.2(h)(14). *See also* amended 8 CFR 214.2(l)(14)(i) (removing “Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.”); amended 8 CFR 214.2(o)(11) and amended 8 CFR 214.2(p)(13) (removing “Supporting documents are not required unless requested by the director.”). DHS expects that these changes will reduce confusion for applicants and petitioners, clarify what

evidence is required for all extension or amendment of stay requests, and simplify adjudications by decreasing the need for RFEs and NOIDs.

Based on the 5-year annual average, DHS estimates that 292,324 Form I-129 petitions are filed requesting an extension of stay. Of those total filed petitions, DHS estimates that 48,064 petitioners who requested an extension of stay received an RFE and the remaining 244,260 did not receive and RFE as shown in Table 10.

Table 10. Form I-129 Extension of Stay, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023			
Fiscal Year	RFE Count	Non-RFE Count	Total
2019	83,417	199,450	282,867
2020	71,811	247,945	319,756
2021	41,003	270,370	311,373
2022	26,989	280,547	307,536
2023	17,101	222,987	240,088
5-year Total	240,321	1,221,299	1,461,620
5-year Annual Average	48,064	244,260	292,324
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.			

DHS estimates that 26,344 petitions are filed requesting to amend the stay.

Of those, DHS estimates that 5,802 petitions that are filed requesting to

amend the stay receive an RFE and 20,542 do not receive an RFE.

Table 11. Form I-129 Amend the Stay, Petition for a Nonimmigrant Worker, FY 2019 through FY 2023			
Fiscal Year	RFE Count	Non-RFE Count	Total
2019	14,625	16,938	31,563
2020	7,235	20,058	27,293
2021	2,824	20,355	23,179
2022	2,323	23,671	25,994
2023	2,005	21,686	23,691
5-year Total	29,012	102,708	131,720
5-year Annual Average	5,802	20,542	26,344
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.			

DHS estimates that 84,164 petitions are filed requesting to change status and extend the stay. Of those, DHS estimates

that 22,867 petitions that are filed requesting to change status and extend

the stay receive an RFE and 61,298 do not receive an RFE.

Table 12. Form I-129 Petition for a Nonimmigrant Worker Requesting New Employment with a COS, FY 2019 through FY 2023

Fiscal Year	RFE Count	Non-RFE Count	Total
2019	44,095	50,880	94,975
2020	23,947	65,948	89,895
2021	18,360	61,629	79,989
2022	16,436	70,644	87,080
2023	11,495	57,388	68,883
5-year Total	114,333	306,489	420,822
5-year Annual Average	22,867	61,298	84,164

Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.

It is important to note that issuing RFEs and NOIDs takes time and effort for adjudicators—to send, receive, and adjudicate documentation—and it requires additional time and effort for applicants or petitioners to respond, resulting in extended timelines for adjudications.¹⁸³ Data on RFEs and NOIDs related to maintenance of status are not standardized or tracked in a consistent way, limiting USCIS's ability to accurately or reliably observe the relationship between specific circumstances and RFEs; however, the data demonstrate that these requests and notices continue to occur at nontrivial rates.

DHS anticipates that USCIS adjudicators may issue fewer RFEs and NOIDs related to maintenance of status under this rule due to clarity of what types of supporting documentation are relevant and clarification that petitioners and applicants should submit such supporting documentation upfront, rather than waiting for USCIS to issue a request for additional

information, which will reduce the burden on applicants, petitioners, and adjudicators, and save time processing applications and petitions.

xii. Eliminating the Itinerary Requirement for H Programs

DHS will eliminate the H programs' itinerary requirement. *See* amended 8 CFR 214.2(h)(2)(i)(B) and (F). Current 8 CFR 214.2(h)(2)(i)(B) states that “A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions.” In addition, current 8 CFR 214.2(h)(2)(i)(F) contains additional language requiring an itinerary for H petitions filed by agents as the petitioner.

DHS recognizes this change may affect H-1B petitioners filing for beneficiaries performing services in more than one location and submitting itineraries.¹⁸⁴ However, due to the absence of detailed data on petitioners

submitting itineraries, DHS estimates the affected population as the estimated number of petitions filed annually for workers placed at off-site locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries may be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. Eliminating the itinerary requirement will reduce petitioner burden and promote more efficient adjudications, without compromising program integrity. This change may benefit petitioners who have beneficiaries at alternative worksites.

Table 13 shows the total number of Form I-129 H-1B Receipts with and without Form G-28, FY 2019 through FY 2023. USCIS received a low of 386,598 Form I-129 H-1B Receipts in FY 2023, and a high of 474,311 Form I-129 H-1B Receipts in FY 2022. Based on the 5-year annual average, DHS estimates that there are 421,421 Form I-129 H-1B petitioners each year.

¹⁸³ The regulations state that when an RFE is served by mail, the response is timely filed if it is received no more than 3 days after the deadline, providing a total of 87 days for a response to be submitted if USCIS provides the maximum period

of 84 days under the regulations. The maximum response time for a NOID is 30 days. *See* USCIS Policy Manual, Vol. 1, “General Policies and Procedures,” Part E, “Adjudications,” Chap. 6,

“Evidence,” <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6>.

¹⁸⁴ USCIS does not currently apply the itinerary requirement to H-1Bs working at multiple locations. *See* 88 FR 72870, 72882.

Table 13. Total Form I-129 H-1B Receipts with and without Form G-28, FY 2019 through FY 2023				
Fiscal Year	Form I-129 H-1B Receipts Received without Form G-28	Form I-129 H-1B Receipts Received with Form G-28	Total Form I-129 H-1B Receipts	Percentage of Form I-129 H-1B filed with Form G-28
2019	90,845	329,777	420,622	78%
2020	90,192	337,097	427,289	79%
2021	79,195	319,090	398,285	80%
2022	90,574	383,737	474,311	81%
2023	83,670	302,928	386,598	78%
5-year Total	434,476	1,672,629	2,107,105	79%
5-year Annual Average	86,895	334,526	421,421	79%
Source: USCIS, Office of Policy and Strategy, PRD, CLAIMS3 and ELIS databases, May 23, 2024.				

Table 14 shows the average number of Form I-129 H-1B petitions approved in FYs 2019 through 2023 for workers placed at off-site locations.

Approximately 27 percent of approved petitions were for workers placed at off-site locations. DHS uses the estimated 27 percent as the proportion of both the

population of received petitions and the population of approved petitions that are for workers placed at off-site locations.

Table 14. Form I-129 H-1B Petitions for Workers Placed at Off-site Locations, FY 2019 through FY 2023			
FY	Total Approved Petitions for Workers Placed at Off-site locations	Total Approved Petitions	Percent Placed at Off-site locations
2019	118,779	332,084	36%
2020	136,142	357,636	38%
2021	95,414	339,768	28%
2022	66,844	382,244	17%
2023	66,538	361,142	18%
5-year Total	483,717	1,772,874	27%
5-year Annual Average	96,743	354,575	27%
Source: USCIS, Office of Policy and Strategy, PRD. May 15, 2024			

DHS conducted a sensitivity analysis to estimate the number of H-1B petitions filed annually for workers placed at off-site locations that may

contain itineraries (113,784).¹⁸⁵ Table 15 presents the lower and upper bound number of petitions filed annually for workers placed at off-site locations who

may submit itineraries, which corresponds to a range of 10 to 90 percent.

¹⁸⁵DHS uses the proportion of petitions approved for off-site workers (27 percent from Table 14) as an approximate measure to estimate the number of

petitions received annually for off-site workers from the total number of petitions filed. 113,784 petitions

filed requesting off-site workers = 421,421 petitions filed annually × 27 percent.

Table 15. Estimated Number of Form I-129 H-1B Petitions Who May Submit Itineraries		
Estimated Number of Petitions Filed Annually for Workers Placed at Off-site Locations	Estimated Number of Petitions Submit Itineraries among Workers Placed at Off-site Locations	
	Lower Bound (10%)	Upper Bound (90%)
A	$B=A \times 10\%$	$C=A \times 90\%$
113,784	11,378	102,406
Source: USCIS analysis		

Using the lower and upper bounds of the estimated annual population for H-1B petitioners who may no longer be required to gather and submit itinerary information, DHS estimates the cost savings based on the opportunity cost of time of gathering and submitting itinerary information by multiplying the estimated time burden to gather

itinerary information (0.08 hours) by the compensation rate of an HR specialist, in-house lawyer, or outsourced lawyer, respectively. Table 16 shows that the total annual cost savings due to the itinerary exemption will range from \$130,631 to \$1,175,692. Since the itinerary information normally is submitted with the Form I-129 H-1B

package, there will be no additional postage cost savings. DHS estimates the total cost savings to be the average between the lower bound and the upper bound estimates. Based on this DHS estimates the average cost savings from this provision to be \$653,162.

Table 16. Estimated Cost Savings to Form I-129 H-1B Petitioners due to Not Submitting an Itinerary				
	Affected Population	Time Burden (Hours)	Compensation Rate	Total Annual Cost
	A	B	C	D=A×B×C
Lower Bound				
Estimated Number of Petitions Submit Itineraries (Lower Bound)				
HR specialist	2,389	0.08	\$53.03	\$10,135
In-house lawyer	8,989	0.08	\$123.02	\$88,466
Outsourced lawyer	8,989	0.08	\$212.10	\$152,525
Total - Lower Bound	11,378			\$130,631
Upper Bound				
Estimated Number of Petitions Submit Itineraries (Upper Bound)				
HR specialist	21,505	0.08	\$53.03	\$91,233
In-house lawyer	80,901	0.08	\$123.02	\$796,193
Outsourced lawyer	80,901	0.08	\$212.10	\$1,372,724
Total - Upper Bound	102,406			\$1,175,692
Total Cost Savings Average				\$653,162
Source: USCIS analysis HR specialist (2,389) = Total-lower bound (11,378) × Percent of petitions filed by HR specialist (21%) In-house lawyer (8,989) = Total-lower bound (11,378) × Percent of petitions filed by in-house lawyer (79%) Outsourced lawyer (8,989) = Total-lower bound (11,378) × Percent of petitions filed by outsourced lawyer (79%) DHS does not know the exact number of petitioners who will choose an in-house or an outsourced lawyer but assumes it may be a 50/50 split and therefore provides an average. HR specialist (21,505) = Total-upper bound (102,406) × Percent of petitions filed by HR specialist (21%) In-house lawyer (80,901) = Total- upper bound (102,406) × Percent of petitions filed by in-house lawyer (79%) Outsourced lawyer (80,901) = Total- upper bound (102,406) × Percent of petitions filed by outsourced lawyer (79%) Calculations for In-house/Outsourced lawyer totals are averaged then added to the HR Specialist, for the total averages. For example (lower bound) Average (\$88,466 + \$152,525)/2 = \$120,496 + \$10,135 = \$130,631 and (upper bound) Average (\$796,193 + \$1,372,724)/2 = \$1,084,459 + \$91,233 = \$1,175,692. The total cost savings is the average of the lower and upper bound average totals = (\$130,631 + \$1,175,692)/2 = \$653,162.				

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DHS acknowledges the elimination of the itinerary requirement may also affect H petitions filed by agents as well as H-2 petitions filed for beneficiaries performing work in more than one location or for multiple employers, however, DHS has not estimated these cost savings here.

xiii. Validity Period Expires Before Adjudication

DHS will allow H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been

established, has passed. This typically will happen if USCIS deemed the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.

If USCIS adjudicates an H-1B petition and deems it approvable after the initially requested validity period end-date, or the last day for which eligibility has been established, USCIS may issue an RFE asking whether the petitioner wants to update the dates of intended employment. This change may increase the number of RFE's; however, it may save petitioners from having to file another H-1B petition and USCIS from having to intake and adjudicate another petition.

If in response to the RFE the petitioner confirms that it wants to update the dates of intended employment and submits a different LCA that corresponds to the new requested validity dates, even if that LCA was certified after the date the H-1B petition was filed, and assuming all other eligibility criteria are met, USCIS will approve the H-1B petition for the new requested period or the period for which eligibility has been established, as appropriate, rather than require the petitioner to file a new or amended petition. Under a no-action baseline, the requirement to file an amended or new petition results in additional filing costs and burden for the petitioner. DHS expects that this change will save

petitioners the difference between the opportunity cost of time and the fee to file an additional form, and the nominal opportunity cost of time and expense associated with responding to the RFE. This change will benefit beneficiaries selected under the cap, who will retain cap-subject petitions while their petition validity dates are extended or whose petitions now may be approved rather than denied based on this technicality.

xiv. H-1B Cap Exemptions

DHS is revising the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity at 8 CFR 214.2(h)(8)(iii)(F)(4). These final changes intend to clarify, simplify, and modernize eligibility for cap-exempt H-1B employment, so that they are less restrictive and better reflect modern employment relationships. The changes also intend to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are employed at a qualifying institution, organization, or entity.

DHS is revising 8 CFR 214.2(h)(19)(iii)(C), which states that a nonprofit research organization is an entity that is "primarily engaged in basic research and/or applied research," and a governmental research organization is a Federal, State, or local entity "whose primary mission is the performance or promotion of basic research and/or applied research." DHS is replacing "primarily engaged" and "primary mission" with "a fundamental activity" in order to permit a nonprofit entity or governmental organization that conducts research as a fundamental activity but is not primarily engaged in research to meet the definition of a nonprofit research entity or a governmental research organization. This will likely increase the population of petitioners who are now eligible for the cap exemption and, by extension, will likely increase the number of petitions that may be cap-exempt.

Petitioners who qualify for a cap exemption for their employees under the final rule will no longer have to register for the cap lottery or pay the \$215 registration fee. Some affected petitioners may avoid ACWIA fees that would have been applicable to their initial cap-subject petitions. While DHS does not have administrative data to estimate precisely how many additional petitioners will now qualify for these cap exemptions, the RIA presented estimates that the modest expansion in I-129 petitions and approved

beneficiaries results from cap-subject registrants, many of whom would not have been randomly selected in the lottery, become eligible to petition directly for cap-exempt researchers.

Aside from the reduction in transfers from not having to pay the registration fee, petitioners that qualify under the cap exemptions will also benefit from not having to wait for H-1B cap season to commence employment. This may allow approved petitioners to have their H-1B workers commence employment earlier, prior to the beginning of the fiscal year on October 1.

The National Science Foundation's (NSF) Nonprofit Research Activities (NPRA) Survey of nonfarm businesses filing IRS tax form 990 as tax-exempt organizations with payroll of \$500,00 or more, estimated there were 2,835 nonprofits with research and development (R&D) activity accounting for \$27B in FY2021 R&D expenditures.¹⁸⁶ This equals \$9.6M R&D expenditures per nonprofit with R&D activity in 2021.¹⁸⁷ The largest share of nonprofits' R&D expenditures were made possible by Federal Government funds (43%), followed by other sources of funds (30%) and internal funds (28%). While data on the specific activities of individual research nonprofits is not available to DHS or the public, NSF NPRA Tables 1, 2, and 3 show that R&D as a share of a research nonprofits' expenditures vary widely. For example, while comparable amounts were spent on research activities by nonprofits in the science and technology (S&T) sector and the healthcare sector (\$21M and \$22M, respectively), these expenditures comprise 53% of a typical S&T nonprofit's expenditures, but only 2% of a typical healthcare nonprofit's total expenditures.¹⁸⁸ Other research nonprofits outside the S&T or healthcare sectors spent less on research activities (\$1M or 5% of total expenditures), but outnumbered both S&T and healthcare sectors combined (1,660 "other nonprofit organizations" compared to 514 S&T and 658 healthcare nonprofits with R&D activity). NPRA Tables 8 through 11 show similar results for research employees as a share of total

employees (R&D employees comprise 55,527 FTE or 68% of the 81,241 employees of S&T organizations with R&D activity, compared with 2% for healthcare organizations with R&D activity and 8% of other nonprofit organizations with R&D activities. NPRA Table 11 provides additional detail on the mix of researchers, technicians and other support personnel employed to support nonprofits' research activities.

Given the highly competitive nature of the market for research funding, DHS assumes R&D funding is unlikely to be awarded to nonprofits that do not already employ the highly skilled, highly specialized staff required to successfully carry out research requirements.¹⁸⁹ Consequently, any impacts to nonprofits that do not already employ skilled/specialized labor would be constrained by the difficulty of competing for research funding before petitioning for qualified researchers or petitioning for qualified researchers before competing for research funding. A national immigration law-firm with significant experience provided comments agreeing a more significant difference in the number of petitions that fit the parameters of cap exempt eligibility is unlikely.

Furthermore, NSF's NPRA Table 7 shows \$0.32 for every \$1 of FY2021 nonprofit organizations' research expenditures flowing out in the form of grants, subcontracts or subawards to support R&D by other organizations. While neither DHS nor NSF know the degree to which research activities' employment is structured around interpretations of DHS's requirement of employment at the cap-exempt entity, NPRA Table 7 depicts a highly interconnected research enterprise in which research activities flow between other organizations with research activities.¹⁹⁰ A practical impact of the definition change could be additional flexibility for research organizations and

¹⁸⁹ NIH RePORT Research Project Grants: Competing Applications, Awards and Success Rates at <https://report.nih.gov/nihdatabook/report/20> (last accessed 8/6/2024). NIH Data Book shows a 19% success rate defined as the number of grants awarded divided by the number of applications received. Similarly, see National Science Board Report at https://www.nsf.gov/nsb/news/news_summ.jsp?cntn_id=307818 (last access 8/6/24) reporting an FY2021 funding rate of 26%.

¹⁹⁰ Funds provided by "Other nonprofit organizations" to others for R&D (\$5.5B in FY2021 from NPRA Table 7) exceeds Total R&D Expenditures by other nonprofit organizations (\$2.4B in NPRA Table 6) because providing R&D funding to another organization does not count as an R&D expenditure. Consequently, DHS describes this as \$2.28 in research funding to other organizations per \$1 of research expenditures rather than 228% of expenditures.

¹⁸⁶ See NSF NPRA Data Table 1 at <https://nces.nsf.gov/surveys/nonprofit-research-activities/2021#data>. Last accessed 8/6/2024.

¹⁸⁷ \$27.19B All R&D expenditures (NPRA Table 3) divided by 2,835 organizations with R&D activity (NPRA Table 1) = \$9.6M (rounded).

¹⁸⁸ USCIS analysis. Dividing All R&D expenditures in NPRA Table 3 by total expenses of Science and technology nonprofit organizations in NPRA Table 2 = 53% (rounded) R&D expenditures as a share of a research nonprofits' expenses. This approach yields 2% for Healthcare and 5% for Other nonprofit organizations.

foreign researchers when determining the appropriate employer. For this reason, these changes are assumed to represent a shift from currently cap-exempt organizations to newly exempt organizations rather than a true expansion in the population of cap-exempt visas. DHS agrees, however, with information submitted by a commenter representing postdocs and research organizations that the change “diversif[ies] international postdocs’ available career paths” and therefore could result in an expansion if cap-exempt H–1B workers’ research careers gradually extend more broadly throughout the research enterprise as a result of this flexibility.

In the NPRM, the RIA estimated these modest impacts would accrue to cap subject registrants seeking highly skilled, highly specialized research staff.¹⁹¹ DHS’s assessment that a larger response is unlikely is supported by several factors. Cap subject petitioners have always had the option to access cap-exempt researchers by creating separate research nonprofits or partnerships with cap-exempt universities and research organizations. DHS’s high-end estimate, 2,845 additional cap exempt visas, is just higher than the NSF estimated number of nonprofits with R&D activity in FY2021.

Commenters provided no information nor substantive critique of the NPRM RIA’s estimated impact, incorrectly alleged no rationale for the proposed changes, and contradicted the NSF NPRA data in asserting, without evidence, that “all nonprofits do some activity they could labeled as or considered to be research [sic]” and, therefore the change would “bust the statutory cap wide open.” In the absence of information, DHS includes the monetized impacts of 0.3–0.8 percent of cap-subject registrants becoming cap-exempt as shown in Table 17.

Table 17. Estimated Net Transfer Payments to USCIS due to Cap Exemption provision, FY 2025			
	Fee	Population	Total fees paid to USCIS
No-Action Baseline			\$ 220,489,895
Total FY25 Registrations	\$215	479,953	\$ 103,189,895
Form I-129	\$780+\$600	85,000	\$ 117,300,000
Cap-Exempt Expansion (0.3%)			\$ 221,274,588
Registrations	\$215	478,513	\$ 102,880,295
Form I-129	\$780+\$600	85,000	\$ 117,300,000
Newly Exempt Form I-129	\$460+\$300	1,440	\$ 1,094,293
Cap-Exempt Expansion (0.8%)			\$ 222,573,654
Registrations	\$215	476,113	\$ 102,364,295
Form I-129	\$780+\$600	85,000	\$ 117,300,000
Newly Exempt Form I-129	\$460+\$300	3,828	\$ 2,909,359
Source: H-1B Electronic Registration Process data as of April 12, 2024 (last accessed 8/27/2024)			

Relative to the No-Action baseline where most registrants will not ultimately be selected in the random lottery to petition using Form I–129 H–1B, the estimated 0.3–0.8 percent expansions in cap-exempt research nonprofits result in reduced registrations as well as additional Form I–129 H–1B filings and fees from non-profits made exempt by this final rule that would not have been selected in the lottery. These newly cap-exempt Form I–129 fees are discounted from \$780 to \$460 and the Asylum Program fees are discounted from \$600 to \$300 consistent with research non-profits.¹⁹² Table 17 shows that cap-exemptions result in \$784,693

additional payments from these new cap-exempt petitioners to USCIS under the 0.3-percent scenario and \$2,083,759 additional payments from these new cap-exempt petitioners to USCIS under the 0.8-percent scenario. The midpoint of this range describes the primary estimate scenario in which these new cap-exempt petitioners will, on net, pay \$1,434,226 to USCIS in additional fee revenue for cap-exempt beneficiaries. Consistent with the NPRM and other USCIS rulemakings, because these payments are made in exchange for existing services provided by USCIS, these payments are described as transfers from newly cap-exempt

petitioners to USCIS rather than costs or cost savings.

xv. Automatic Extension of Authorized Employment “Cap-Gap”

DHS is extending the automatic cap-gap extension at 8 CFR 214.2(f)(5)(vi). Currently, the automatic extension is valid only until October 1 of the fiscal year for which H–1B status is being requested, but DHS extends this until April 1 of the fiscal year. *See* amended 8 CFR 214.2(f)(5)(vi). This change will result in more flexibility for both students and USCIS and will help to avoid disruption to U.S. employers that are lawfully employing F–1 students

¹⁹¹ See 88 FR 72934.

¹⁹² “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other

Immigration Benefit Request Requirements,” 89 FR 6194 (Jan. 31, 2024).

while a qualifying H-1B cap-subject petition is pending.

Each year, a number of U.S. employers seek to employ F-1 students via the H-1B program by requesting a COS and filing an H-1B cap petition with USCIS. Many F-1 students complete a program of study or post-completion OPT in mid-spring or early summer. Per current regulations, after completing their program or post-completion OPT, F-1 students have 60 days to take the steps necessary to maintain legal status or depart the United States. *See* 8 CFR 214.2(f)(5)(iv). However, because the change to H-1B

status cannot occur earlier than October 1, an F-1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H-1B status begins.

Under current regulations, the automatic cap-gap extension is valid only until October 1 of the fiscal year for which H-1B status is being requested. DHS is changing the automatic extension end date from October 1 to April 1 to avoid disruptions in employment authorization that some F-1 nonimmigrants awaiting the change to H-1B status have been experiencing

over the past several years. Table 18 shows the historical pending petition volumes, for F-1 nonimmigrants awaiting H-1B status. Preventing such employment disruptions will also benefit employers of F-1 nonimmigrants with cap-gap extensions. This change in the automatic extension end date will also allow USCIS greater flexibility in allocating officer resources to complete adjudications without the pressure of completing as many change of status (COS) requests as possible before October 1.

Table 18. Historical Form I-129 Petitions Seeking Initial H-1B Status for Beneficiaries Who Are in F-1 Status and Seeking a Change of Status (COS) to H-1B Pending after October 1 Volume, FY 2019 through FY 2023

Fiscal Year	Pending Petitions on October 1
2019	43,975
2020	26,967
2021	23,339
2022	23,282
2023	17,243
5-year Total	134,806
5-year Annual Average	26,961
Source: USCIS, OP&S PRD, C3 May 20, 2024.	

DHS does not have precise data on the number of cap-gap F-1 nonimmigrants who have faced EAD disruptions. Using available administrative data, DHS estimated in the NPRM that between 1 and 5 percent of F-1 nonimmigrants seeking a change of status to H-1B may have faced EAD disruptions.

Current regulations allow OPT F-1 students 60 days to take the steps necessary to maintain legal status or depart the United States. *See* 8 CFR 214.2(f)(5)(iv). However, because the change to H-1B status cannot occur earlier than October 1, an F-1 student whose program or post-completion OPT expires in mid-spring has two or more months following the 60-day period before the authorized period of H-1B status begins. While many F-1 students complete a program of study or post-completion OPT in mid-spring or early summer, some complete their programs at different times of the year, with 60-day grace periods. Additionally, some F-1 nonimmigrants with pending H-1B petitions may not have intended to work during the full period covered by this provision. The labor impacts of this provision of the rule would be constrained in these and other instances

not readily available in USCIS's administrative data.

DHS estimates that this change will benefit up to 5 percent (1,348) of the population (26,961) on an annual basis and on the low end 270 (1 percent); however, F-1 students who are beneficiaries of H-1B cap petitions that provide cap-gap relief will be able to avoid employment disruptions while waiting to obtain H-1B status. DHS estimates that an F-1 student who is the beneficiary of an H-1B cap petition makes \$46.14¹⁹³ per hour in compensation. This compensation includes wages and salaries, benefits such as paid leave and insurance, and legally required benefits such as Social Security and Medicare.¹⁹⁴

¹⁹³ \$46.14 Total Employee Compensation per hour. *See* BLS, Economic News Release, "Employer Costs for Employee Compensation—March 2024," Table 1. "Employer Costs for Employee Compensation by ownership [Mar. 2024]," https://www.bls.gov/news.release/archives/ecec_06182024.htm (last visited Aug. 20, 2024).

¹⁹⁴ For a breakout of the components of total compensation, *see* BLS, Economic News Release, "Employer Costs for Employee Compensation—March 2024," Table 1. "Employer Costs for Employee Compensation by ownership [Mar. 2024]," https://www.bls.gov/news.release/archives/ecec_06182024.htm (last visited Aug. 20, 2024).

Based on a 40-hour work week,¹⁹⁵ DHS estimates the potential compensation for each F-1 student who is the beneficiary of an H-1B cap petition to be \$47,996¹⁹⁶ for 6 months of employment from October 1st to April 1st. DHS estimates that this potential compensation may be a benefit to F-1 students who are seeking a COS to a H-1B status. This benefit ranges from \$12,958,920¹⁹⁷ to \$64,698,608¹⁹⁸ annually, with a midpoint of \$38,828,764. This midpoint is the primary estimate of transfer payments from other workers to F-1 students who remain employed up to six months longer than under current regulations, in the form of increased compensation during the additional duration of employment. Employers will benefit, as they will be gaining productivity and potential profits that the F-1 students'

¹⁹⁵ *See, e.g.*, 8 CFR 214.2(f)(5)(vi)(A) (describing cap-gap employment) and (f)(11)(ii)(B) (describing OPT and noting that it may be full-time).

¹⁹⁶ Calculation: \$46.14 * 40 hours = \$1,846 per week * 26 weeks = \$47,996 per 6 months.

¹⁹⁷ Calculation: \$47,996 per 6 months * 270 (1 percent of 26,961) F-1 students = \$12,958,920.

¹⁹⁸ Calculation: \$47,996 per 6 months * 1,348 (5 percent of 26,961) F-1 students = \$64,698,608.

continuing employment will provide. Companies may also benefit by not incurring opportunity costs associated with the next best alternative to the immediate labor the F–1 student will provide. DHS does not know what this next best alternative may be for impacted companies. For instance, in the absence of F–1 workers providing this labor, employers may redistribute the work to their other workers either as a part of their regular job duties or require them to work overtime, or companies may need to reprioritize the work, or put off certain work until a later time.

There may be additional transfers due to tax impacts associated with this compensation, but these transfers are difficult to quantify. Foreign students in F–1 status more than five calendar years are typically liable for Social Security and Medicare taxes¹⁹⁹ in addition to Federal and State income taxes.

xvi. Provisions To Ensure Bona Fide Job Offer for a Specialty Occupation Position

a. Contracts

DHS will codify USCIS' authority to request contracts, work orders, or similar evidence. *See* amended 8 CFR 214.2(h)(4)(iv)(C). Such evidence may take the form of contracts or legal agreements, if available, or other evidence including technical documentation, milestone tables, or statements of work. Evidence submitted should show the contractual relationship between all parties, the bona fide nature of the beneficiary's position, and the minimum educational requirements to perform the duties.

While USCIS already has the authority to request contracts and other similar evidence, DHS is amending the regulations for added clarity. By codifying this authority, USCIS is putting stakeholders on notice of the kinds of evidence that could be requested to establish the nature of the beneficiary's work and the minimum educational requirements to perform the duties. This evidence, in turn, could establish that the petitioner has a bona fide job offer for a specialty occupation position for the beneficiary. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to provide contracts or legal agreements, if available, or other

evidence including technical documentation, milestone tables, or statements of work. DHS cannot estimate how much time it will have taken for petitioners to provide that information.

b. Bona Fide Employment

DHS will codify its requirement that the petitioner must establish, at the time of filing, that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. *See* 8 CFR 214.2(h)(4)(iv)(D). This change is consistent with current USCIS policy guidance that an H–1B petitioner must establish that the purported employment exists at the time of filing the petition and that it will employ the beneficiary in a specialty occupation.²⁰⁰ Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may require time to provide documentation to establish that their position was a bona fide position in a specialty occupation. DHS cannot estimate how much time it takes for petitioners to provide that information.

c. LCA Corresponds With the Petition

DHS will update the regulations to expressly include DHS's existing authority to ensure that the LCA supports and properly corresponds with the accompanying H–1B petition. Relative to the no-action baseline, this change has no costs and may yield transparency benefits due to consistency between regulation and current policy. Relative to the without-policy baseline petitioners may have taken time to provide their LCA to DHS, however DHS cannot estimate how much time it will have taken for petitioners to provide that information.

d. Revising the Definition of U.S. Employer

DHS is revising the definition of "United States employer." First, DHS will eliminate the employer-employee relationship requirement. In place of the employer-employee relationship requirement, DHS will codify the requirement that the petitioner has a bona fide job offer for the beneficiary to work, which may include telework, remote work, or other off-site work within the United States. DHS also will replace the requirement that the petitioner "[e]ngages a person to work

within the United States" with the requirement that the petitioner have a legal presence and is amenable to service of process in the United States. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline, petitioners may require time to provide documentation establishing a bona fide job offer for the beneficiary to work. DHS cannot estimate how much time petitioners take to provide that information.

e. Employer-Employee Relationship

DHS will remove from the definition of U.S. employer the reference to an employer-employee relationship requirement, which, in the past, was interpreted using common law principles and was a significant barrier to the H–1B program for certain petitioners, including beneficiary-owned petitioners. This proposed change is consistent with current USCIS policy guidance and will promote clarity and transparency in the regulations. This change will benefit petitioners because it may decrease confusion and increase clarity for stakeholders. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this change. Relative to the without-policy baseline petitioners may have taken time to understand the change.

xvii. Beneficiary-Owners

DHS codifies a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner. To promote access to H–1Bs for entrepreneurs, start-up entities, and other beneficiary-owned businesses, DHS will add provisions to specifically address situations where a potential H–1B beneficiary owns a controlling interest in the petitioning entity. If more entrepreneurs are able to obtain H–1B status to develop their business enterprise, the United States could benefit from the creation of jobs, new industries, and new opportunities.²⁰¹ This change will

¹⁹⁹ *See* <https://www.irs.gov/individuals/international-taxpayers/foreign-student-liability-for-social-security-and-medicare-taxes> (last visited Sep. 26, 2024).

²⁰⁰ *See* USCIS, "Rescission of Policy Memoranda," PM–602–0114 (June 17, 2020) (citing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010)).

²⁰¹ *See, e.g.*, National Bureau of Economic Research, "Winning the H–1B Visa Lottery Boosts the Fortunes of Startups" (Jan. 2020), <https://www.nber.org/digest/jan20/winning-h-1b-visa-lottery-boosts-fortunes-startups> ("The opportunity to hire specialized foreign workers gives startups a leg up over their competitors who do not obtain visas for desired employees. High-skilled foreign labor boosts a firm's chance of obtaining venture capital funding, of successfully going public or being acquired, and of making innovative breakthroughs."). Pierre Azoulay, et al., "Immigration and Entrepreneurship in the United States" (National Bureau of Economic Research, Working Paper 27778 (Sept. 2020) <https://>

benefit H-1B petitions filed by start-up entities and other beneficiary-owned businesses, or filed on behalf of entrepreneurs who have a controlling interest in the petitioning entity. DHS is unable to estimate how many petitioners will benefit from this change.

DHS is also providing new guardrails for beneficiary-owned entities, including limiting the validity period for beneficiary-owned entities' initial petition and first extension (including an amended petition with a request for an extension of stay) of such a petition to 18 months. *See* amended 8 CFR 214.2(h)(9)(iii)(E). Any subsequent extension will not be limited and may be approved for up to 3 years, assuming the petition satisfies all other H-1B requirements. DHS is limiting the first two validity periods to 18 months as a safeguard against possible fraudulent petitions. While DHS sees a significant advantage in promoting the H-1B program to entrepreneurs and allowing these beneficiaries to perform a significant amount of non-specialty occupation duties, unscrupulous petitioners might abuse such provisions without sufficient guardrails. DHS believes that there may be a cost to petitioners associated with this change however cannot estimate how many petitioners may be affected by limiting the validity period. DHS is also finalizing the provision that a beneficiary-owner may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H-1B petition. DHS believes that there may be a cost to petitioners associated with this change however cannot estimate how many petitioners may be affected.

xviii. Site Visits

USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). DHS is adding regulations specific to the H-1B program to codify its existing authority and clarify the

scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. Using its general authority, USCIS may conduct audits, on-site inspections, reviews, or investigations to ensure that a petitioner and beneficiary are entitled to the benefits sought and that all laws have been complied with before and after approval of such benefits.²⁰² The authority to conduct on-site inspection is critical to the integrity of the H-1B program to detect and deter fraud and noncompliance.

In July 2009, USCIS started the Administrative Site Visit and Verification Program²⁰³ as an additional method to verify information in certain visa petitions under scrutiny. Under this program, FDNS officers are authorized to make unannounced site visits to collect information as part of a compliance review, which verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, interviewing the petitioner or beneficiary, and conducting site visits. Once the FDNS officers complete the site visit, they write a Compliance Review Report for any indicators of fraud or noncompliance to assist USCIS in final adjudicative decisions.

The site visits conducted under USCIS's existent, general authority, and thus part of the baseline against which this rule's impact should be measured, have uncovered a significant amount of noncompliance in the H-1B program.²⁰⁴

²⁰² *See* INA section 103 and 8 CFR 2.1. As stated in subsection V.A.5.ii(d) of this analysis, regulation would also clarify the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

²⁰³ *See* USCIS, "Administrative Site Visit and Verification Program," <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last visited Sept. 18, 2019). *See* USCIS, "Administrative Site Visit and Verification Program," <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last visited Sept. 18, 2019). *See* USCIS, "Administrative Site Visit and Verification Program," <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program> (last visited Sept. 18, 2019).

²⁰⁴ USCIS, Office of Policy and Strategy, PRD, Summary of H-1B Site Visits Data.

Further, when disaggregated by worksite location, the noncompliance rate was found to be higher for workers placed at an off-site or third-party location compared to workers placed at a petitioner's on-site location.²⁰⁵ As a result, USCIS began conducting more targeted site visits related to the H-1B program, focusing on the cases of H-1B dependent employers (*i.e.*, employers who have a high ratio of H-1B workers compared to U.S. workers, as defined by statute) for whom USCIS cannot validate the employer's basic business information through commercially available data, and on employers petitioning for H-1B workers who work off-site at another company or organization's location.

DHS believes that site visits are important to maintain the integrity of the H-1B program to detect and deter fraud and noncompliance in the H-1B program, which in turn ensures the appropriate use of the H-1B program and the protection of the interests of U.S. workers. These site visits will continue in the absence of this rule and DHS notes that current Form I-129 instructions notify petitioners of USCIS' legal authority to verify information before or after a case decision, including by means of unannounced physical site inspection. Hence, DHS is adding additional requirements specific to the H-1B program to set forth the scope of on-site inspections, and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with existing inspections. DHS does not foresee the rule leading to more on-site inspections.

This rule will provide a clear disincentive for petitioners that do not cooperate with compliance reviews and inspections while giving USCIS greater authority to access and confirm information about employers and workers as well as identify fraud.

The regulations will make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-1B program. *See* amended 8 CFR 214.2(h)(4)(i)(B)(2). The regulation will also clarify that an

²⁰⁵ *Id.*

www.nber.org/system/files/working_papers/w27778/w27778.pdf ("immigrants act more as 'job creators' than 'job takers' and . . . non-U.S. born founders play outsized roles in U.S. high-growth entrepreneurship").

inspection may take place at the petitioning organization’s headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. The provisions will make clear that an H–1B petitioner or any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H–1B requirements. The regulation will state the consequences if USCIS is unable to verify facts related to an H–1B petition, including due to the failure or refusal of the petitioner or a third-party worksite to cooperate with a site visit. These failures or refusals may be grounds for denial or revocation of any H–1B petition related to locations that are a subject of inspection, including any third-party worksites. See amended 8 CFR 214.2(h)(4)(i)(B)(2).

In order to estimate the population impacted by site visits, DHS uses site inspection data used to verify facts pertaining to the H–1B petition adjudication process. The site inspections were conducted at H–1B

petitioners’ on-site locations and third-party worksites during FY 2019 through FY 2023. For instance, from FY 2019 through FY 2023, USCIS conducted a total of 32,366 H–1B compliance reviews and found 6,206 of them, equal to 19 percent, to be noncompliant or indicative of fraud.²⁰⁶ These compliance reviews (from FY 2019 through FY 2023) consisted of reviews conducted under both the Administrative Site Visit and Verification Program and the Targeted Site Visit and Verification Program, which began in 2017. The targeted site visit program allows USCIS to focus resources where fraud and abuse of the H–1B program may be more likely to occur.²⁰⁷

Table 19 shows the number of H–1B worksite inspections conducted each year and the number of visits that resulted in compliance and noncompliance. USCIS found a low of 1,061 fraudulent/noncompliant cases in FY 2022, and a high of 1,473 fraudulent/noncompliant cases in FY 2021. DHS estimates that, on average, USCIS conducted 6,473 H–1B worksite

inspections annually from FY 2019 through FY 2023 and of those DHS finds a noncompliance rate of 19 percent. Assuming USCIS continues worksite inspections at the 5-year annual average rate, the population impacted by this provision will be 1,241 or 19 percent of H–1B petitioners visited who are found noncompliant or indicative of fraud. The outcomes of site visits under the rule are indeterminate as currently noncooperative petitioners might be found to be fully compliant, might continue to not cooperate with site visits despite penalties, or might be forced to reveal fraudulent practices to USCIS. The expected increase in cooperation from current levels will be the most important impact of the provision, which DHS discusses below. DHS notes that the increased cooperation might come disproportionately from site visits of third-party worksites that did not sign Form I–129 attesting to permit unannounced physical site inspections of residences and places of employment by USCIS.

Table 19. H-1B Compliance and Fraud/Noncompliance Percentages Closed by FDNS Overall, FY 2019 through FY 2023				
Fiscal Year	Compliant	Fraud/Noncompliant	Total	Percent of Fraud/Noncompliance
2019	7,897	1,435	9,332	15%
2020	4,065	1,083	5,148	21%
2021	5,429	1,473	6,902	21%
2022	4,663	1,061	5,724	19%
2023	4,106	1,154	5,260	22%
5-year Total	26,160	6,206	32,366	19%
5-year Annual Average	5,232	1,241	6,473	19%
Source: USCIS, Fraud Detection and National Security (FDNS) June 2, 2024				

²⁰⁶ DHS, USCIS, PRD (2023). PRD399. USCIS conducted these site visits through its Administrative and Targeted Site Visit Programs.

²⁰⁷ See USCIS, “Putting American Workers First: USCIS Announces Further Measures to Detect H–1B Visa Fraud and Abuse” (April 3, 2017), <https://www.uscis.gov/archive/putting-american-workers-first-uscis-announces-further-measures-to-detect-h-1b-visa-fraud-and-abuse>.

Table 20 shows the average duration of time to complete each inspection was 1.09 hours. Therefore, DHS assumes that USCIS will continue to conduct the same number of annual worksite inspections (6,929), on average, and that the average duration of time for a USCIS immigration officer to conduct each

worksite inspection will be an average of 1.09 hours. The data in Tables 19 and 20 differ slightly based on the different search criteria, pull dates and systems accessed. DHS also assumes that the average duration of time of 1.09 hours to conduct an inspection covers the entire inspection process, which

includes interviewing the beneficiary, the on-site supervisor or manager and other workers, as applicable, and reviewing all records pertinent to the H-1B petitions available to USCIS when requested during inspection.

Table 20. Total Number of Worksite Inspections Conducted for H-1B Petitioners and Average Inspection Time, FY 2019 to FY 2023.

Fiscal Year	Number of Worksite Inspections	Average Duration for Worksite Inspection (Hours)
2019	10,463	1.23
2020	5,843	1.12
2021	6,805	0.86
2022	5,659	1.05
2023	5,874	1.17
5-year Total	34,644	5.43
5-year Average	6,929	1.09

Source: USCIS, Fraud Detection and National Security (FDNS). June 2, 2024

DHS assumes that a supervisor or manager, in addition to the beneficiary, will be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection. The officer will interview the beneficiary to verify the date employment started, work location, hours, salary, and duties performed to corroborate with the information provided in an approved petition. The supervisor or manager will be the most qualified employee at the location who could answer all questions pertinent to the petitioning organization and its H-1B nonimmigrant workers. They will also be able to provide the proper records available to USCIS immigration officers. Consequently, for the purposes of this economic analysis, DHS assumes that on average two individuals will be interviewed during each worksite inspection: the beneficiary and the supervisor or manager. DHS uses their respective compensation rates in the estimation of the worksite inspection costs.²⁰⁸ However, if any other worker or on-site manager is interviewed, the same compensation rates will apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time

a beneficiary and supervisor or manager will incur during worksite inspections. Based on data obtained from a USCIS report in 2024, DHS estimates that an H-1B worker earned an average of \$130,000 per year in FY 2023.²⁰⁹ DHS therefore estimates the salary of an H-1B worker is approximately \$130,000 annually, or \$62.50 hourly wage.²¹⁰ The annual salary does not include noncash compensation and benefits, such as health insurance and transportation. DHS adjusts the average hourly wage rate using a benefits-to-wage multiplier

²⁰⁹ This is the annual average earning of all H-1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2023. It is what employers agreed to pay the nonimmigrant workers at the time the applications were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. USCIS, "Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2023 Annual Report to Congress, October 1, 2022–September 30, 2023," at 50, Table 9a (Mar. 6, 2024). See https://www.uscis.gov/sites/default/files/document/reports/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2023.pdf (last visited Aug. 21, 2024).

²¹⁰ The hourly wage is estimated by dividing the annual salary by the total number of hours worked in a year (2,080, which is 40 hours of full-time workweek for 52 weeks). \$62.50 hourly wage = \$130,000 annual pay ÷ 2,080 annual work hours. According to DOL that certifies the LCA of the H-1B worker, a full-time H-1B employee works 40 hours per week for 52 weeks for a total of 2,080 hours in a year assuming full-time work is 40 hours per week. DOL, Wage and hour Division: "Fact Sheet # 68—What Constitutes a Full-Time Employee Under H-1B Visa Program?" (July 2009), <https://www.dol.gov/whd/regs/compliance/wdf68.htm> (last visited July 30, 2019).

to estimate the average hourly compensation of \$90.63 for an H-1B nonimmigrant worker.²¹¹ In order to estimate the opportunity cost of time they will incur during a worksite inspection, DHS uses an average hourly compensation rate of \$96.03 per hour for a supervisor or manager, where the average hourly wage is \$66.23 per hour worked and average benefits are \$29.80.²¹² While the average duration of time to conduct an inspection is estimated at 1.09 hours in this analysis, DHS is not able to estimate the average duration of time for a USCIS immigration officer to conduct an interview with a beneficiary or supervisor or manager. In the absence of this information, DHS assumes that it will on average take 0.545 hours to interview a beneficiary and 0.545 hours to interview a supervisor or manager.²¹³

²¹¹ Hourly compensation of \$90.63 = \$62.50 average hourly wage rate for H-1B worker × 1.45 benefits-to-wage multiplier. See section V.A.5. for estimation of the benefits-to-wage multiplier.

²¹² Hourly compensation of \$96.03 = \$66.23 average hourly wage rate for Management Occupations (national) × 1.45 benefits-to-wage multiplier. See BLS, "Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2023, 11–0000 Management Occupations (Major Group)," <https://www.bls.gov/oes/2023/may/oes110000.htm> (last visited Aug. 20, 2024).

²¹³ DHS assumes that beneficiary takes 50 percent of average inspection duration and supervisor, or manager takes 50 percent. Average duration of interview hours for beneficiaries (0.545) = Average inspection duration (1.09) × 50% = 0.545. Average duration of interview hours for Supervisors or

Continued

²⁰⁸ DHS does not estimate any other USCIS costs associated with the worksite inspections (*i.e.*, travel and deskwork relating to other research, review and document write up) here because these costs are covered by fees collected from petitioners filing Form I-129 for H-1B petitions. All such costs are discussed under the Federal Government Cost section.

In Table 21, DHS estimates the total annual opportunity cost of time for worksite inspections of H-1B petitions by multiplying the average annual

number of worksite inspections (6,929) by the average duration the interview will take for a beneficiary or supervisor or manager and their respective

compensation rates. DHS obtains the total annual cost of the H-1B worksite inspections to be \$704,886 for this rule.

Table 22. Form I-129 Petitioners' Annual Cost of Worksite Inspection for H-1B Petitions				
Cost Item	Number of Worksite Inspections (Annual Average)	Average Duration of Interview (Hours)	Compensation Rate	Total Cost
	A	B	C	D=A×B×C
Beneficiaries' opportunity cost of time during worksite inspections	6,929	0.545	\$90.63	\$342,247
Supervisors or managers' opportunity cost of time during worksite inspections	6,929	0.545	\$96.03	\$362,639
Total	-	1.09	-	\$704,886
Source: USCIS analysis				

This change may affect employers who do not cooperate with site visits who will face denial or revocation of their petition(s), which could result in costs to those businesses. Petitioners may face financial losses because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this rule.

xix. Third-Party Placement (Codifying Policy Based on *Defensor v. Meissner* (5th Cir. 2000))

Amended 8 CFR 214.2(h)(4)(i)(B)(3) clarifies that, in certain circumstances USCIS will look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.

As required by both INA section 214(i)(1) and 8 CFR 214.2(h)(4)(i)(A)(1), an H-1B petition for a specialty occupation worker must demonstrate that the worker will perform services in

a specialty occupation, which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as a minimum requirement for entry into the occupation in the United States. This provision will ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party. Specifically, under amended 8 CFR 214.2(h)(4)(i)(B)(3), if the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party), the actual work to be performed by the beneficiary must be in a specialty occupation. Therefore, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation. Relative to the no-action baseline, this change has no costs associated with it, and there may be transparency benefits due to this

change. Relative to the without-policy baseline some petitioners for third parties may have taken time to demonstrate that the worker will perform services in a specialty occupation for that third party. Because this has been in place for a long time, DHS cannot estimate how much time it will have taken for petitioners to provide that information.

4. Alternatives Considered

In the NPRM, DHS sought public comment on how to ensure that the limited number of H-1B cap-subject visas, and new H-1B status grants available each fiscal year are used for non-speculative job opportunities. DHS has reviewed public comments, including suggested alternatives, on the various provisions in the NPRM and responded above.

5. Total Quantified Net Costs of the Final Regulatory Changes

In this section, DHS presents the total annual cost savings of this final rule annualized over a 10-year period of analysis. Table 22 details the annual cost savings of this rule. DHS estimates the total cost savings is \$1,038,721.

managers (0.545) = Average inspection duration (1.09) × 50% = 0.545.

Table 22. Summary of Cost Savings	
Description	Cost Savings
Amended Petitions	\$385,559
Eliminating the Itinerary Requirement for H Programs	\$653,162
Total Cost Savings	\$1,038,721
Source: USCIS Analysis	

DHS summarizes the annual costs of this rule. Table 23 details the annual costs of this rule. DHS estimates the total cost is \$704,886.

Table 23. Summary of Costs	
Description	Costs
Cost of Worksite Inspection for H-1B Workers	\$704,886
Total Costs	\$704,886
Source: USCIS Analysis	

Net costs savings to the public of \$333,835 are the total costs minus cost savings.²¹⁴ Table 24 illustrates that over a 10-year period of analysis from FY 2024 through FY 2033 annualized cost savings will be \$333,835 using a 2-percent discount rates.

Table 24. Discounted Net Cost Savings Over a 10-Year Period of Analysis	
Fiscal Year	Total Estimated Cost Savings
	\$333,835 (Undiscounted)
	Discounted at 2 percent
2024	\$327,289
2025	\$320,872
2026	\$314,580
2027	\$308,412
2028	\$302,365
2029	\$296,436
2030	\$290,623
2031	\$284,925
2032	\$279,338
2033	\$273,861
10-year Total	\$2,998,701
Annualized Cost Savings	\$333,835

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 and 602, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental

jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.²¹⁵

An “individual” is not considered a small entity and costs to an individual are not considered a small entity impact for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities.²¹⁶ Consequently, indirect impacts from a

²¹⁴ Calculations: \$1,038,721 Total Costs Savings – \$704,886 Total Costs = \$333,835 Net Cost Savings.

²¹⁵ A small business is defined as any independently owned and operated business not

dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

²¹⁶ See Small Business Administration, “A Guide For Government Agencies, How to Comply with the Regulatory Flexibility Act,” at 22, <https://>

advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf (last visited Aug. 23, 2024).

rule on a small entity are not considered as costs for RFA purposes. USCIS acknowledges that the rule could have indirect impacts on small entities including, but not limited to, costs associated with the time required to comply with the site visits provision. These indirect impacts are not included within the RFA because of uncertainty related to how many small entities would be affected and the degree to which affected entities would be impacted. The Regulatory Impact Analysis included above contains in-depth analysis of those possible impacts and how they may impact small entities.

USCIS's RFA analysis for this final rule focuses on the population of Form I-129 petitions for H-1B workers.

C. Final Regulatory Flexibility Act (FRFA)

6. A Statement of the Need for, and Objectives of, the Rule

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibility for petitioners and beneficiaries; and (3) improving integrity measures.

7. A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

DHS invited comments in the NPRM but did not receive any comments specific to the IRFA. USCIS responded to general comments concerning the rule in section III (Public Comments on the Proposed Rule).

8. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

DHS invited comments in the NPRM but did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

9. A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

For this analysis, due to the impracticality of full population analysis, DHS conducted a sample analysis of historical Form I-129 H-1B petitions to estimate the number of small entities impacted by this rule. DHS utilized a subscription-based electronic database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity. To determine whether an entity is small for purposes of RFA, DHS first classified the entity by its NAICS code and then used Small Business Administration (SBA) guidelines to classify the revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue, and some by their numbers of employees.

Using FY 2022 internal data on actual filings of Form I-129 H-1B petitions, DHS identified 44,593 unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. DHS first determined the minimum sample size necessary to achieve a 95-percent confidence level confidence interval estimation for the impacted population of entities using the standard statistical

formula at a 5-percent margin of error. DHS then created a sample size greater than the minimum necessary to increase the likelihood that our matches would meet or exceed the minimum required sample. DHS notes that the random sample was drawn from the population of Form I-129 H-1B petitioners for purposes of estimating impacts of each provision in the NPRM, including those finalized here, on the population of Form I-129 H-1B petitioners at-large.

DHS randomly selected a sample of 3,396 entities from the population of 44,593 entities that filed Form I-129 for H-1B petitions in FY 2022. Of the 3,396 entities, 1,724 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 1,672 entities did not return a match. Using these databases' revenue or employee count and their assigned NAICS code, DHS determined 1,209 of the 1,724 matches to be small entities, 515 to be non-small entities. DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this final rule will affect, DHS considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS classifies 2,881 of 3,396 entities as small entities, including combined non-matches (1,672), and small entity matches (1,209). Thus, DHS estimates that 84.8 percent (2,881 of 3,396) of the entities filing Form I-129 H-1B petitions are small entities.

In this analysis DHS assumes that the distribution of firm size for our sample is the same as the entire population of Form I-129 H-1B petitioners. Thus, DHS estimates the number of small entities to be 84.8 percent of the population of 44,593 entities that filed Form I-129 under the H-1B classification, as summarized in Table 25 below. The annual numeric estimate of the small entities impacted by this final rule is 37,815 entities.²¹⁷

Table 25. Number of Small Entities for Form I-129 for H-1B, FY 2022

Population	Number of Small Entities	Proportion of Population (Percent)
44,593	37,815	84.8%

²¹⁷ The annual numeric estimate of the small entities (37,815) = Population (44,593) * Percentage of small entities (84.8%).

Following the distributional assumptions above, DHS uses the set of 1,209 small entities with matched revenue data to estimate the economic impact of the final rule on each small entity. Typically, DHS will estimate the economic impact, in percentage, for each small entity is the sum of the impacts of the final changes divided by the entity's sales revenue.²¹⁸ DHS constructed the distribution of economic impact of the final rule based on the 1,209 small entity matches in the sample. Because this final rule resulted in an overall cost savings for petitioners there also would be no adverse impact on the estimated small entity population. Based on FY 2022 revenue, of the 1,209 small entities, 0 percent (0 small entities) would experience a cost increase that is greater than 1 percent of revenues.

10. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

This rule codifies USCIS' existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections, and supervisors of H-1B beneficiaries will bear an opportunity cost of time as described above.

11. A Description of the Steps the Agency has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and why Each of the Other Significant Alternatives to the Rule Considered by the Agency was Rejected

While the site visit provision imposes some burden to prospective employers, USCIS found no other alternatives that achieved stated objectives with less burden to small entities.

²¹⁸ The economic impact, in percentage, for each small entity $i = ((\text{Cost of one petition for entity } i \times \text{Number of petitions for entity } i) / \text{Entity } i\text{'s sales revenue}) \times 100$. The cost of one petition for entity i ($-\$0.79$) is estimated by dividing the total cost of this rule by the estimated population. $-\$333,835 / 421,421 = -\$0.79$. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.²¹⁹

The inflation adjusted value of \$100 million in 1995 is approximately \$200 million in 2023 based on the Consumer Price Index for All Urban Consumers (CPI-U).²²⁰ This final rule does not contain a Federal mandate as the term is defined under UMRA.²²¹ The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

E. Congressional Review Act

OIRA has determined that this final rule is not a major rule, as defined in 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Pub. L. 104–121, title II, sec. 251 (Mar. 29, 1996), 110 Stat. 868 (codified at 5 U.S.C. 801–808). This rule will not result in an annual effect on the economy of \$100 million or more.

DHS will send this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

F. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the

National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This final rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have “tribal implications” because it will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. National Environmental Policy Act (NEPA)

As discussed in the National Environmental Policy Act (NEPA) ²²² section of the NPRM,²²³ and partially addressed in the H-1B Registration Improvement final rule,²²⁴ DHS proposed a broader set of reforms in the H-1B program, as well as discrete reforms impacting other nonimmigrant programs. DHS received one public comment on the NEPA discussion in the NPRM. DHS is addressing that comment here to the extent it pertains to the provisions of this final rule. DHS previously addressed this public comment in the rule that finalized the registration process aspects of the NPRM.²²⁵

Comment: One commenter asserted that DHS's reliance on categorical

²¹⁹ See 2 U.S.C. 1532(a).

²²⁰ See BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month,” <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202312.pdf> (last visited Jan. 17, 2024). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2023); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = $[(\text{Average monthly CPI-U for 2023} - \text{Average monthly CPI-U for 1995}) / (\text{Average monthly CPI-U for 1995})] \times 100 = [(304.702 - 152.383) / 152.383] \times 100 = 0.99958001 \times 100 = 99.96 \text{ percent} = 100 \text{ percent (rounded)}$. Calculation of inflation-adjusted value: \$100 million in 1995 dollars $\times 2.00 = \$200 \text{ million in 2023 dollars}$.

²²¹ The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. See 2 U.S.C. 1502(1), 658(6).

²²² See Public Law 91–190, 42 U.S.C. 4321–4347.

²²³ 88 FR 72870, 72955 (Oct. 23, 2023).

²²⁴ “Improving the H-1B Registration Selection Process and Program Integrity,” 89 FR 7456, 7489 (Feb. 2, 2024) (final rule).

²²⁵ 89 FR 7456, 7489 (Feb. 2, 2024).

exclusion (“CATEX”) A3 is arbitrary and capricious and indicated that DHS must prepare an environmental impact statement or at least an environmental assessment before finalizing the NPRM.²²⁶ The commenter asserted that the action proposed in the NPRM is an action that, by its nature, increases the population because its goal is to increase the number of foreign nationals who enter the country. The commenter argued that the action proposed in the NPRM has the potential to have a cumulative effect when combined with other actions that increase levels of immigration, and that it should be considered rather than categorically excluded. The commenter further stated that DHS’s use of categorical exclusion A3 is “entirely irrational” because DHS does not assess the environmental impact of the rule and thus concluded that the rule is of the type that would not have any. The commenter further stated that the NPRM does not fit into any of the categories under CATEX A3, and that DHS was not considering rules that increase immigration to the United States when it formulated this rule.

Response: DHS disagrees with both the factual and the legal assertions made by this commenter. The commenter cited no data, analysis, evidence, or statements made by DHS in the NPRM to support the commenter’s assertion. Specifically with respect to the provisions being finalized through this final rule, the intended and expected impact of those provisions is not anticipated to significantly increase the number of foreign nationals in the United States. Rather, as discussed throughout this preamble, DHS is amending existing regulations to primarily modernize the H–1B program but is also including certain provisions that impact other nonimmigrant programs—H–2, H–3, F–1, L–1, O, P, Q–1, R–1, E–3, and TN. In addition, the final rule will provide certain benefits and flexibilities, as well as improve program integrity. These amendments to existing regulations clearly fit within CATEX A3 because they are administrative in nature, do not have

the potential to significantly affect the environment, are not a part of any larger Federal actions, and DHS is unaware of the existence of any extraordinary circumstances that create the potential for environmental effects. These amendments are administrative in nature, reflect current USCIS policy, and will not result in a change to the environmental impact of the regulation. The same is true with clarifications regarding the filing of amended petitions, deference policy, and rules regarding evidence of maintenance of status.

NEPA Final Rule Analysis

DHS and its components analyzed the proposed actions to determine whether NEPA applies to them and, if so, what level of analysis is required. DHS Directive 023–01, Rev. 01 (Directive) and Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual)²²⁷ establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. See 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions (“categorical exclusions”) that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment or Environmental Impact Statement. See 40 CFR 1501.4(a). Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.²²⁸

As discussed throughout this preamble, this final rule amends existing regulations governing the H–1B program primarily to modernize and streamline those regulations, provide certain benefits and flexibilities to the regulated public, and improve program

integrity. It therefore fits within CATEX A3 because the amendments are administrative and procedural in nature, are not a part of a larger Federal action and do not have the potential to significantly affect the environment. Finally, DHS is unaware of the existence of any extraordinary circumstances that would result in any environmental effects.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, all agencies must submit to the OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt.

In compliance with the PRA, DHS published an NPRM on October 23, 2023 (88 FR 72870), in which comments on the revisions to the information collections associated with this rulemaking were requested. Any comments received on information collections activities were related to the beneficiary-centric changes and documentation required for establishing unique beneficiary identification. DHS responded to those comments in section III. of this final rule. The information collection instruments that will be revised with this final rule are described below.

Overview of Information Collections:

H–1B Registration Tool (OMB Control No. 1615–0144)

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–1B Registration Tool.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* OMB–64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine which employers will be informed that they may submit a USCIS Form I–129, Petition for Nonimmigrant Worker, for H–1B classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool (Businesses) is 20,950 and the estimated hour burden per response is 0.6 hours. The estimated total number of respondents for the information collection H–1B Registration Tool (Attorneys) is 19,339 and the estimated hour burden per response is 0.6 hours.

²²⁶ The commenter stated: “Categorical exclusion A3, in full, is as follows: A3 Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature: (a) Those of a strictly administrative or procedural nature; (b) Those that implement, without substantive change, statutory or regulatory requirements; (c) Those that implement, without substantive change, procedures, manuals, and other guidance documents; (d) Those that interpret or amend an existing regulation without changing its environmental effect; (e) Technical guidance on safety and security matters; or (f) Guidance for the preparation of security plans.”

²²⁷ See DHS, “Implementing the National Environmental Policy Act,” DHS Directive 023–01, Rev. 01 (Oct. 31, 2014), and DHS Instruction Manual Rev. 01 (Nov. 6, 2014), <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>.

²²⁸ See Instruction Manual, section V.B.2 (a–c).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 213,354 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$0.

Form I-129 (OMB Control No. 1615-0009)

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I-129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses Form I-129 and accompanying supplements to determine whether the petitioner and beneficiary(ies) is (are) eligible for the nonimmigrant classification. A U.S. employer, or agent in some instances, may file a petition for nonimmigrant worker to employ foreign nationals under the following nonimmigrant classifications: H-1B, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, P-1S, P-2S, P-3S, Q-1, or R-1 nonimmigrant worker. The collection of this information is also required from a U.S. employer on a petition for an extension of stay or change of status for E-1, E-2, E-3, Free Trade H-1B1 Chile/Singapore nonimmigrants and TN (USMCA workers) who are in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*²²⁹ The estimated total number of respondents for the information

collection I-129 (paper-filings) is 572,606 and the estimated hour burden per response is 2.55 hours; the estimated total number of respondents for the information collection I-129 (electronic-filings) is 45,000 and the estimated hour burden per response is 2.333 hours the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 12,050 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement (paper-filings) to Form I-129 is 10,945 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement (electronic-filings) to Form I-129 is 2,000 and the estimated hour burden per response is 0.5833 hours; the estimated total number of respondents for the information collection H Classification Supplement (paper-filings) to Form I-129 is 426,983 and the estimated hour burden per response is 2.07 hours; the estimated total number of respondents for the information collection H Classification Supplement (electronic-filings) to Form I-129 is 45,000 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement (paper-filings) is 353,936 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement (electronic-filings) is 45,000 and the estimated hour burden per response is .9167 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 40,353 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 28,434 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 54 and the estimated hour burden per response is 0.34 hours; and the estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-129 is 6,782 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,795,670 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$294,892,090.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Amend § 214.1 by:

- a. Revising paragraphs (c)(1) and (4);
- b. Redesignating paragraph (c)(5) as paragraph (c)(7);
- c. Adding a new paragraph (c)(5) and paragraph (c)(6); and
- d. Revising newly redesignated paragraph (c)(7).

The revisions and additions read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) *Extension or amendment of stay for certain employment-based nonimmigrant workers.* An applicant or petitioner seeking the services of an E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, P-1S, P-2S, P-3S, Q-1, R-1, or TN nonimmigrant beyond the period previously granted, or seeking to amend the terms and conditions of the nonimmigrant's stay without a request for additional time, must file for an extension of stay or amendment of stay, on Form I-129, with the fee prescribed in 8 CFR 106.2, with the initial evidence specified in § 214.2, and in accordance

²²⁹ After the publication of the NPRM, DHS published the USCIS Fee Schedule Final Rule ("Fee Rule") (89 FR 6194) on January 31, 2024, and that rule went into effect on April 1, 2024. Subsequently, DHS updated the information collection, and the baseline estimated total number of respondents, and the amount of time estimated for an average respondent to respond, to reflect the changes to the information collection approved in connection with the Fee Rule. As a result, the estimated total public burden in hours and cost associated with the information collection has changed since the publication of the NPRM. USCIS Form I-129 (paper-filings) estimated time burden average per response is 2.487 hours (current) + .067 hours (increase from the NPRM) = 2.55 hours. On April 1, 2024, DHS also began accepting online filing for H-1B cap petitions and since included the estimated total respondents and the estimated time burden average per response to account for electronic filing submissions since the publication of the NPRM.

with the form instructions. Dependents holding derivative status may be included in the petition if it is for only one worker and the form version specifically provides for their inclusion. In all other cases, dependents of the worker should file extensions of stay using Form I-539.

* * * * *

(4) *Timely filing and maintenance of status.* (i) An extension or amendment of stay may not be approved for an applicant or beneficiary who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that USCIS may excuse the late filing in its discretion where it is demonstrated at the time of filing that:

(A) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;

(B) The applicant or beneficiary has not otherwise violated their nonimmigrant status;

(C) The applicant or beneficiary remains a bona fide nonimmigrant; and

(D) The applicant or beneficiary is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(ii) If USCIS excuses the late filing of an extension of stay or amendment of stay request, it will do so without requiring the filing of a separate application or petition and will grant the extension of stay from the date the previously authorized stay expired, or the amendment of stay from the date the petition was filed.

(5) *Deference to prior USCIS determinations of eligibility.* When adjudicating a request filed on Form I-129 involving the same parties and the same underlying facts, USCIS gives deference to its prior determination of the petitioner's, applicant's, or beneficiary's eligibility. However, USCIS need not give deference to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.

(6) *Evidence of maintenance of status.* When requesting an extension or amendment of stay on Form I-129, an applicant or petitioner must submit supporting evidence to establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or

amendment request was filed. Evidence of such maintenance of status may include, but is not limited to: copies of paystubs, W-2 forms, quarterly wage reports, tax returns, contracts, and work orders.

(7) *Decision on extension or amendment of stay request.* Where an applicant or petitioner demonstrates eligibility for a requested extension or amendment of stay, USCIS may grant the extension or amendment in its discretion. The denial of an extension or amendment of stay request may not be appealed.

* * * * *

■ 3. Amend § 214.2 by:

■ a. Revising paragraph (f)(5)(vi)(A);

■ b. Removing and reserving paragraph (h)(2)(i)(B);

■ c. Revising paragraphs (h)(2)(i)(E) and (F) and (h)(4)(i)(B);

■ d. Revising the definitions of "Specialty occupation" and "United States employer" in paragraph (h)(4)(ii);

■ e. Revising the heading for paragraph (h)(4)(iii) and paragraph (h)(4)(iii)(A);

■ f. Adding paragraph (h)(4)(iii)(F);

■ g. Revising paragraph (h)(4)(iv) introductory text;

■ h. Adding paragraph (h)(4)(iv)(C);

■ i. Revising paragraphs (h)(8)(iii)(F)(2)(iv), (h)(8)(iii)(F)(4), and (h)(9)(i);

■ j. Adding paragraphs (h)(9)(ii)(D) and (h)(9)(iii)(E);

■ k. Revising paragraph (h)(11)(ii);

■ l. Removing the period at the end of paragraph (h)(11)(iii)(A)(6) and adding "; or" in its place;

■ m. Adding paragraph (h)(11)(iii)(A)(7);

■ n. Revising paragraphs (h)(14), (h)(19)(iii)(B)(4), (h)(19)(iii)(C), and (h)(19)(iv);

■ o. Adding paragraph (h)(33); and

■ p. Revising paragraphs (l)(14)(i), (o)(11), and (p)(13).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(5) * * *

(vi) * * *

(A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), of an F-1 student who is the beneficiary of an H-1B petition subject to section 214(g)(1)(A) of the Act (8 U.S.C. 1184(g)(1)(A)) requesting a change of status will be automatically extended until April 1 of the fiscal year for which such H-1B status is being requested or until the validity start date of the approved petition, whichever is earlier, where such petition:

(1) Has been timely filed;

(2) Requests an H-1B employment start date in the fiscal year for which such H-1B status is being requested consistent with paragraph (h)(2)(i)(I) of this section; and

(3) Is nonfrivolous.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(E) *Amended or new petition—(1) General provisions.* The petitioner must file an amended or new petition, with the appropriate fee and in accordance with the form instructions, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a current or new certified labor condition application.

(2) *Additional H-1B provisions.* The amended or new petition must be properly filed before the material change(s) takes place. The beneficiary is not authorized to work under the materially changed terms and conditions of employment until the new or amended H-1B petition is approved and takes effect, unless the beneficiary is eligible for H-1B portability pursuant to paragraph (h)(2)(i)(H) of this section. Any change in the place of employment to a geographical area that requires a corresponding labor condition application to be certified to USCIS is considered a material change and requires an amended or new petition to be filed with USCIS before the H-1B worker may begin work at the new place of employment. Provided there are no material changes in the terms and conditions of the H-1B worker's employment, a petitioner does not need to file an amended or new petition when:

(i) Moving a beneficiary to a new job location within the same area of intended employment as listed on the labor condition application certified to USCIS in support of the current H-1B petition approval authorizing the H-1B nonimmigrant's employment.

(ii) Placing a beneficiary at a short-term placements(s) or assignment(s) at any worksite(s) outside of the area of intended employment for a total of 30 days or less in a 1-year period, or for a total of 60 days or less in a 1-year period where the H-1B beneficiary continues to maintain an office or work station at their permanent worksite, the

beneficiary spends a substantial amount of time at the permanent worksite in a 1-year period, and the beneficiary's residence is located in the area of the permanent worksite and not in the area of the short-term worksite(s); or

(iii) An H-1B beneficiary is going to a non-worksite location to participate in employee development, will be spending little time at any one location, or when the job is peripatetic in nature, in that the normal duties of the beneficiary's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location. Peripatetic jobs include situations where the job is primarily at one location, but the beneficiary occasionally travels for short periods to other locations on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations).

(F) *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required.

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition.

(2) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

* * * * *

(4) * * *

(i) * * *

(B) *General requirements for petitions involving a specialty occupation—(1) Labor condition application*

requirements. (i) Before filing a petition for H-1B classification in a specialty occupation, the petitioner must obtain a certified labor condition application from the Department of Labor in the occupational specialty in which the alien(s) will be employed.

(ii) Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by the agency that the occupation in question is a specialty occupation. USCIS will determine whether the labor condition application involves a specialty occupation as defined in section 214(i)(1) of the Act and properly corresponds with the petition. USCIS will also determine whether all other eligibility requirements have been met, such as whether the alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

(iii) If all of the beneficiaries covered by an H-1B labor condition application have not been identified at the time a petition is filed, petitions for newly identified beneficiaries may be filed at any time during the validity of the labor condition application using copies of the same certified labor condition application. Each petition must refer by file number to all previously approved petitions for that labor condition application.

(iv) When petitions have been approved for the total number of workers specified in the labor condition application, substitution of aliens against previously approved openings cannot be made. A new labor condition application will be required.

(v) If the Secretary of Labor notifies USCIS that the petitioning employer has failed to meet a condition of paragraph (B) of section 212(n)(1) of the Act, has substantially failed to meet a condition of paragraphs (C) or (D) of section 212(n)(1) of the Act, has willfully failed to meet a condition of paragraph (A) of section 212(n)(1) of the Act, or has misrepresented any material fact in the application, USCIS will not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least 1 year from the date of receipt of such notice.

(vi) If the employer's labor condition application is suspended or invalidated by the Department of Labor, USCIS will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the labor condition

application for the duration of the authorized stay of aliens it employs.

(2) *Inspections, evaluations, verifications, and compliance reviews.*

(i) The information provided on an H-1B petition and the evidence submitted in support of such petition may be verified by USCIS through lawful means as determined by USCIS, including telephonic and electronic verifications and on-site inspections. Such verifications and inspections may include, but are not limited to: electronic validation of a petitioner's or third party's basic business information; visits to the petitioner's or third party's facilities; interviews with the petitioner's or third party's officials; reviews of the petitioner's or third party's records related to compliance with immigration laws and regulations; and interviews with any other individuals possessing pertinent information, as determined by USCIS, which may be conducted in the absence of the employer or the employer's representatives; and reviews of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H-1B petition, such as facts relating to the petitioner's and beneficiary's H-1B eligibility and compliance. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the interviewee and USCIS away from the employer's property. An inspection may be conducted at locations including the petitioner's headquarters, satellite locations, or the location where the beneficiary works, has worked, or will work, including third party worksites, as applicable. USCIS may commence verification or inspection under this paragraph (h)(4)(i)(B)(2) for any petition and at any time after an H-1B petition is filed, including any time before or after the final adjudication of the petition. The commencement of such verification and inspection before the final adjudication of the petition does not preclude the ability of USCIS to complete final adjudication of the petition before the verification and inspection are completed.

(ii) USCIS conducts on-site inspections or other compliance reviews to verify facts related to the adjudication of the petition and compliance with H-1B petition requirements. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or a third party to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-1B petition for H-

1B workers performing services at the location or locations that are a subject of inspection or compliance review, including any third party worksites.

(3) *Third party requirements.* If the beneficiary will be staffed to a third party, meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party), the actual work to be performed by the beneficiary must be in a specialty occupation. When staffed to a third party, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation.

* * * * *

(ii) * * *

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a directly related specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. A position is not a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position. A position may allow for a range of qualifying degree fields, provided that each of those fields is directly related to the duties of the position. *Directly related* means there is a logical connection between the required degree, or its equivalent, and the duties of the position.

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States that:

(1) Has a bona fide job offer for the beneficiary to work within the United States, which may include telework, remote work, or other off-site work within the United States;

(2) Has a legal presence in the United States and is amenable to service of process in the United States; and

(3) Has an Internal Revenue Service Tax identification number.

(4) If the H-1B beneficiary possesses a controlling interest in the petitioner, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner, such a beneficiary may perform duties

that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H-1B petition.

(iii) *General H-1B requirements—(A) Criteria for specialty occupation position.* A position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria at paragraphs (h)(4)(iii)(A)(1) through (4) of this section:

(1) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular occupation;

(2) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is normally required to perform job duties in parallel positions among similar organizations in the employer's industry in the United States;

(3) The employer, or third party if the beneficiary will be staffed to that third party, normally requires a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, to perform the job duties of the position; or

(4) The specific duties of the proffered position are so specialized, complex, or unique that the knowledge required to perform them is normally associated with the attainment of a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

(5) For purposes of the criteria at paragraphs (h)(4)(iii)(A)(1) through (4) of this section, normally means conforming to a type, standard, or regular pattern, and is characterized by that which is considered usual, typical, common, or routine. Normally does not mean always.

* * * * *

(F) *Bona fide position in a specialty occupation.* At the time of filing, the petitioner must establish that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. A petitioner is not required to establish specific day-to-day assignments for the entire time requested in the petition.

* * * * *

(iv) *General documentary requirements for H-1B classification in a specialty occupation.* Except as specified in paragraph (h)(4)(iv)(C) of this section, an H-1B petition involving

a specialty occupation must be accompanied by:

* * * * *

(C) In accordance with 8 CFR 103.2(b) and paragraph (h)(9) of this section, USCIS may request evidence such as contracts, work orders, or other similar evidence between all parties in a contractual relationship showing the bona fide nature of the beneficiary's position and the minimum educational requirements to perform the duties.

* * * * *

(8) * * *

(iii) * * *

(F) * * *

(2) * * *

(iv) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity.

* * * * *

(4) An H-1B beneficiary who is not directly employed by a qualifying institution, organization, or entity identified in section 214(g)(5)(A) or (B) of the Act will qualify for an exemption under such section if the H-1B beneficiary will spend at least half of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions of the qualifying institution, organization, or entity, namely, either higher education, nonprofit research, or government research. Work performed "at" the qualifying institution may include work performed in the United States through telework, remote work, or other off-site work. When considering whether a position is cap-exempt, USCIS will focus on the job duties to be performed, rather than where the duties are physically performed.

* * * * *

(9) * * *

(i) *Approval.* (A) USCIS will consider all the evidence submitted and any other evidence independently required to assist in adjudication. USCIS will notify the petitioner of the approval of the petition on a Notice of Action. The approval notice will include the beneficiary's (or beneficiaries') name(s) and classification and the petition's

period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. The approval notice will cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(B) Where an H-1B petition is approved for less time than requested on the petition, the approval notice will provide or be accompanied by a brief explanation for the validity period granted.

(ii) * * *

(D)(1) If an H-1B petition is adjudicated and deemed approvable after the initially requested validity period end-date or end-date for which eligibility is established, the officer may issue a request for evidence (RFE) asking the petitioner whether they want to update the requested dates of employment. Factors that inform whether USCIS issues an RFE could include, but would not be limited to: additional petitions filed or approved on the beneficiary's behalf, or the beneficiary's eligibility for additional time in H-1B status. If the new requested period exceeds the validity period of the labor condition application already submitted with the H-1B petition, the petitioner must submit a certified labor condition application with a new validity period that properly corresponds to the new requested validity period on the petition and an updated prevailing or proffered wage, if applicable, except that the petitioner may not reduce the proffered wage from that originally indicated in their petition. This labor condition application may be certified after the date the H-1B petition was filed with USCIS. The request for new dates of employment and submission of a labor condition application corresponding with the new dates of employment, absent other changes, will not be considered a material change. An increase to the proffered wage will not be considered a material change, as long as there are no other material changes to the position.

(2) If USCIS does not issue an RFE concerning the requested dates of employment, if the petitioner does not respond, or the RFE response does not support new dates of employment, the petition will be approved, if otherwise approvable, for the originally requested period or until the end-date eligibility has been established, as appropriate. However, the petition will not be forwarded to the Department of State nor will any accompanying request for a change of status, an extension of stay, or amendment of stay, be granted.

(iii) * * *

(E) *H-1B petition for certain beneficiary-owned entities.* The initial approval of a petition filed by a United States employer in which the H-1B beneficiary possesses a controlling interest in the petitioning organization or entity, meaning the beneficiary owns more than 50 percent of the petitioner or has majority voting rights in the petitioner, will be limited to a validity period of up to 18 months. The first extension (including an amended petition with a request for an extension of stay) of such a petition will also be limited to a validity period of up to 18 months.

* * * * *

(11) * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based. The approval of an H-1B petition is also immediately and automatically revoked upon notification from the H-1B petitioner that the beneficiary is no longer employed.

(iii) * * *

(A) * * *

(7) The petitioner failed to timely file an amended petition notifying USCIS of a material change or otherwise failed to comply with the material change reporting requirements in paragraph (h)(2)(i)(E) of this section.

* * * * *

(14) *Extension of visa petition validity.* The petitioner must file a request for a petition extension on the Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. A request for a petition extension generally may be filed only if the validity of the original petition has not expired.

* * * * *

(19) * * *

(iii) * * *

(B) * * *

(4) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity;

(C) *A nonprofit research organization or government research organization.*

When a fundamental activity of a nonprofit organization is engaging in basic research and/or applied research, that organization is a nonprofit research organization. When a fundamental activity of a governmental organization is the performance or promotion of basic research and/or applied research, that organization is a government research organization. A governmental research organization may be a Federal, State, or local entity. A nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. Both basic research and applied research may include research and investigation in the sciences, social sciences, or humanities and may include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle;

* * * * *

(iv) *Nonprofit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity must be determined by the Internal Revenue Service to be a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 U.S.C. 501(c)(3), (c)(4), or (c)(6).

* * * * *

(33) *Severability.* The Department intends that should any of the revisions effective on January 17, 2025, to provisions in paragraphs (f)(5), (h)(2), (4) through (6), (8), (9), (11), (14), and (19), (l)(14), (o)(11), and (p)(13) of this section or to the provisions in 8 CFR 214.1(c)(1) and (4) through (7) be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law, unless any such provision is held to be wholly invalid

and unenforceable, in which event the provision(s) should be severed from the remainder of the provisions and the holding should not affect the other provisions or the application of those other provisions to persons not similarly situated or to dissimilar circumstances.

* * * * *

(l) * * *

(14) * * *

(i) *Individual petition.* The petitioner must file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. A petition extension generally may be

filed only if the validity of the original petition has not expired.

* * * * *

(o) * * *

(11) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on the form prescribed by USCIS, in order to continue or complete the same activities or events specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

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(p) * * *

(13) *Extension of visa petition validity.* The petitioner must file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on the form prescribed by USCIS in order to continue or complete the same activity or event specified in the original petition. A petition extension generally may be filed only if the validity of the original petition has not expired.

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Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

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Part III

Department of Homeland Security

8 CFR Parts 214 and 274a

Modernizing H-2 Program Requirements, Oversight, and Worker
Protections; Final Rule

DEPARTMENT OF HOMELAND SECURITY**8 CFR Parts 214 and 274a**

[CIS No. 2740–23; DHS Docket No. USCIS–2023–0012]

RIN 1615–AC76

Modernizing H–2 Program Requirements, Oversight, and Worker Protections

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations affecting temporary agricultural (H–2A) and temporary nonagricultural (H–2B) nonimmigrant workers (H–2 programs) and their employers. This rulemaking is intended to better ensure the integrity of the H–2 programs and enhance protections for workers.

DATES: This final rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, MD, Camp Springs, 20746; telephone (240) 721–3000. (This is not a toll-free number.) Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Executive Summary
 - A. Purpose of the Regulatory Action
 - B. Legal Authority
 - C. Summary of Major Provisions of the Regulatory Action
 - D. Costs and Benefits
- II. Background
 - A. Description of the H–2 Nonimmigrant Classifications
 - 1. H–2A Temporary Agricultural Workers
 - 2. H–2B Temporary Nonagricultural Workers
- III. Changes in the Final Rule
 - A. Changes to Provisions Related to Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries
 - 1. Clarification of Acceptable Reimbursement Fees
 - 2. Prohibiting Breach of Contract Fees and Penalties
 - 3. Similar Employment Services
 - 4. Extraordinary Circumstances Standard
 - 5. Due Diligence Standard

- 6. Application of the Prohibited Fee Provisions, and 1- and 3-Year Denial Periods
- B. Application of Mandatory Grounds for Denial
- C. Application of Discretionary Grounds for Denial
- D. Discretionary Grounds for Denial
- E. Conforming Changes To Align With the USCIS Fee Schedule Final Rule
- IV. Response to Public Comments on the Proposed Rule
 - A. Summary of Comments on the Proposed Rule
 - B. General Feedback on the Proposed Rule
 - 1. General Support for the Rule
 - 2. General Overview of Comments Opposing the Rule
 - 3. Other General Feedback Regarding the Rule
 - C. Legal Authority and Background
 - 1. DHS/USCIS Legal Authority
 - 2. H–2 Program Background
 - D. Program Integrity and Worker Protections
 - 1. Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries
 - 2. Mandatory and Discretionary Denials for Past Violations
 - 3. Compliance Reviews and Inspections
 - 4. Whistleblower Protection
 - E. Worker Flexibilities
 - 1. Grace Periods/Admission Periods
 - 2. Transportation Costs for Revoked H–2 Petitions
 - 3. Portability and Extension of Stay Petitions
 - 4. Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa
 - 5. Removal of “Abscondment,” “Abscond,” and Its Other Variations, and Notification to DHS
 - F. Program Efficiencies and Reducing Barriers to Legal Migration
 - 1. Eligible Countries Lists
 - 2. Eliminating the “Interrupted Stay” Calculation, Reducing the Period of Absence for Resetting the 3-Year Stay Clock
 - G. Severability
 - H. Input on Future Actions/Proposals for Beneficiary Notification
 - I. Other Comments Related to the Rule or H–2 Programs/Requirements
 - 1. Alternatives and Other General Comments on the Proposed Rule
 - 2. Implementation
 - 3. Employer/Petitioner Requirements, Processes, and Fees
 - 4. Validity Period and 3-Year Maximum Period of Stay
 - J. Statutory and Regulatory Requirements
 - 1. Administrative Procedure Act (APA)
 - 2. Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)
 - K. Out of Scope
 - V. Statutory and Regulatory Requirements
 - A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)
 - 1. Summary of Major Provisions of the Regulatory Action

- 2. Summary of Costs and Benefits of the Final Rule
- 3. Summary of Comments Related to the Regulatory Impact Analysis and Associated Responses
- 4. Background and Purpose of the Rule
- 5. Population
- 6. Cost-Benefit Analysis
- B. Regulatory Flexibility Act (RFA) C. Unfunded Mandates Reform Act of 1995 (UMRA)
- D. Congressional Review Act
- E. Executive Order 13132 (Federalism)
- F. Executive Order 12988 (Civil Justice Reform)
- G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
- H. National Environmental Policy Act (NEPA)
- I. Paperwork Reduction Act (PRA)

Table of Abbreviations

AAO—Administrative Appeals Office
 APA—Administrative Procedure Act
 BLS—Bureau of Labor Statistics
 CBP—U.S. Customs and Border Protection
 CEQ—Council on Environmental Quality
 CFR—Code of Federal Regulations
 CPI—U—Consumer Price Index for All Urban Consumers
 DHS—Department of Homeland Security
 DOJ—Department of Justice
 DOL—Department of Labor
 DOS—Department of State
 DOT—Department of Transportation
 ELIS—Electronic Immigration System
 ETA—Employment and Training Administration
 FAM—Foreign Affairs Manual
 FDNS—Fraud Detection and National Security Directorate
 FR—Federal Register
 FRFA—Final Regulatory Flexibility Analysis
 FTE—Full-time equivalent
 FY—Fiscal year
 GAO—Government Accountability Office
 GDOL—Guam Department of Labor
 HR—Human Resources
 HSA—Homeland Security Act of 2002
 H–2A—Temporary Agricultural Workers Nonimmigrant Classification
 H–2B—Temporary Nonagricultural Workers Nonimmigrant Classification
 ICE—U.S. Immigration and Customs Enforcement
 IEFA—Immigration Examinations Fee Account
 INA—Immigration and Nationality Act
 INS—Immigration and Naturalization Service
 IRFA—Initial Regulatory Flexibility Analysis
 MOU—Memorandum of understanding
 NAICS—North American Industry Classification System
 NEPA—National Environmental Policy Act
 NOID—Notice of intent to deny
 NPRM—Notice of proposed rulemaking
 OFLC—Office of Foreign Labor Certification
 OMB—Office of Management and Budget
 OSHA—Occupational Safety and Health Administration
 PRA—Paperwork Reduction Act

RFA—Regulatory Flexibility Act of 1980
 RFE—Request for evidence
 RIA—Regulatory Impact Analysis
 SBA—Small Business Administration
 TFR—Temporary final rule
 TLC—Temporary labor certification
 UMRA—Unfunded Mandates Reform Act of 1995
 USCIS—U.S. Citizenship and Immigration Services
 USDA—U.S. Department of Agriculture
 WHD—Wage and Hour Division

I. Executive Summary

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the DHS regulations relating to the H–2A temporary agricultural worker program and the H–2B temporary nonagricultural worker program (H–2 programs). Through this rule, DHS seeks to strengthen worker protections and the integrity of the H–2 programs, provide greater flexibility for H–2A and H–2B workers, and improve program efficiency.

B. Legal Authority

The Immigration and Nationality Act (INA or the Act) sec. 101(a)(15)(H)(ii)(a) and (b), 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (b), establishes the H–2A and H–2B nonimmigrant visa classifications for noncitizens¹ who are coming to the United States temporarily to perform agricultural labor or services or to perform nonagricultural services or labor, respectively.

The Secretary's authority for this rule can be found in various provisions of the immigration laws, including but not limited to INA sections 103(a), 8 U.S.C. 1103(a), and 214, 8 U.S.C. 1184.² INA sec. 103(a), as amended, 8 U.S.C. 1103(a), provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Section 402 of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 202, charges the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States” and “[e]stablishing national immigration enforcement policies and priorities.” See also HSA sec. 428, 6 U.S.C. 236. The HSA also

provides that a primary mission of DHS is to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.” HSA sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F).

With respect to nonimmigrants in particular, the INA provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.”³ INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1); see INA secs. 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens who are not authorized for employment). In addition, the HSA transferred to USCIS the authority to adjudicate petitions for H–2 nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities. See HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). Furthermore, under INA sec. 214(b), 8 U.S.C. 1184(b), every noncitizen, with the exception of noncitizens seeking L, V, or H–1B nonimmigrant status, is presumed to be an immigrant unless the noncitizen establishes the noncitizen's entitlement to a nonimmigrant status. INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining (H), (L), (O), or (P)(i) nonimmigrant status (except for those in the H–1B1 classification). This statutory provision provides the Secretary of Homeland Security with exclusive authority to approve or deny H–2 nonimmigrant visa petitions after consultation with the appropriate agencies of the Government. It also authorizes the Secretary to prescribe the form of and identify information necessary to adjudicate the petition. With respect to the H–2A classification, this section defines the term “appropriate agencies of [the] Government” to include the Departments of Labor (DOL) and Agriculture (USDA), and cross-references INA sec. 218, 8 U.S.C. 1188.

Section 214(c)(14) of the INA, 8 U.S.C. 1184(c)(14), provides the Secretary of Homeland Security with the authority to impose, “in addition to any other remedy authorized by law,” such administrative remedies (including civil monetary penalties) as the Secretary

“determines to be appropriate” and to deny petitions for a period of at least 1 but not more than 5 years, if, after notice and an opportunity for a hearing, the Secretary finds that an employer substantially failed to meet any of the conditions of the H–2B petition or engaged in willful misrepresentation of a material fact in the H–2B petition. See INA sec. 214(c)(14)(A)(i) and (ii), 8 U.S.C. 1184(c)(14)(A)(i) and (ii). It also authorizes the Secretary to delegate to the Secretary of Labor the authority under INA sec. 214(c)(14)(A)(i) to determine violations and impose administrative remedies, including civil monetary penalties, and any other remedy authorized by law. See INA sec. 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B).⁴ The Secretary of Homeland Security may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. See INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

Section 291 of the INA, 8 U.S.C. 1361, establishes that the petitioner or applicant for a visa or other immigration document bears the burden of proof with respect to eligibility and inadmissibility, including that a noncitizen is entitled to the immigration status being sought.

C. Summary of the Major Provisions of the Regulatory Action

This final rule includes the following major changes:

- Program Integrity and Worker Protections

To improve the integrity of the H–2 programs, DHS is making significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bases for denial for some H–2 petitions.⁵ Further, as a significant new program integrity measure and a deterrent to petitioners that have been found to have committed labor law violations or abused the H–2 programs, DHS is instituting certain mandatory and discretionary grounds for denial of an H–2A or H–2B petition. In addition, to protect workers who report their

¹ For purposes of this discussion, DHS uses the term “noncitizen” as synonymous with the term “alien” as it is used in the INA and regulations. See INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3).

² The broad authority under INA sections 103(a), 8 U.S.C. 1103(a)(3), and 214, 8 U.S.C. 1184, applies with respect to all of the provisions of this final rule, regardless of whether this authority is explicitly referenced in responses to specific public comments on any of the provisions of this final rule.

³ Although several provisions of the INA discussed in this final rule refer exclusively to the “Attorney General,” such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. See 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen v. Preap*, 586 U.S. 392, 397 n.2 (2019).

⁴ In 2009, the Secretary delegated to the Secretary of Labor certain authorities under INA sec. 214(c)(14)(A)(i). See “Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act” (Jan. 16, 2009).

⁵ DHS is making a change from the NPRM in how it refers to these new bases for denial, referring to the new 1- and 3-year periods following a petition denial or revocation for a prohibited fee as denial periods rather than as bars on approval.

employers for program violations, DHS is providing H-2A and H-2B workers with “whistleblower protection” comparable to the protection that is currently offered to H-1B workers. Additionally, DHS is clarifying requirements for petitioners and employers to consent to, and fully comply with, USCIS compliance reviews and inspections. DHS is also clarifying USCIS’ authority to deny or revoke a petition if USCIS is unable to verify information related to the petition, including but not limited to where such inability is due to lack of cooperation from a petitioner or an employer during a site visit or other compliance review.

- **Worker Flexibilities**

This final rule makes changes meant to provide greater flexibility to H-2A and H-2B workers. These changes include adjustments to the existing admission periods before and after the validity dates of an approved petition (grace periods) so that H-2 workers would be considered maintaining valid H-2 status for a period of up to 10 days prior to the petition’s validity period and up to 30 days following the expiration of the petition. In addition, the final rule provides for an extension of the existing 30-day grace period to a period of up to 60 days following revocation of an approved petition during which an H-2 worker may seek new qualifying employment or prepare for departure from the United States without violating their nonimmigrant H-2 status or accruing unlawful presence. Further, to account for other situations in which a worker may unexpectedly need to stop working or wish to seek new employment, DHS is providing a new grace period for up to 60 days during which an H-2 worker can cease working for their petitioner while maintaining H-2 status.

Additionally, in a change meant to work in conjunction with the new grace period provisions, DHS is permanently providing portability—the ability to begin new employment with the same or new employer upon the proper filing

of an extension of stay petition rather than only upon its approval—to H-2A and H-2B workers. Furthermore, in the case of petition revocations, DHS is clarifying that H-2A employers have the same responsibility that H-2B employers have for reasonable costs of return transportation for the beneficiary. DHS also is clarifying that H-2 workers will not be considered to have failed to maintain their H-2 status and will not have H-2 petitions filed on their behalf denied solely on the basis of taking certain steps mentioned in this rule toward becoming lawful permanent residents of the United States. Finally, DHS is removing the phrase “abscondment,” “abscond,” and its other variations to emphasize that the mere fact of leaving employment, standing alone, does not constitute a basis for assuming wrongdoing by the worker.

- **Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration**

DHS is making two changes to improve the efficiency of the H-2 programs and to reduce barriers to use of those two programs. First, DHS is removing the requirement that USCIS may generally only approve petitions for H-2 nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as eligible to participate in the H-2 programs. Second, DHS is simplifying the regulatory provisions regarding the effect of a departure from the United States on the 3-year maximum period of stay by providing a uniform standard for resetting the 3-year clock following such a departure.

D. Costs and Benefits

This final rule will directly impose costs on petitioners in the form of increased opportunity costs of time to complete and file H-2 petitions and time spent to familiarize themselves with the rule. Other difficult to quantify costs may also be incurred by certain

petitioners who are selected for a compliance review, petitioners that face stricter consequences for charging prohibited fees, and/or those that opt to transport and house H-2A beneficiaries earlier than they would have otherwise based on the extension of the H-2A pre-employment grace period from 7 to 10 days. The Federal Government may also incur increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely and to issue requests for evidence (RFE) or notices of intent to deny (NOID), as well as additional costs for related computer system updates.

The benefits of this final rule will be diverse, though most are difficult to quantify. The final rule will extend portability to H-2 workers lawfully present in the United States regardless of a porting petitioner’s E-Verify standing, affording these workers agency of choice at an earlier moment in time, which is consistent with other portability regulations and more similar to other workers in the labor force. Employers and beneficiaries will also benefit from the extended grace periods and from eliminating the interrupted stay provisions and instead reducing the period of absence out of the country to reset employees’ 3-year maximum period of stay. The Federal Government, employers, and U.S. and noncitizen workers will realize benefits, mainly through bolstering existing program integrity activities, possible increased compliance with program requirements, and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance.

Table 1 provides a detailed summary of the provisions in this rule and their impacts. The impact of the costs and benefits described herein are quantified (and monetized) wherever possible given all available information. Where there are insufficient data to quantify a given impact, we provide a qualitative description of the impact.

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Table 1: Summary of Provisions and Impacts

Provision	Purpose of Provision	Expected Impact of the Provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)	DHS is adding stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS' authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Costs: - Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. - Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. Benefits: - USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities will be improved through increased cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H-2 workers.
8 CFR 214.2(h)(20)	DHS is providing H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers.	Costs: Employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefits: Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H-2 programs while also offering protection to such workers (therefore potentially improving overall working conditions for both U.S. and noncitizen workers), but the extent to which this would occur is unknown.
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D)	DHS is significantly revising the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bases for denial for some H-2 petitions.	Costs: - Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H-2 programs. Benefits: - Possibly increase compliance with provisions regarding prohibited fees and thus reduce the

		occurrence and burden of prohibited fees on H-2 beneficiaries. • More effective application of provisions regarding prohibited fees benefits domestic workers, compliant petitioners, and H-2 beneficiaries.
8 CFR 214.2(h)(10)(iv) ⁶	DHS is instituting certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. • Expanding the grounds for denial could lead to increased financial losses and extended ineligibility from participating in H-2 programs for affected petitioners. Benefits: • Expected to increase compliance with H-2 program requirements, thereby increasing protection of H-2 workers directly and indirectly benefiting domestic workers and compliant petitioners.
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E)	Eliminate the lists of countries eligible to participate in the H-2 programs.	Costs*: • None expected. Benefits: • Employers and the Federal Government will benefit from the simplification of Form I-129 adjudications by eliminating the “national interest” portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H-2 programs. • Free up agency resources currently devoted to developing and publishing the eligible country lists in the <i>Federal Register</i> every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A)	Change grace periods such that they will be the same for both H-2A and H-2B Programs. Create a 60-day grace period following any H-2A or H-2B	Costs**: • H-2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.

8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C)	revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Benefits: • Provides employees (and their employers) with extra time to prepare for the start of work. • Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. • Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarify responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: • None expected since H-2A petitioning employers are already generally liable for the return transportation costs of H-2A workers. Benefits: • Beneficiaries will benefit in the event that clarified employer responsibility decreases the incidence of workers having to pay their own return travel costs in the event of a petition revocation.
8 CFR 214.2(h)(16)(i)	Clarify that H-2 workers may take certain steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	Costs: • None expected. Benefits: • DHS expects this to enable some H-2 workers who have otherwise been dissuaded to take certain steps toward becoming a lawful permanent resident with the ability to do so without concern over becoming ineligible for H-2 status based solely on taking these steps.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B)	Eliminate the “interrupted stay” calculation and instead reduce the period of absence to reset an individual’s 3-year period of stay.	Costs: • Workers in active H-2 status considering making trips abroad for periods of fewer than 60 days but more than 45 days, may be disincentivized to make such trips. Benefits: • Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. • May reduce the number of RFEs related to 3-year periods of stay. Transfers: • As a result of a small number of H-2 workers at the 3-year maximum stay responding to the shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of \$2,918,958 in additional earnings from consumers to H-2 workers and \$337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21)	Make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.	Costs: • The total estimated annual opportunity cost of time to file Form I-129 by human resource (HR) specialists is approximately \$42,186. The total estimated annual opportunity cost of time to file

		Form I-129 and Form G-28 will range from approximately \$93,628 if filed by in-house lawyers to approximately \$161,434 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I-907 if it is filed with Form I-129 is \$4,728 if filed by HR specialists. The total estimated annual costs associated with filing Form I-907 will range from approximately \$9,006 if filed by an in-house lawyer to approximately \$15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from \$144,636 to \$216,633, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form. Benefits: • Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity will aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H-2 worker with an employer that is not complying with H-2 program requirements will have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of \$884,180 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(3)	DHS is clarifying that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.	Costs: • None expected. Benefits: • Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.
Cumulative Impacts of Proposed Regulatory Changes		

DHS is making changes to the Form I-129, to effectuate the proposed regulatory changes.	Costs: The time burden to complete and file Form I-129, H Classification Supplement, will increase by 0.23 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer will be \$11.72 for an HR specialist, \$26.26 for an in-house lawyer, and \$45.28 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this final rule ranges from \$571,700 to \$755,946.
Petitioners and/or their representatives will familiarize themselves with the rule.	Costs: Petitioners and/or their representatives will need to read and understand the final rule at an estimated opportunity cost of time that ranges from \$9,741,753 to \$12,881,310, incurred during the first year of the analysis.
Source: USCIS analysis. Notes: * DHS notes that there were comments advising of possibly adverse costs from the removal of the eligible countries list, notably that the list provides an important incentive for other countries to cooperate with the United States, such as by accepting repatriation of their nationals who are subject to a final order of removal. DHS disagrees with those comments, as discussed in the preamble. ** DHS does not expect any significant additional costs to H-2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H-2A workers. <i>See</i> INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H-2B workers, although there are limited regulatory prohibitions against deductions from wages for the cost of housing by an H-2B employer when it is provided primarily for the benefit or convenience of the employer. <i>See</i> 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).	

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II. Background**A. Description of the H-2 Nonimmigrant Classifications****1. H-2A Temporary Agricultural Workers**

The INA establishes the H-2A nonimmigrant classification for temporary agricultural workers, described as a noncitizen “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services.” INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). USCIS cannot approve petitions for H-2A workers unless the Secretary of Labor has certified that there are not sufficient able, willing, qualified, and available U.S. workers who are capable of performing such services or labor, and H-2A employment will not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); INA sec. 218(a)(1),

8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii).⁷

As noted in INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a), not only must the noncitizen be coming “temporarily” to the United States, but the agricultural labor or services that the noncitizen is performing must also be “of a temporary or seasonal nature.” Current DHS regulations further define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no

⁶ DHS initially proposed this provision as new 8 CFR 214.2(h)(10)(iii). *See Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, 88 FR 65040 (Sept. 20, 2023). Because a separate DHS final rule, *Improving the H-1B Registration Selection Process and Program Integrity*, 89 FR 7456 (Feb. 2, 2024) has since added a subparagraph within 8 CFR 214.2(h)(10), the provision of this final rule will now be new 8 CFR 214.2(h)(10)(iv).

⁷ DHS regulations provide that an H-2A petition must be accompanied by a Temporary Labor Certification (TLC) from DOL, which serves as DHS’s consultation with DOL with respect to these requirements. *See* 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A).

longer than 1 year. *See* 8 CFR 214.2(h)(5)(iv)(A). An employer’s seasonal need is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels above those necessary for ongoing operations. *Id.* There is no annual limit or “cap” on the number of noncitizens who may be issued H-2A visas or otherwise provided H-2A status (such as through a change from another nonimmigrant status, *see* INA sec. 248, 8 U.S.C. 1258).

2. H-2B Temporary Nonagricultural Workers

Similarly, the INA establishes the H-2B nonimmigrant classification for temporary nonagricultural workers, described as a noncitizen “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot

be found in this country.” INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). H–2B workers may not displace qualified, available U.S. workers who are capable of performing such services or labor, and H–2B employment may not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see also* 8 CFR 214.2(h)(6)(i).⁸ Current DHS regulations define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker generally will last no longer than 1 year, unless the employer’s need is a one-time event, in which case the need could last up to 3 years. *See* 8 CFR 214.2(h)(1)(ii)(D), (h)(6)(ii), and (h)(6)(vi)(D).

Unlike the H–2A classification, there is a statutory annual limit or “cap” on the number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status. Specifically, the INA sets the annual number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status at 66,000,⁹ to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions,¹⁰ up to

33,000 noncitizens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H–2B visas from the first half of a fiscal year, will be available for employers seeking to hire H–2B workers during the second half of the fiscal year.¹¹ If insufficient petitions are approved to use all available H–2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

III. Changes in the Final Rule

Following careful consideration of public comments received, this final rule adopts the regulatory text proposed in the notice of proposed rulemaking (NPRM), *Modernizing H–2 Program Requirements, Oversight, and Worker Protections*, 88 FR 65040, published in the **Federal Register** on September 20, 2023, with some changes. DHS retains the rationale for the proposed rule and the reasoning provided in that rule, except as described in the preamble of this final rule. Section IV of this preamble includes a detailed summary and analysis of the comments and presents DHS’s responses to those comments.

A. Changes to Provisions Related to Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries

1. Clarification of Acceptable Reimbursement Fees

In the NPRM, DHS explained that it is not the intention of DHS to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker. Under the proposed rule, payments made primarily for the benefit of the worker, such as a passport fee, would not be prohibited fees or payments related to the H–2 employment and would, therefore, permissibly be considered the

responsibility of the worker. To simplify the language related to acceptable reimbursement fees and to clarify that the exception only applies to costs that are truly for the worker’s benefit, proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) would have replaced the existing regulatory language on this topic with text stating that the provision would not prevent relevant parties “from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.” As mentioned in the NPRM, this language was derived from, and is consistent with, DOL regulations on prohibited fees for H–2B and H–2A workers at 20 CFR 655.20(o), 29 CFR 503.16(o), and 20 CFR 655.135(j).

In response to public comments requesting additional clarity on this topic, DHS is finalizing the proposed language about costs that are the responsibility and primarily for the benefit of the worker and further revising 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to add: “This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations.”¹² Adding this language clarifies that, under certain conditions, the employer can reimburse the worker after the worker initially pays costs that are the employer’s responsibility (such as certain transportation costs), and that this would not be considered a collection of a prohibited fee. This change to specify when an employer may make reimbursements to the beneficiary for a cost that is ultimately the employer’s responsibility complements the regulatory text as proposed and finalized in 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) regarding reimbursements from the beneficiary. That language specifies that the prohibited fee provisions do not prohibit petitioners and third parties from receiving reimbursement from the beneficiary for costs that are the responsibility of and primarily for the benefit of the worker, such as government-required passport fees.

¹² *See, e.g.*, 20 CFR 655.20(j)(2) (“The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H–2B worker . . .”).

⁸ DHS regulations provide that an H–2B petition must be accompanied by an approved TLC from DOL or from the Guam Department of Labor (GDOL) for H–2B workers who will be employed on Guam, which serves as DHS’s consultation with DOL or GDOL with respect to these requirements. 8 CFR 214.2(h)(6)(iii)(A), (C)–(E), (h)(6)(iv)(A), (h)(6)(v).

⁹ Since 2017, Congress has authorized up to an additional 64,716 visas when the Secretary of Homeland Security, after consultation with the Secretary of Labor, determines that the needs of American businesses cannot be satisfied in a given fiscal year with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor. For example, on September 25, 2024, Congress passed the FY 2025 authority, Public Law 118–83, which the President signed the next day. This law extends authorization under the same terms and conditions provided in section 105 of Division G, Title I of the FY 2024 Omnibus permitting the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2025, and expires on December 20, 2024.

¹⁰ Generally, workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H–2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See* 8 CFR 214.2(h)(8)(ii)(A) and 8 CFR 214.2(h)(2)(iii). The spouse and children of H–2B workers, classified as H–4 nonimmigrants, also do not count against the cap. *See* INA 214(g)(2) and 8 CFR 214.2(h)(8)(ii). Additionally, until December 31, 2029, petitions for the following types of workers are exempt from the H–2B cap: fish roe

processors, fish roe technicians, or supervisors of fish roe processing; and workers performing labor or services in the Commonwealth of the Northern Mariana Islands or Guam. *See* Public Law 108–287, sec. 14006, 118 Stat. 951, 1014 (Aug. 5, 2004); Northern Mariana Islands U.S. Workforce Act of 2018, Public Law 115–218, sec. 3, 132 Stat. 1547, 1547 (July 24, 2018). Once the H–2B cap is reached, USCIS may only accept petitions for H–2B workers who are exempt or not subject to the H–2B cap.

¹¹ The Federal Government’s fiscal year runs from October 1 of the prior calendar year through September 30 of the year being described. For example, fiscal year 2023 ran from October 1, 2022, through September 30, 2023.

2. Prohibiting Breach of Contract Fees and Penalties

DHS is adding text to the proposed provisions at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to clarify that a prohibited fee may not be collected from a beneficiary “or any person acting on the beneficiary’s behalf.” This revision responds to public comment in that it strengthens the proposed language in the NPRM prohibiting the charging of breach of contract fees by barring non-monetary penalties or penalties imposed on a worker or anyone acting on behalf of the worker.

3. Similar Employment Services

Based on feedback from commenters requesting greater clarity with respect to the phrase “similar employment services,” DHS is amending its proposed provisions at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to clarify that “similar employment service refers to any person or entity that recruits or solicits prospective beneficiaries of the [H–2] petition.” This clarification addresses commenters’ feedback as to what “similar employment services” means.

4. Extraordinary Circumstances Standard

In response to public comments, DHS is making several changes to 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) to clarify the standards under which a petitioner will be held accountable for its own prohibited fee-related violations or those of its employees. These changes include removing the proposed “rare and unforeseeable” language, as this phrase was always meant to specifically explain “extraordinary circumstances” and not create another standard separate and apart from “extraordinary circumstance.” DHS is also removing the proposed “To qualify for this exception” language because this phrase was intended only to refer to the “extraordinary circumstances” exception, not to create another exception. In addition, new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) requires the petitioner to demonstrate that it “made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process” instead of “significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees.” These changes clarify what was meant by “significant”; moreover, they clarify

the petitioner’s obligation to not only prevent prohibited fees before the collection of or agreement to collect such fees occurs, but also to prevent and learn of any collection or agreement to collect such fees on an ongoing basis given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process. DHS is also deleting duplicative language about the petitioner’s obligation to fully reimburse all affected beneficiaries.

5. Due Diligence Standard

In response to public comments, DHS is making several changes at 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2) to clarify the standards under which a petitioner may be held accountable for the prohibited fee-related violations of its agents, attorneys, facilitators, recruiters, or similar employment services. Specifically, DHS is foregoing the proposed “did not know and could not, through due diligence, have learned” language and instead requiring the petitioner to demonstrate “ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process.” This is not intended to be a substantive change, but instead is intended to clarify what DHS meant by “due diligence” and to better align the regulatory language at 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) which also requires the same “ongoing, good faith, reasonable efforts.” Further, new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2) require the petitioner to take immediate remedial action as soon as it becomes aware of the payment of or agreement to pay the prohibited fee, which was missing from these provisions as proposed in the NPRM. The only difference in the evidentiary requirements at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), compared to new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2), is that prohibited fee-related violations by the petitioner or its employees, unlike those by third parties, will require an additional showing that extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for the collection of prohibited fees in order to avoid denial or revocation of an H–2 petition on notice.

6. Application of the Prohibited Fee Provisions, and 1- and 3-Year Denial Periods

As discussed in response to public comments, DHS is clarifying in this final rule how it will apply the revised provisions governing the collection of or agreement to collect prohibited fees. Namely, the denial or revocation of H–2 petitions under the provisions of this final rule will apply only to petitions filed on or after the effective date of this rule. New 8 CFR 214.2(h)(5)(xi)(A)(1)–(2) and 8 CFR 214.2(h)(6)(i)(B)(1)–(2). Similarly, DHS is clarifying that the 1-year and 3-year additional denial periods of H–2 petitions based on the denial or revocation of petitions for collection or agreement to collect prohibited fees will apply in cases where the denial or revocation of the H–2 petition was made on a petition filed on or after the effective date of this final rule. New 8 CFR 214.2(h)(5)(xi)(B)–(C) and 8 CFR 214.2(h)(6)(i)(C)–(D). Petitions filed before the effective date of this final rule will be subject to the provisions in place before this final rule. DHS has made edits to the relevant regulatory provisions to ensure consistent application and transparency for the public.

7. Clarifying When a Designee May Be Reimbursed

DHS is adding language at new 8 CFR 214.2(h)(5)(xi)(A)(2) and (C)(1), and new 8 CFR 214.2(h)(6)(i)(B)(2) and (D)(1), to clarify that a beneficiary’s designee may be reimbursed only if the affected beneficiary(ies) cannot be located or is (are) deceased. These are clarifying, non-substantive changes. While proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) contained the clarifying clause “only if such beneficiaries cannot be located or are deceased,” DHS never intended for this to apply only when the prohibited fee was collected by the petitioner pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). To better ensure parity in the regulations, DHS is adding the same or similar clause to the other prohibited fee provisions addressing a prohibited fee collection or agreement by an agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer at new 8 CFR 214.2(h)(5)(xi)(A)(2) and (C)(1), and new 8 CFR 214.2(h)(6)(i)(B)(2) and (D)(1).

B. Application of Mandatory Grounds for Denial

DHS is clarifying in this final rule and discussing in more detail in response to

public comments how it will apply the new mandatory grounds for denial.

With respect to denials based on final administrative determinations made by the Secretary of Labor or the Governor of Guam to debar the petitioner, USCIS will deny a petition pursuant to new 8 CFR 214.2(h)(10)(iv)(A)(1) if it is filed during the debarment period or if the debarment occurs during the pendency of the petition, as proposed in the NPRM. 88 FR 65040, 65057–58 (Sept. 20, 2023). This final rule adds language clarifying that this provision will only apply if the petition is filed on or after the effective date of the rule and the final administrative determination to debar the petitioner is issued on or after the effective date of the rule.

Similarly, as proposed in the NPRM, USCIS will deny petitions pursuant to new 8 CFR 214.2(h)(10)(iv)(A)(2) if a finding of fraud or willful misrepresentation of a material fact was included in the initial denial or revocation of a prior petition if such decision was issued during the pendency of the petition or within 3 years prior to filing the petition. 88 FR 65040, 65058 (Sept. 20, 2023). This final rule rephrases the provision for clarity and adds language specifying that this provision will only apply if the final denial or revocation decision is made on a prior petition filed on or after the effective date of the rule.

When it comes to mandatory denials based on violations of INA sec. 274(a) under new 8 CFR 214.2(h)(10)(iv)(A)(3), USCIS will deny petitions if there is a final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition, as proposed in the NPRM. 88 FR 65040, 65058 (Sept. 20, 2023). This final rule adds language clarifying that this provision will only apply if the final determination of violation(s) under section 274(a) of the Act is made on or after the effective date of the rule and if the petition is filed on or after the effective date of the rule.

C. Application of Discretionary Grounds for Denial

DHS will apply the discretionary grounds for denial under new 8 CFR 214.2(h)(10)(iv)(B), as proposed in the NPRM. 88 FR 65040, 65058–60 (Sept. 20, 2023). This final rule adds language clarifying that this provision will apply to petitions filed on or after the effective date of this final rule, regardless of whether the action(s) or the violation(s) underlying the determination of violation(s) of the discretionary grounds for denial occurred before, on, or after the effective date of this final rule.

D. Discretionary Grounds for Denial

In response to comments, DHS is adding new 8 CFR 214.2(h)(10)(iv)(F) to state that, if USCIS has determined in the course of a previous adjudication that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H–2A or H–2B program requirements notwithstanding relevant violation determinations under paragraph (h)(10)(iv)(B), USCIS will not seek to deny a subsequent petition under paragraph (h)(10)(iv)(B) of this section based on the same previous violation(s) unless USCIS becomes aware of a new material fact (such as a repeat of the previous violation(s)) or if USCIS finds that its previous determination was based on a material error of law.

At 8 CFR 214.2(h)(10)(iv)(B), DHS is making non-substantive changes to replace “or” with “and/or” to clarify that USCIS may deny a petition if the petitioner (or successor in interest) has not established its “intention and/or ability to comply with H–2A or H–2B program requirements.” Consistent with the NPRM, the petitioner must demonstrate that it has both the intent and ability to comply with H–2 program requirements, and USCIS can deny a petition under this ground if the petitioner has not established either its intent to comply with H–2A or H–2B program requirements, or its ability to comply with H–2A or H–2B program requirements, or both.

E. Conforming Changes To Align With the USCIS Fee Schedule Final Rule

As DHS proposed to eliminate the eligible countries lists from 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(C), DHS also proposed to remove a reference to the eligible countries list from 8 CFR 214.2(h)(2)(ii) which, at the time of the NPRM, allowed an unlimited number of H–1C, H–2A, H–2B, and H–3 beneficiaries to be requested on a single nonimmigrant petition. After the publication of the NPRM, DHS published the Fee Schedule Final Rule (“Fee Rule”) on January 31, 2024, and that rule went into effect on April 1, 2024. 89 FR 6194. Most relevantly, the Fee Rule replaced the language in 8 CFR 214.2(h)(2)(ii) allowing the grouping of an unlimited number of H–1C, H–2A, H–2B, and H–3 beneficiaries on a single nonimmigrant petition and imposed a limit of 25 named beneficiaries. Therefore, in addition to amending the language in final 8 CFR 214.2(h)(2)(ii) to remove the reference to the eligible country list, this provision has been

amended to reflect the change made by the Fee Rule.

F. Severability

In the severability clause contained in this final rule, DHS has identified the second level paragraphs (for example, (h)(6)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.2 that are not being impacted by this final rule.

IV. Response to Public Comments on the Proposed Rule

A. Summary of Comments on the Proposed Rule

DHS received a total of 1,944 public comment submissions in Docket USCIS–2023–0012 in response to the NPRM. Of the submissions, 223 were unique submissions, 1,714 were form letter copies, 3 were duplicate submissions, 1 was out of scope, 2 were foreign language submissions, and 1 was a partial foreign-language submission. The majority of comment submissions originated from individual or anonymous commenters, including attorneys and individual employers or farmers. Other commenters included companies, trade and business associations, advocacy groups, professional associations, unions, research organizations, Federal elected officials, State or local government agencies, farming or agricultural entities, a religious organization, and a foreign government. While the great majority of comment submissions (1,844) were supportive of the rule, some commenters (7) expressed general opposition to the rule, and many commenters (87) offered mixed feedback, such as by providing both support for and opposition to various provisions of the proposed rule throughout their comment, or by generally providing support or opposition but with suggested revisions.

B. General Feedback on the Proposed Rule

1. General Support for the Rule

a. Positive Impacts on Nonimmigrants/Workers/Noncitizens, Their Communities, and Support Systems

Comment: Approximately 1,850 submissions, including a large form letter campaign, discussed the proposed rule’s positive impacts on H–2 beneficiaries, their communities, and support systems.

A few individual commenters endorsed USCIS' efforts to advance protections and flexibilities for H-2 workers on the basis that such measures would be responsive to the needs of nonimmigrants and their support systems. Numerous commenters, including individual commenters, unions, joint submissions, advocacy groups, and a group of Federal elected officials, stated that the proposed rule would address long-standing issues of abuse, exploitation, and trafficking among H-2 workers by allowing workers to leave an abusive employer in search of outside opportunities, enhancing enforcement against retaliation, and protecting visa status for those seeking lawful permanent residence. Several individual commenters added that the proposed rule's efforts to provide flexibility and protections for H-2 workers would enhance workers' well-being and rights, as well as reporting practices. Similarly, a few individual commenters stated that the changes to nonimmigrant worker protections would represent a positive step towards equality and addressing health equity disparities by ensuring proper compensation, appropriate physical conditions, legal protections, and equal rights and opportunities relative to U.S. citizens.

Several individual commenters, including an advocacy group, and a couple of joint submissions provided examples of abusive and exploitative behavior—such as what was seen in “Operation Blooming Onion,”¹³ employer retaliation against workers for protesting hazardous conditions, and other anecdotes from H-2 workers that they said showed the need for increased protections, including those proposed in the NPRM. A couple of individual commenters wrote that with the increase in extreme heat resulting from climate change, H-2 workers need further protection.

Numerous individual commenters and a form letter campaign stated that DHS has a responsibility to protect workers' rights, as H-2 workers help to provide food for the U.S. public, serve as the “backbone” of the U.S. agricultural industry, help U.S. society function, and as a result, strengthen U.S. national security. The form letter campaign added that the proposed rule

would “not only protect the rights and dignity of farm workers but also contribute to the welfare and security of [the] nation's agricultural workforce.” Several individual commenters and a trade association commented that implementing measures to protect H-2 workers while ensuring their fair treatment would align with U.S. and agriculture industry values. An individual commenter added that farm workers are vital members of communities they work and live in, and that strengthened protections would benefit local, regional, and national communities.

A couple of individual commenters and a couple of joint submissions including one from a union and numerous advocacy organizations stated that domestic farm workers' labor conditions are undermined by the exploitation of H-2 workers, highlighting the necessity of the proposed rule. An individual commenter stated that the proposed rule demonstrates DHS's commitment to listening to those working in the agriculture industry, including unions and organizations that represent migrant and non-English speaking agriculture workers. A joint submission from a union and numerous advocacy organizations contained comments from H-2 workers voicing support for the proposed rule changes on the basis that it would improve their job security and working conditions, and allow them to better provide for their families.

Response: DHS appreciates public commenters' general support for this rulemaking and for the Department's ongoing efforts to advance protections and flexibilities for H-2 workers. As discussed earlier, DHS is cognizant of the importance of temporary nonimmigrant workers for agricultural and nonagricultural employers and of the positive impacts these workers contribute to local and regional economies in the United States. DHS agrees with the general support of the majority of commenters that the changes adopted in this rule will help to reduce the H-2A and H-2B programs' vulnerabilities and better ensure the rights and dignity of H-2 workers.

b. Positive Impacts on Employers/Petitioners/Farmers, Employment Service Providers, Workforce, Industry, and Economy

Comment: Approximately 10 submissions discussed the proposed rule's positive impacts on petitioners, employment service providers, the U.S. workforce, U.S. industries related to the H-2 program, and the U.S. economy.

An individual commenter expressed support for the proposed rule's efforts to streamline the petition process for employers, reasoning that these measures would reduce administrative and financial burdens for employers while increasing program efficiency and accessibility.

Several commenters provided feedback on the potential positive impacts the proposed rule would have on the U.S. agricultural workforce and labor conditions for U.S. workers. Some individual commenters stated that H-2 workers are essential for the well-being of the U.S. economy and agriculture industry as they alleviate domestic workforce shortages, and stated that as a result, the protections put forth in the proposed rule are needed. Other individual commenters also voiced support for the proposed rule on the basis that their farming operations would benefit from their employees being able to stay for temporary H-2A employment.

Response: DHS appreciates these commenters' support and their recognition of the positive impacts the proposed rule would have to the agricultural industry and the efforts to improve the Department's administration of the H-2 programs. In addition to the rule's focus on providing workers with better labor protections and increased flexibility, streamlining the process for requesting temporary nonimmigrant workers through reducing administrative and financial burdens is a positive change for both employers and their employees.

c. Positive Impacts on the Government, Program Operability, and Integrity

Comment: Approximately 10 unique submissions, including a form letter campaign, discussed the proposed rule's impacts on the government, program operability, and integrity.

Several commenters, including multiple advocacy groups, a joint submission from a union, a form letter campaign, and a group of Federal elected officials, endorsed the proposed rule's measures to improve program oversight and enforcement, reasoning that these provisions would deter misconduct by employers and recruiters while ensuring the integrity and quality of H-2 programs. Other commenters, including an advocacy group, a union, the form letter campaign, and joint submissions, also expressed support for the proposed rule on the grounds that it would create needed accountability and transparency in the H-2 programs. A business association provided additional feedback that the proposed changes would streamline requirements

¹³ See, e.g., DOJ, U.S. Attorney's Office, Southern District of Georgia, “Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion” (Mar. 31, 2022) (involving forced labor, keeping workers in substandard conditions, kidnapping, and rape, among other abuses), <https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking>.

between H-2A and H-2B programs, helping USCIS make the those program more effective and efficient overall.

Multiple commenters, including a joint submission, advocacy groups, a union, the form letter campaign, and a group of Federal elected officials, stated that the proposed rule complemented DOL H-2 program initiatives in making needed program integrity improvements and enhancing DOL and DHS combined capabilities to protect workers from exploitation.

Response: The Department appreciates the commenters' support for the changes finalized in this rule and agrees that the new provisions herein will have a positive impact on the effort to increase programmatic efficiency, integrity, and accountability. As demonstrated by the changes first proposed in the NPRM, and by those adopted as final in this rule, DHS is committed to efforts that will better protect workers from exploitation and deter misconduct by employers and recruiters.

2. General Overview of Comments Opposing the Rule

a. Lack of Need for the Rule

Comment: An individual commenter expressed opposition to the rule on the basis that there is no need for the proposed changes. In addition to citing "obstructive" costs that will "fall on general taxpayer[s]," the commenter reasoned that DOL already provides a system of protection for temporary workers.

Response: DHS declines to revise the proposed rule in response to this comment. The commenter does not identify any specific costs to general taxpayers or offer data to support the claims of such costs being "obstructive." The commenter does not contest any of the Government Accountability Office (GAO) studies or media reports of abuse of H-2 workers occurring under current regulations that this rule is designed to curtail. Further, while DOL provides protection for temporary workers consistent with its authority and available resources, the changes in this rule are intended to complement DOL regulations to provide a more comprehensive framework for worker protections.

b. Negative Impacts on Employers/Petitioners/Farmers, Employment Service Providers, Workforce, Industry, and Economy

Comment: Approximately 10 submissions discussed the proposed rule's potential negative impacts on petitioners, employment service

providers, the U.S. workforce, U.S. industries relevant to the H-2 programs, and the U.S. economy.

An individual commenter stated their concern that the proposed rule could impact the availability and diversity of H-2 workers by deterring employers from participating or causing them to pass costs to workers. In support of this position, the commenter cited examples of proposals that are not included in either the proposed rule or this final rule, such as increasing filing fees, limiting the number of H-2B visas available each fiscal year, and excluding certain occupations from the H-2B program. In a separate comment, a research organization acknowledged the new flexibilities the NPRM provided for workers but stated that it does not make use of all the legal authorities available and does not include any effort to streamline the process for employers. The commenter expressed concern that the increased costs would cause employers to leave the program and would lead to more undocumented immigration and unauthorized employment.

Some commenters expressed concern that the proposed rule would unfairly target employers who are largely compliant with labor laws and regulations, with multiple associations and an individual commenter stating that the Department's approach signals a belief that most employers are acting in violation of labor laws and that the proposed rule would debar good faith employers for minor infractions. In addition, one of the trade associations stated that 80 to 90 percent of H-2 workers return to previous employers and many refer friends and family as indication that a majority of petitioners are compliant with labor laws and treat workers fairly.

In addition, other commenters expressed concern over the general costs that the proposed rule would have on employers. A trade association cited statistics on increases in domestic worker wages that have necessitated employers' reliance on the H-2 program, and stated that without a dependable workforce and a predictable and stable wage rate, farmers are making difficult decisions about the crops they grow and may be forced out of business. An individual commenter expressed a general, vague concern that the proposed rule "would have a negative impact on my farm and the local, healthy food we produce," without further explaining the nature of the claimed negative impacts. Another individual commenter expressed concern that with the "lengthy" list of regulations both DHS and DOL have

released in recent years, the new proposed rule would complicate farmers' ability to hire the workers they need in an already complex system. The commenter concluded that broadening DHS's authority to come onto farmers' property with "unfettered access" to employees for interviews without a farmer or agent present "worr[ies] American farmers," and urged USCIS to "find solutions rather than create more problems." Another individual commenter repeated these concerns and added that the "stringent" nature of the disciplinary process would exceed State requirements for employers discharging U.S. workers, exacerbating disparities in employment law. Referencing the Department's statement on the purpose of the proposed regulation, a State agency voiced opposition to the proposed changes to the H-2 programs, reasoning that such changes would confuse entities in the agricultural industry and increase the likelihood that they will violate labor laws in the future.

Response: While certain clarifying revisions that DHS has made in this final rule may address some of the commenters' concerns as discussed below, DHS is not making changes to the proposal in direct response to these comments. While a commenter identifies higher fees for filing petitions and certifications, this rule (both as proposed and finalized) does not include any higher filing fees. The concern from this commenter that employers would pass any costs on to workers is not persuasive as employers are already prohibited from passing costs to workers and this rule imposes new consequences on employers who pass those prohibited costs to workers. With respect to limiting which occupations qualify for H-2B visas, this rule did not remove any occupations from H-2B eligibility. While DHS appreciates a commenter's interest in streamlining the process, the commenter's broad characterization of the H-2 process as being complicated and time-consuming does not address the specific provisions contained in this regulation. Among other things, the commenter offers no support in speculating that extra costs imposed by this rulemaking will inevitably cause employers to leave the program and result in more immigrants working without documentation. DHS considered potential costs of this rule and consequences to employers, such as impacts of site visits and time estimates for these administrative visits, lost productivity due to whistleblower revelations, and completing filings for

porting H-2 workers, and determined that the benefits of the proposed provisions, as outlined in various parts of this rule, outweighed any costs.

DHS also maintains that the rule does not unfairly target compliant employers with loyal employees who return annually and refer their friends and family or, as the commenter characterizes it, “debar” good faith employers for minor infractions. As discussed below, and in the NPRM, this final rule is not punitive in nature, rather, it is adjudicative in nature, and, as is extensively explained throughout this preamble, intended to enhance the integrity of the H-2 program for the benefit of good faith employers and their workers alike, and to protect H-2 workers from exploitation and other abuses.

DHS nonetheless is revising the proposed due diligence language regarding third parties’ collection of prohibited fees to minimize negative impacts on responsible employers who make ongoing, good faith, reasonable efforts to prevent prohibited fees. Further, as explained below, mandatory denial is reserved for final determinations involving very specific egregious conduct, while discretionary denial occurs only if USCIS has determined, taking into account the totality of the circumstances and the factors outlined in the proposed regulations, that the petitioner or successor has not established its intention or ability to comply with H-2 program requirements. Moreover, DHS is adding new 8 CFR 214.2(h)(10)(iv)(F) to assure petitioners with past violations who have established their intention and ability to comply with H-2A or H-2B program requirements in the course of USCIS’ adjudication of a previously filed H-2 petition that USCIS will not seek to deny a subsequently filed petition under the discretionary denial provisions of this final rule based on the same violation(s), unless USCIS becomes aware of a new material fact or finds that its previous determination was based on a material error of law.

Regarding concerns about increased wages, DHS reiterates that this rulemaking does not address worker wages, which is an issue that broadly falls within the jurisdiction of DOL.

DHS acknowledges that employers will need time to familiarize themselves with the new regulations, which is why the final rule clarifies that DHS will apply certain provisions in a manner that balances the strong interest in enhancing H-2 program integrity and protection of H-2 workers with, as discussed below, the interest in providing petitioners with notice of new

future effects applicable to certain conduct. DHS has determined that the benefits of the rule, including increased worker protections and flexibility as well as program integrity, outweigh time costs to employers. Finally, DHS notes that this rule does not create any new labor laws, which are under the jurisdiction of DOL or other labor agencies.

3. Other General Feedback Regarding the Rule

a. General Feedback Without Stating Support or Opposition to the Proposed Rule

Comment: An individual commenter provided remarks on labor abuses in the H-2A visa program without stating a position on the proposed rule. The commenter expressed the need to address concerns around abuse and power imbalances through congressional action and comprehensive immigration reform.

Response: DHS appreciates the commenter’s concerns with the vulnerabilities of H-2 workers and would implement any legislative changes Congress might make. DHS, however, maintains that it has the authority to improve the program under current laws as expressed in the proposed rule and this final rule.

C. Legal Authority and Background

1. DHS/USCIS Legal Authority

a. Congressional Intent and Statutory Authority

Comment: Some commenters contended that DHS exceeded its authority to make some of the proposed changes. A joint submission from former DHS senior officials stated that, under the auspices of efficiency, equity, and ease of the administrative process, the proposed rule contradicts congressional authority and direction, makes semantic and substantive changes to undermine immigration enforcement, and removes one of our strongest defenses against the “illegal job magnate [sic].” However, other commenters, a group of Federal elected officials, stated that, in creating the H-2 programs, Congress struck a “delicate balance” between ensuring that industries have available workers and that employers in those industries maintain a standard level of protections, rights, and working conditions for those workers. The commenters said this rulemaking effectuates congressional intent for the H-2 programs by protecting vulnerable workers and holding employers accountable. A union stated that DHS has the necessary statutory authority to implement the proposed rule. Specifically, the

commenter quoted section 103(a) of the INA and section 402 of the HSA as granting DHS broad authority to implement the regulations contemplated in the NPRM. Citing case law, the commenter said courts have consistently characterized section 103(a) of the INA as a broad delegation of authority to the Secretary of Homeland Security. The commenter further quoted section 214(c)(14) of the INA as granting the Secretary specific authority to impose penalties on employers for “a substantial failure to meet any of the conditions of the petition,” INA sec. 214(c)(14)(A)(i), 8 U.S.C. 1184(c)(14)(A)(i), as well as the authority to deny or approve petitions for foreign temporary workers, INA sec. 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii). A form letter campaign stated that the rule would create flexibility inherent in DHS’s immigration authority. The commenter said the proposed changes complement the improvements created by the DOL H-2 rule by utilizing the distinct authority of DHS to address abuses against farm workers.

Response: DHS agrees with commenters who indicated that DHS has broad statutory authority to implement the changes proposed in the NPRM through this final rule.¹⁴ DHS set out the legal authority for the proposed changes in the NPRM in the Legal Authority section of the preamble at 88 FR 65040, 65045 (Sept. 20, 2023), and has specifically addressed the legal authority for the proposed changes in the sections pertaining to those changes. Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), provides DHS with the authority to prescribe conditions for the admission of nonimmigrants, and section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining H-2A or H-2B status (among others). Further, section 274A(a)(1), 8 U.S.C. 1324a(a)(1), prohibits employment of noncitizens who are not authorized for employment. Section 214(c)(14)(A) of the INA, 8 U.S.C. 1184(c)(14)(A), authorizes the Secretary of Homeland Security to impose administrative remedies and to

¹⁴ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes ‘expressly delegate’ to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’”) (cleaned up).

deny H-2B petitions for a period of at least 1 but not more than 5 years based on the substantial failure to meet any of the conditions of the H-2B petition or willful misrepresentation of a material fact in the H-2B petition. Section 214(c)(14)(B) of the INA, in turn, authorizes the Secretary to delegate to the Secretary of Labor the authority Congress provided to DHS under section 214(c)(14)(A)(i) to determine violations and impose administrative remedies, including civil monetary penalties. In addition to these specific statutory authorities, sec. 103(a) of the INA, 8 U.S.C. 1103, provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Further, sec. 402 the HSA, 6 U.S.C. 202, charges the Secretary with broad authority to establish and administer rules governing the granting of visas or other forms of permission to enter the United States and establishing national immigration enforcement policies and priorities.

In this final rule, DHS similarly addresses the sources of its legal authority in the Legal Authority section. DHS is also addressing questions and comments regarding its authority to make specific changes in the respective sections of this rule. For example, DHS has specifically addressed comments challenging its authority to revise 8 CFR 214.2(h)(16)(ii) to preclude denials of a nonimmigrant visa petition solely on the basis of the filing of a permanent labor certification or immigrant visa petition for that beneficiary in Section IV.E.4, Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa, in the subsection titled *Opposition on the Basis of Legal Authority* of this final rule. In addition, in Section IV. D. 3.a. Legal Authority for Compliance Reviews and Inspections, DHS also at length addresses comments challenging the USCIS Fraud Detection and National Security Directorate (FDNS) authority to conduct compliance reviews and inspections.

DHS disagrees with the commenters asserting that DHS lacks authority to implement the changes proposed in the NPRM, including the mandatory and discretionary grounds for denial. Contrary to the commenters' assertion, and as noted in the NPRM, the mandatory and discretionary denial provisions best ensure the integrity of the H-2 programs and the protection of H-2 workers from exploitation and other abuses based on and consistent with the statutory authorities discussed

above. DHS also disagrees that its proposed changes undermine immigration enforcement and remove defenses against unauthorized immigration and employment. To the contrary, the changes proposed in the NPRM and finalized in this rule strike a balance between improving the H-2 programs for workers and their U.S. employers while also furthering program integrity. First, this final rule does not alter DHS's authority to deny petitions, as is provided in sections 103(a), 214(a)(1), 214(c)(1), and 214(c)(14)(A)(ii) of the INA. Also, a number of the changes made through this rulemaking facilitate lawful participation in the H-2 programs. For example, and as discussed in more detail elsewhere in this rule, H-2 portability, harmonizing grace periods and periods of admission, removing the filing of a permanent labor certification/immigrant visa petition as a sole impediment to temporary petition approval, all in different ways help workers to find new H-2 employment and/or to timely depart the United States while maintaining their status. These protections in turn encourage workers, who may seek to enter the United States, to go through the proper channels of the temporary H-2 program and work for employers who need temporary H-2 workers. Similarly, H-2 workers who may face an unexpected cessation of employment or are exposed to adverse work environment that merits a revocation of the petition would not be faced with potentially finding other work without work authorization and/or accruing unlawful presence that could result in future bars to entry, which in turn might create the possibility that workers who are unable to participate in the program may opt to enter the United States via unauthorized means. Finally, contrary to the assertion by some commenters that this final rule "undermines" immigration enforcement, this final rule does not in any way limit the ability of DOL, pursuant to the authority DHS has delegated to DOL under section 214(c)(14)(B) of the INA, to impose appropriate civil monetary penalties and other administrative remedies, or any other remedy authorized by law. This final rule also does not limit the ability of U.S. Immigration and Customs Enforcement (ICE) to engage in worksite enforcement or enforce employment authorization rules.

Comment: A couple of trade associations said some proposed enforcement changes appear to conflict with current law or lack legal authority altogether. These commenters said DHS

has proposed to implement investigative and enforcement authority that conflicts with DOL's investigative and enforcement authority in the H-2A and H-2B programs, and fails to acknowledge the existing legal investigative and enforcement structure. A couple of commenters, including one of the trade associations and an individual commenter stated that the Secretary of Homeland Security has delegated all of DHS's H-2B enforcement authority to DOL. Citing case law, the individual commenter stated that since this redelegation has been unchanged, the investigative and enforcement power belongs exclusively to DOL Wage and Hour Division (WHD), as DHS has "incapacitated itself" from exercising any such authority. In addition, citing NPRM references to "general" authority, the commenter said Congress subsequently spoke very specifically—even comprehensively—to the enforcement powers at issue in the NPRM. The commenter said "those very-general provisions" simply do not address the H-2B program or the fact that the Department has redelegated all of its authority.

Response: DHS disagrees that the changes conflict with the law or lack legal authority or that DHS's investigative and enforcement authority conflicts with DOL's or that DHS has delegated all of its enforcement authority to DOL.

With respect to both H-2A and H-2B nonimmigrant classifications, DHS has authority to make these changes under INA secs. 214(a)(1) and 214(c)(1), 8 U.S.C. 1184(a)(1) and 8 U.S.C. 1184(c)(1) and, with respect to the H-2B classification, INA sec. 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). In addition to those specific statutory authorities, the Secretary has broad general authority under INA sec. 103(a), 8 U.S.C. 1103(a) to, among other things, administer the immigration system, issue regulations and delegate certain duties to any employee of former INS, including USCIS, as established by HSA sec. 451, 6 U.S.C. 271, and implemented through Delegation 0150.1 (Jun. 5, 2003). In addition, USCIS has the additional authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under INA section 287(a), (b), and (f), 8 U.S.C. 1357(a), (b), and (f), and INA section 235(d), 8 U.S.C. 1225(d). INA sec. 287. Through this final rule DHS is exercising the delegated authority conferred upon it by Congress to ensure that participants of the H-2 programs comply with applicable laws. In particular, as it relates to ensuring compliance with the

H-2B program, under INA sec. 214(c)(14)(B), Congress explicitly permitted DHS to delegate to DOL authority under INA sec. 214(c)(14)(A)(i) to impose certain administrative remedies and any other remedy authorized by law. *See* INA sec. 214(c)(14)(B). In 2009, DHS delegated this section 214(c)(14)(A)(i) authority to DOL. *See* 88 FR 65040, 65046 n.5 (Sept. 20, 2023).

Significantly, the 2009 H-2B delegation to DOL cited in the NPRM is limited to section 214(c)(14)(A)(i) of the INA (as specifically authorized by section 214(c)(14)(B) of the INA), which focuses on administrative remedies, including civil monetary penalties. Notwithstanding the above-described delegation, DHS did not also delegate its authority to deny petitions for certain periods of time under INA section 214(c)(14)(A)(ii) pursuant to 214(c)(14)(B). A plain reading of the statute makes clear that DHS's delegation authority under section 214(c)(14)(B) does not extend to section 214(c)(14)(A)(ii). Furthermore, section 10.0 of the DHS-DOL Interagency Agreement implementing the delegation states that "[n]othing in this IAA is intended to conflict with current law or regulation. If a term of this IAA is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this IAA shall remain in full force and effect." Thus, as described further below, DHS maintains its authority to deny petitions filed by petitioners who failed to follow applicable laws.

DHS recognizes that the delegation mentions DHS's authority to deny petitions under section 214(c)(14)(A)(ii) of the INA, but it does so solely in the context of enabling DHS to rely, in DHS's discretion, on certain DOL findings of fact—after notice and an opportunity for a hearing—made by DOL in the context of DOL exercising authorities it was delegated under section 214(c)(14)(A)(i). Specifically, the delegation states that if DOL has issued a debarment order, DHS "may" (but need not) rely on the underlying DOL findings and "take appropriate action with respect to the petition, including exercising [DHS] authorities under 214(c)(14)(A)(ii) of the INA, 8 U.S.C. 1184(c)(14)(A)(ii) and other provisions of the immigration laws." Nowhere in the delegation, however, is it stated that DHS lacks the authority to make its own findings of fact, provide notice and an opportunity for a hearing, or deny petitions in connection with its exercise of section 214(c)(14)(A)(ii) authority. Under the statute and the implementing Interagency Agreement, DHS may deny

H-2B petitions for a given period in two potential ways: (a) by relying on DOL findings, or (b) after conducting its own hearing and by relying on its own findings.¹⁵ DHS's section 214(c)(14)(A)(i) delegation does not in any way limit DHS's authority under section 214(c)(14)(A)(ii), but findings by DOL provide an additional way for DHS to obtain information helpful or necessary to exercise its 214(c)(14)(A)(ii) authority, should facts be uncovered in the course of DOL's exercise of section 214(c)(14)(A)(i) delegated authority. The use of the word "may" highlights the nonbinding nature of how DHS uses any findings by DOL that DOL makes in the course of exercising any enforcement authority that DHS delegated to DOL with respect to section 214(c)(14)(A)(i). Under section 214(c)(1) of the INA, DHS—not DOL—is the sole U.S. governmental agency authorized to determine whether an H-2 (or other H, L, O, or P) petition may be approved.

DHS, in its discretion, may avail itself of or rely on fact determinations made by DOL in exercising its delegated authority under section 214(c)(14)(A)(i). DHS, however, did not delegate its own authority to make factual determinations (following notice and an opportunity for a hearing) for purposes of section 214(c)(14)(A)(ii), nor did DHS delegate its authority under section 214(c)(14)(A)(ii) of the INA to deny H-2B petitions (or other petitions filed under INA secs. 204 or 214(c)(1)) from petitioners determined by DHS—based on its findings of fact, whether in choosing to rely on DOL's fact findings or DHS's own or both—have violated applicable laws for a 1- to 5-year period.

The new denial provisions in this rule, as applied to H-2B petitions, are consistent with INA section 214(c)(14)(A). Specifically, INA section 214(c)(14)(A) provides that DHS may deny H-2B petitions for a period of at least 1 year, but not more than 5 years, based on the substantial failure to meet any of the conditions of the petition or a willful misrepresentation of a material fact in the petition. Under INA section 214(c)(14)(D), the term "substantial failure" means a willful failure to comply with requirements of INA section 214 that constitutes a significant deviation from the terms and conditions of a petition. As discussed in greater detail below, each of the violations triggering new denial periods in this final rule, as applied to H-2B petitions, stems from a willful failure to comply with program requirements. Such a willful failure to comply would constitute a significant deviation from

the terms and conditions of the petition or a willful misrepresentation of a material fact. Consistent with caselaw, DHS interprets the term "willfully" in INA 214(c)(14)(A) to mean "knowingly" or "recklessly," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.¹⁶

Each mandatory denial ground in new 8 CFR 214.2(h)(10)(iv)(A), as applied to H-2B petitions, requires a finding of willfulness that comports with the applicable case law on willfulness. Specifically, with respect to 8 CFR 214.2(h)(10)(iv)(A)(1), debarment by DOL from the H-2B program requires that DOL has found either that the employer willfully misrepresented a material fact or that the employer willfully failed to comply with program requirements and the failure constituted a significant deviation from such requirements. *See* 20 CFR 655.73(a); 29 CFR 503.19(a). DOL regulations defining willful violations for purposes of INA sec. 214(c)(14), state, "A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer . . . knows a statement is false or that the conduct is in violation or shows a reckless disregard for the truthfulness of its representations or for whether its conduct satisfies the

¹⁶ *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("We have said before that 'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears; and where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.") (quotation marks and citations omitted); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132–33, (1988) ("willful," as used in a limitation provision for actions under the Fair Labor Standards Act, covers claims of reckless violation); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125–26 (1985) (same, as to a liquidated damages provision of the Age Discrimination in Employment Act of 1967); *United States v. Ill. Cent. R. Co.*, 303 U.S. 239, 242–43, (1938) ("willfully," as used in a civil penalty provision, includes "conduct marked by careless disregard whether or not one has the right so to act") (quotation marks and citation omitted); *Bedrosian v. United States*, 912 F.3d 144, 152 (3d Cir. 2018) ("[G]eneral consensus among courts is that, in the civil context, the term ['willfulness'] often denotes that which is intentional, or knowing, or voluntary, as distinguished from accidental, and that it is employed to characterize conduct marked by careless disregard whether or not one has the right so to act . . . In particular, where willfulness is an element of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.") (quotation marks and citations omitted); *Matter of Healy and Goodchild*, 17 I & N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of a representation" is sufficient).

¹⁵ *See* sec. 5.6 of the IAA.

required conditions.”¹⁷ 20 CFR 655.73(d); 29 CFR 503.19(b).

A finding of willful material misrepresentation of a material fact or a finding of fraud by USCIS, as relevant in 8 CFR 214.2(h)(10)(iv)(A)(2), likewise requires a finding of willfulness, in accordance with established case law. In addition, under 8 CFR 214.2(h)(10)(iv)(A)(3) a finding of violation under INA section 274(a) also requires the element of willfulness. In this regard, each subsection of INA section 274(a) includes an element of “knowing” and/or “reckless disregard” indicating that a finding under INA section 274(a) would meet the requirements of the term willfully referenced in INA 214(c)(14) and as defined in applicable civil case law.¹⁸

Finally, we note that, as a part of its application for a TLC, an employer must attest that they will comply with applicable Federal, State and local employment-related laws and regulations, and on the H-2 petition itself, they must also attest that they agree to the conditions of H-2 employment, which limits participation in the H-2 program to those petitioners who have not engaged in the types of criminal activities covered by INA section 274(a). Such a limitation is intended to ensure the integrity of the H-2 program, insofar as employers who have been found guilty of engaging in activities related to the bringing in and harboring of certain aliens have a demonstrated record of knowing or reckless disregard for adherence to the immigration law. Given the seriousness of the violations described in section 274(a), there is no assurance that they will take seriously their obligation to abide by the terms and conditions of the H-2 program, or that they have the intention and ability to do so absent the passage of a sufficient time period for them to demonstrate that they in fact will abide by the terms and conditions of the H-2 program. For this reason, DHS has determined that precluding approval of H-2 petitions for employers convicted of a violation of section 274(a) for the period of time specified in this rule is necessary not only to ensure compliance with the H-2 program but to serve as a disincentive to employers from engaging in the types of criminal

activities specified in section 274(a) should they wish to avoid the mandatory denial periods set forth in this rule. For these reasons, a violation of INA section 274(a) therefore constitutes a willful violation of section 214 that constitutes a significant deviation from the terms and conditions of a petition that calls into question the petitioner's intent and ability to comply with the requirements of the H-2 program.

In addition, the 1-year denial period for H-2B petitions set forth in new 8 CFR 214.2(h)(6)(i)(C) stems from a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition. Specifically, new 8 CFR 214.2(h)(6)(i)(C) will only apply after USCIS issues a decision denying or revoking on notice an H-2 petition for violation of the prohibited fee provision at paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), or if a petitioner withdraws a petition following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition for prohibited fees under one of those provisions. The cited provisions, as finalized in this rule, enable a petitioner to avoid denial or revocation—and thus avoid the 1-year denial period—by demonstrating that it made ongoing, good faith, reasonable efforts throughout the process to prevent and learn of the prohibited fee collection or agreement, that it took immediate remedial action upon learning of the fee, that it has made all necessary reimbursements, and, for cases where the petitioner itself collected the fee, that its failure to prevent the fee resulted from extraordinary circumstances beyond its control. As discussed in the NPRM and in this final rule, the prohibitions related to fees charged to workers are a longstanding and important H-2 program requirement, and petitioners have to attest in the H-2 petition that, among other things, they have taken reasonable steps to ensure that prohibited fees are not being charged. As such, it is a petitioner's responsibility and obligation to make ongoing, good faith, reasonable efforts toward the prevention of such fees being charged by its employees and by any third parties within the recruitment chain, to take immediate remedial action if a violation occurs, and to reimburse the affected parties.

Accordingly, as the same steps that are required to avoid denial or revocation are in fact petitioner obligations for compliance with program requirements and/or the terms and conditions of the H-2 petition, DHS considers the failure

to take steps described above in order to prevent the payment of prohibited fees, and/or provide evidence that such steps were taken, to constitute a substantial failure, that is, a willful failure to comply with INA section 214 requirements that constitutes a significant deviation from the terms and conditions of the H-2B petition.¹⁹

Similarly, the additional 3-year period described in new 8 CFR 214.2(h)(6)(i)(D) only applies in instances where the petitioner has failed to provide the evidence necessary to avoid denial or revocation under paragraph (h)(6)(i)(B) or (h)(5)(xi)(A). Further, during this 3-year period, USCIS may approve the petition notwithstanding such a denial or revocation upon a showing that each affected beneficiary has been reimbursed or that the beneficiary's designee has been reimbursed if the beneficiary cannot be located or is deceased. DHS considers a petitioner's failure to reimburse all relevant parties despite knowledge of the reimbursement requirement, or failure to provide evidence of such reimbursement, to constitute a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition.²⁰

As a matter of policy and condition of participation in H-2 programs, DHS is imposing denials based on a predecessor's substantial failure to comply with program requirements or a willful misrepresentation of material facts, including a predecessor's denial under new 8 CFR 214.2(h)(6)(i)(C) or (D) and (h)(10)(iv), on any successors in interest. While the acceptance of certain liabilities may not be agreed upon by the successor within the documents underlying the acquisition, merger, or other transfer resulting in a successor in interest relationship, under this final rule, DHS has decided to extend the

¹⁹ In this regard, DHS notes that its regulations and petition instructions have long prohibited petitioners and recruiters from collecting prohibited fees and therefore violations of such prohibitions necessarily constitute a significant deviation from longstanding publicly known terms and conditions of a petition.

²⁰ DHS has noted that there are steps a petitioner can take to ensure they will be able to successfully provide reimbursement in the event that a prohibited fee violation occurs. Specifically, in the NPRM, DHS suggested that petitioners, as a matter of best practice, obtain in writing the beneficiary's full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, as well as obtain full designee information, early on during the recruitment process, and to maintain and update such information as needed to ensure the petitioner's ability to comply with the reimbursement requirement. 88 FR 65040, 65056 (Sept. 20, 2023).

¹⁷ See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 FR 24042, 24086–87, 24129, 24139 (Apr. 29, 2015).

¹⁸ For the purposes of civil liability (as opposed to criminal liability), the term “willful” includes both knowing violations and reckless violations. See, e.g., *United States v. Hughes*, 113 F.4th 1158, 1161–62 (9th Cir. 2024). See also, *Safeco Ins. Co. of Am.*, 551 U.S. at 56; *McLaughlin*, 486 U.S. at 132–33; *Trans World Airlines*, 469 U.S. at 125–26; *Ill. Cent. R. Co.*, 303 U.S. at 242–43.

periods of denial based on a predecessor's willful failure to comply with program requirements to successors in interest regardless of whether any such successor in interest has agreed to succeed to all of the liabilities of the predecessor entity. Accordingly, as proposed in the NPRM and after this rule becomes effective, a successor in interest will be subject to any applicable denial period stemming from the violations of this rule. DHS has made this determination to prevent predecessors that have willfully violated program requirements or misrepresented material facts from avoiding any consequences by simply reorganizing into a successor entity. This regulation puts prospective successors in interest on notice that they would assume liability for the predecessor's willful violation(s). To permit successors in interest to avoid successor liability would defeat the purpose/objective of this regulation and would create a loophole to avoid the consequences of a willful failure to abide by the terms and conditions of the H-2 programs. This policy furthers the statutory purpose of ensuring integrity in the H-2 programs.

Comment: An attorney commenter stated that the NPRM is premised on the belief that there are no material differences between the H-2A and H-2B programs, but they have been developed independently since 1986 and each is subject to its own statutory provisions. The commenter wrote that failing to differentiate between the programs fails to follow congressional policy and rewrites statute. The commenter also said another major premise of the NPRM is the apparent conclusion that H-2B workers deserve or are entitled to extensive regulatory protection, but it is well-established that Congress created all H visas to promote the national interests and alleviate U.S. labor shortages for temporary positions by providing nonimmigrant labor. The commenter said there is no "credible statutory language, structure, or legislative history suggesting that H-2B workers are a protected class" but instead they are "merely a conduit to safeguard the true protected class" by reducing the incentive to bypass U.S. workers and avoid wage depression. The commenter stated that the preamble includes "virtually no discussion" of the national interest, employer interests, or the interests of even U.S. workers, while DHS is effectively erecting a completely new and groundless regulatory structure.

Response: DHS disagrees with the commenter's assertion that the NPRM is premised on the beliefs that there are no material differences between the H-2A

and H-2B programs and that failing to differentiate between them is contrary to congressional intent. While DHS generally agrees with the commenter that the H-2 programs were created to alleviate U.S. labor shortages, and thus promote the national interest, those objectives are consistent with providing protections from abuses common to both H-2A and H-2B workers. Further, the commenter stated that the NPRM failed to address the interests of U.S. workers; however, it is well established that providing protections for H-2 workers also benefits U.S. workers.²¹ For example, the 2023 report of the H-2B Worker Protection Taskforce stated that H-2B workers work alongside U.S. workers in some of our country's most critical occupations, but that structural disincentives to report or leave abusive work conditions not only harm H-2B workers but also undermine the wages and working conditions of U.S. workers who work with them.²² With respect to the commenter's contention that the rulemaking fails to address the national interest and employer interests, DHS also disagrees. The NPRM specifically discussed the importance of the H-2 programs to U.S. employers, including the expansion in their use in recent years in a section titled *Importance of the H-2 Programs and the Need for Reforms*. 88 FR 65040, 65049 (Sept. 20, 2023). In this section DHS detailed the administration's policies to increase interest and expand access to these programs for employers, as well as the need to balance the expanded use of the H-2 programs with greater protections for workers. *Id.* The NPRM also specifically addressed the proposals that would most benefit U.S. employers, such as portability, as well as both the elimination of the eligible countries lists and the revision of the calculation of the maximum period of stay for H-2 workers.

DHS also explained that with respect to the H-2B program specifically, the proposed regulations which are also being finalized in this rule are intended to ensure that only those employers who comply with the requirements of the H-2B program will be able to compete for

²¹ See generally Daniel Costa, EPI, "Second-class workers: Assessing H-2 visa programs' impact on workers" (July 20, 2022) (testimony before the Subcommittee on Workforce Protections in the United States House Committee on Education and Labor), <https://www.epi.org/publication/second-class-workers-assessing-h2-visa-programs-impact-on-workers/>.

²² The White House, "Strengthening Protections for H-2B Temporary Workers: Report of the H-2B Worker Protection Taskforce" (Oct. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/10/Final-H-2B-Worker-Protection-Taskforce-Report.pdf>.

the limited number of available cap-subject visas, by precluding those employers who fail to demonstrate an intent to do so from participating in the H-2B program. 88 FR 65040, 65051–65052 (Sept. 20, 2023).

2. H-2 Program Background

a. Worker Vulnerability

Comment: A few commenters discussed the vulnerability of H-2 workers to labor abuses and expressed their support for additional labor protections to be put into place. For example, a religious organization stated that foreign workers are uniquely vulnerable given that they are temporary workers, rely on their employers for basic needs, often have a language barrier, and many other factors. The commenter expressed their support for the Department's effort to address ongoing issues within the H-2 programs. A union and a trade association also expressed their support for additional worker protections for H-2 workers, reasoning that H-2 programs are a public benefit and that employers who use them need to be held to the highest possible standards. Similarly, a joint submission expressed their support for the proposed regulatory changes which they stated "would make some badly overdue improvements for these most vulnerable workers."

Response: DHS agrees with, and appreciates, the commenters' feedback concerning the vulnerability of H-2 workers and the need for programmatic reforms, as well as their overall support for the rule's efforts to enhance H-2 worker protections.

b. Violations of Labor Laws

Comment: Several commenters discussed labor violation issues within the H-2 programs and how employers can abuse their H-2 workers due to excessive leeway and weak oversight. Some labor unions stated that the program gives too much leeway to employers and that USCIS does not effectively enforce existing labor rules. The commenters said that this allows employers to bypass hiring procedures even though there are domestic workers available for these jobs. A research organization discussed how both H-2 programs have been plagued with controversy regarding undocumented immigration and human trafficking. The commenter cited reports from DOL showing that 70 percent of the audits for temporary labor certifications (TLCs) led to enforcement actions against the employer ranging from a warning to program debarment. The commenter further stated that Department of State

(DOS) reports showed that these programs enabled human trafficking and that between 2018 and 2020 there were 3,694 potentially identified victims of labor trafficking within the H-2A program. Lastly, the commenter noted that of over 200,000 investigations DOL had done in the seven major H-2B industries, 80 percent found labor violations. A trade association noted that DOL figures showed that only a small percentage of farms, about 5 percent, accounted for 71 percent of all violations over a 15-year period.

A union and a religious organization stated that they have witnessed abuses against migrant workers such as charging fees for basic services, inadequate housing, long work hours, and limited training for the operation of heavy machinery. The commenters further discussed how in addition to these abuses, farm workers are often subject to restrictions on mobility, such as being prohibited from leaving their residences, insufficient health care, and isolation from the community. Lastly, a religious organization stated that workers have reported practices where an employer works its employees for 1 or 2 months with no days off, then replaces them with a different group, and repeats the process. The commenter stated that these practices might even be considered human trafficking under the Trafficking Victims Protection Act of 2000. A joint submission from a union and numerous advocacy organizations noted that 72 percent of labor trafficking victims between 2018 and 2020 reported holding an H-2A or another temporary visa.

A union further discussed how recruitment fees can be predatory and place a worker into an indentured servitude relationship with their employer, and further stated that the H-2 programs are one of the sources of modern forced labor. The commenter cited a study that it said showed about half of all H-2A workers from Mexico surveyed between 2006 and 2011 took out loans to pay for these fees. A separate joint submission from a union and numerous advocacy organizations brought up reports that over half of H-2A workers paid recruitment fees, with some upwards of \$4,500. The commenter also brought up concerns related to issues within the construction industry, and cited studies on how foreign workers are more vulnerable to injuries in this dangerous workplace environment.

Commenters also addressed violations related to wage theft and its prevalence among H-2 employers. For example, a union cited studies that it said showed how H-2B employers often pay H-2B

employees below what is required by State and Federal law and that this practice has led to almost 2 billion dollars in stolen wages. The commenter noted that another study showed that within the construction sector, foreign workers earn about 24 percent less than domestic workers while in the overall economy, this figure is about 11 percent. A joint submission from a union and numerous advocacy organizations cited other studies that they said showed 73 percent of the back wages and civil money penalties owed by farm employers were due to H-2A violations, and when investigated, agricultural employers are often found to be committing wage or hour theft from employees. A different union noted that this abuse leads workers to be deprived of job opportunities and subjected to lower wages.

Response: DHS thanks these commenters, many of whom have on-the-ground experience speaking to or working with participants in the H-2 programs, for bringing attention to the violations of various labor laws that many H-2 workers experience and the harms they cause them. Several of the provisions finalized in this rule, such as the strengthened prohibited fee provisions and the new mandatory and discretionary grounds for denial, aim to mitigate against some of these harms and vulnerabilities.

c. Economic and Industry Reliance on H-2 Workers

Comment: A few commenters, including a religious organization, discussed the current role of H-2 programs in the economy and how it is being used to fulfill labor demands that the domestic workforce is unable to meet. A few commenters discussed the use of the H-2 programs in the agricultural sector and how the industry has become more reliant on H-2A workers. A trade association stated that in part due to increased industrial job opportunities in Mexico, Texas farmers have begun to rely more heavily on H-2A workers to fill labor gaps. A business association noted that due to a shrinking domestic workforce, employers have had to rely more on H-2A workers in recent years and that the number of H-2A workers that are hired can range between a few dozen or thousands per entity. A separate business association discussed how the number of H-2A agricultural workers in states like Washington, Oregon, and Idaho has increased by significant margins in the past few years. The commenter stated that the number of H-2A workers in Washington has increased from 18,800 in 2017 to 38,664 in 2023, while in

Oregon the number of H-2A workers increased by a third between 2018 and 2021. The commenter also noted that about 90 percent of these workers return to the same place of employment in the following years.

A trade association noted that over the last decade, an aging domestic workforce and changing economic conditions in Mexico have led the agricultural industry in border states such as Texas to rely on H-2A workers to meet labor demands that are difficult to fulfill through domestic workers and Mexican day laborers. A professional association stated that there was an acute need for the H-2 and other similar programs to fill labor gaps in the U.S. economy, such as the construction industry where the ratio of openings to employment has climbed to 4.4 percent from 2.3 percent in 2015 and there were over 300,000 openings at the time of commenting.

Response: DHS is aware of the considerable increase in recent years in the utilization of both the H-2A and H-2B programs by U.S. employers and appreciates these commenters offering information on this growth. As noted in the NPRM, both the H-2A and H-2B programs have experienced significant growth over the last decade. H-2A visa issuances have increased by over 365 percent over the last decade, and H-2B visa issuances have nearly doubled over the last decade.²³ 88 FR 65040, 65049 (Sept. 20, 2023). Whether due to U.S. workers seeking employment opportunities in sectors other than agriculture, or due to an aging domestic workforce, or for other reasons, the strong interest from U.S. employers in seeking temporary workers through the H-2 programs is apparent, as these commenters note. The changes to the H-2 programs finalized in this rule will benefit these employers by further streamlining and improving the overall integrity of the programs as these programs grow.

d. H-2B Program Size

Comment: A couple of commenters generally discussed the growing size of the H-2 programs and, in particular, issues with the H-2B program exceeding the statutory 66,000 cap in recent years. A union expressed concern with how, through annual riders included in recent appropriations laws and DHS regulations including

²³ As further explained in the NPRM, while Congress has capped the number of H-2B visas available, the number of H-2B visas issued has regularly far-exceeded the statutory cap as a result of congressionally-provided limited authority to increase the cap over the past several years. 88 FR 65040, 65049 (Sept. 20, 2023).

returning worker exemptions, the government has been able to effectively increase the cap well above the 66,000 originally set when the H-2B program was established. The commenter also expressed concern that the increase in size and lax enforcement of labor laws has led to an undercutting of domestic labor.

A research organization raised concerns over how the NPRM does not discuss the impact of portability on the H-2B annual cap, the number of extensions of stay with the same employer for the H-2B program, nor the true size of the H-2B program in terms of the total number of H-2B workers employed in a given fiscal year. The commenter noted that publicly available data at the time of comment do not convey the total number of positions filled by H-2B workers, which they stated was “critical to know since H-2B workers who change employers or extend with the same employer will have filled two positions under one slot under the annual cap.” The commenter said that the number of beneficiaries approved for the H-2B program was important to know because the number of H-2B beneficiaries has grown far beyond the annual cap set by statute. The same commenter noted that USCIS calculates the total number of H-2B workers by adding the number of visas approved and the number of new H-2B workers that do not need visas, but that it leaves out H-2B workers that were approved to continue their status with the same employer or were approved to change employers. The commenter said that a similar issue exists with more recent data regarding the total number of H-2B workers because they do not differentiate between a new worker and one that is extending their current status or changing employers. Lastly, the commenter concluded that over the past few years, there have been significantly more H-2B workers than what is allowed by the statutory and supplemental caps. The commenter estimated that there would be a similar proportion of H-2B workers compared to the statutory and supplementary cap in 2023.

Response: As alluded to by a commenter, the INA sets the annual number of noncitizens who may be issued H-2B visas or otherwise provided H-2B status at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B). Under this semi-annual cap, up to 33,000 noncitizens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H-2B visas from the first half of a fiscal year, will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. *See* INA sec. 214(g)(10), 8 U.S.C. 1184(g)(10). There are some exceptions to the cap, for example, as workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment are not subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See id.*

Once the H-2B cap is reached, USCIS may only accept petitions for H-2B workers who are exempt or not subject to the H-2B cap. No provisions adopted in this final rule allow DHS to exceed the statutory limitation on the number of H-2B visas issued per fiscal year. Similarly, no provisions adopted in this final rule alter the current exemptions to the statutory cap for workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment.

In recent fiscal years, Congress has authorized the Secretary of Homeland Security to temporarily increase the statutory cap. Before authorizing the additional visa numbers, the Secretary, in consultation with the Secretary of Labor, considers the needs of businesses and other factors, including the impact on U.S. workers and the integrity of the H-2B program. Most recently, on

December 2, 2024, DHS and DOL jointly published a temporary final rule (TFR) increasing the numerical limit for FY 2025.²⁴ This increase is based on time-limited statutory authority that does not affect the H-2B program in future fiscal years.

DHS appreciates the commenter’s analysis regarding the portability provision but does not agree with the conclusion that DHS fails to adequately assess the impact of the type of portability proposed on the growth and overall size of the H-2B program. Much of the comment’s substance focuses on aspects of the H-2 program that, as described above, would not be affected by this rulemaking and therefore should not be considered as an impact of the rule. For instance, this rulemaking does not *establish* the ability to extend stay nor does it speak to which workers are cap exempt or subject to the respective caps. DHS believes that the NPRM’s discussion of the marginal impact of portability on the affected population of porting workers is an accurate and sufficient articulation of the impacts of this rule. *See* 88 FR 65040, 65074, 65079–80 (Sept. 20, 2023).

Additionally, DHS appreciates the commenters’ analysis of available H-2 data and agrees that the combination of data sources and methods described in the comment leads to overcounting of the total universe of H-2B workers in the country in a given fiscal year. More specifically, the commenter noted that the H-2B Data Hub’s “Continuing Approvals” field likely overcounts total H-2B workers because of a lack of data on workers who switched employers or changed job conditions while at the same employer. In order to address concerns raised by the commenter, USCIS is providing relevant data in Table 2 and Table 3 below:

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²⁴ This increase in the cap is in accordance with Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, which gave the Secretary of Homeland Security the authority to make available additional H-2B visas for FY 2025.

Table 2: Historical Data for H-2B Petitions and Beneficiaries Extending Stay Without a Change in Employer		
Year	Approved H-2B petitions for extensions of stay with the same employer	Approved H-2B beneficiaries for extensions of stay with the same employer
2011	293	2,155
2012	197	1,186
2013	214	1,811
2014	224	1,443
2015	214	1,734
2016	60	697
2017	112	1,099
2018	116	2,171
2019	148	2,296
2020	248	3,553
2021	326	5,138
2022	474	6,862
2023	675	8,888
Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried February 2024, TRK 14143		

Table 3: Historical Data for H-2B Petitions and Beneficiaries Extending Stay with a Change in Employer

Year	Approved H-2B petitions for extensions of stay and change in employer	Approved H-2B beneficiaries for extensions of stay and change in employer
2011	348	3,464
2012	283	2,915
2013	259	2,798
2014	300	2,971
2015	390	3,705
2016	402	3,767
2017	543	5,729
2018	726	7,014
2019	806	6,959
2020	789	7,705
2021	1,092	9,611
2022	1,764	15,769
2023	2,254	20,241
Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried February 2024, TRK 14143		

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Regarding the comment that the increase in H-2 program size and “lax enforcement” of labor laws has led to an undercutting of domestic labor, DHS disagrees and emphasizes that enforcement of labor laws involving domestic labor generally falls under the jurisdiction of DOL. DHS notes that, to avoid the undercutting of domestic workers as mentioned by the commenter, it is a requirement under both H-2 programs that the Secretary of Labor must certify that there are not sufficient able, willing, qualified, and available U.S. workers who can perform such services or labor.²⁵ Additionally, H-2 employment may not adversely affect the wages and working conditions of workers in the United States.²⁶ An H-2A or H-2B petition must be

accompanied by an approved TLC from DOL, issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor (GDOL) for H-2B workers who will be employed on Guam. The TLC serves as DHS’s consultation with DOL or GDOL with respect to whether a qualified U.S. worker is available to fill the petitioning H-2A or H-2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages and working conditions of similarly employed workers in the United States.²⁷

D. Program Integrity and Worker Protections

1. Payment of Fees, Penalties, or Other Compensation by H-2 Beneficiaries
a. Use of Phrase “Related to”

Comment: Several commenters, including a trade association, a union, a

joint submission, some advocacy groups, and a religious organization, expressed support for conforming USCIS regulations to DOL’s regulatory language, such as the prohibition of fees “related to” employment, or clarifying the term “prohibited fee” to include any fee, penalty, or compensation. The religious organization expressed support for the language change to prohibit fees “related to” H-2 employment in order to better protect workers and urged DHS to adopt the regulation as proposed.

Response: DHS appreciates the commenters’ support for conforming USCIS regulations to DOL’s regulatory language. These conforming changes are expected to increase clarity regarding prohibited fees and better protect workers. As discussed below, DHS is making some changes to the proposed regulation in light of other comments that suggested specific changes.

Comment: A union and a State agency generally supported the language change to prohibit fees “related to” H-2 employment but suggested that USCIS include a list describing prohibited fees

²⁵ See INA secs. 101(a)(15)(H)(ii)(a)–(b), 8 U.S.C. 1101(a)(15)(H)(ii)(a)–(b), 218(a)(1), 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(i).

²⁶ See INA sec. 218(a)(1)(B), 8 U.S.C. 1188(a)(1)(B) (H-2A); INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b) (H-2B); 8 CFR 214.2(h)(5)(ii), (h)(6)(i).

²⁷ See INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A), (h)(5)(ii), (h)(6)(iii)(A), (h)(6)(v).

in the regulatory text, similar to the list in the preamble.

Response: As the commenters noted, the preamble of the NPRM provided examples of fees that are “related to” H–2 employment including, but not limited to, the employer’s agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs.²⁸ However, DHS declines the suggestions to include this or another listing of specific prohibited fees in the regulatory text. As noted in the NPRM, DHS is replacing the term “as a condition of” with “related to” to substantially conform with DOL prohibited fee regulations. DHS is also finalizing the clarification that “[t]he passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee.” New 8 CFR 214.2(h)(5)(xi)(A), (h)(6)(i)(B). As DOL regulations already provide a non-exhaustive list of fees that are “related to” employment and thus are the responsibility of the employer,²⁹ it is unnecessary to repeat that non-exhaustive list in DHS regulations.

Comment: An attorney expressed concern with the phrase “related to,” stating it was “unrestricted” and allows the Department to “sweep up” any and all violations, including violations that are simply inadvertent or technical by “even the most innocent employer.”

Response: DHS disagrees with the commenter’s characterization that the phrase “related to” is “unrestricted” and allows the Department to “sweep up” any violations that are simply inadvertent or technical. Instead, that phrase seeks to balance an interest in protecting workers from prohibited cost-shifting by employers while recognizing that not all payments or reimbursements by workers are forbidden. Moreover, this change in terminology provides consistency across agencies by conforming to the long-standing use of the phrase in DOL regulations.³⁰

²⁸ 88 FR 65040, 65052 (Sept. 20, 2023) (citing DOL, WHD, “Fact Sheet #78D: Deductions and Prohibited Fees under the H–2B Program,” <https://www.dol.gov/agencies/whd/fact-sheets/78d-h2b-deductions>).

²⁹ See 20 CFR 655.20(o) (stating that fees “related to” H–2B employment “include the employer’s attorney or agent fees, application and H–2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification*”); 29 CFR 503.16(o) (containing a similar list for fees “related to” H–2B employment); 20 CFR 655.135(j) (stating that fees “related to” H–2A employment include “payment of the employer’s attorney fees, application fees, or recruitment costs”).

³⁰ See 20 CFR 655.135(j) (H–2A); 20 CFR 655.20(o) (H–2B). For readability purposes, this rule refers to all of the H–2B-related provisions of 20

The term “related to” is meant to be read broadly to ensure that employers bear the cost of bringing in noncitizen workers under the H–2 programs and prevent employers from passing those costs to H–2 workers, with the resulting consequences of indebtedness, intimidation, and exploitation of nonimmigrant workers that can occur. This is consistent with the intent expressed by DOL in promulgating its own prohibited fee regulations, to “require[] employers to bear the full cost of their decision to import foreign workers [as] a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.” 75 FR 6884, 6925 (Feb. 12, 2010); 73 FR 77110, 77158 (Dec. 18, 2008). However, the phrase “related to” is not “unrestricted,” as the commenter claimed. Consistent with DOL regulations, DHS recognizes that an H–2 employer is not responsible for costs that are primarily for the benefit of the H–2 worker and will finalize regulatory text making this clear. See new 8 CFR 214.2(h)(5)(xi)(A), (h)(6)(i)(B) (“This provision does not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.”). DHS therefore disagrees with the commenter’s concerns about the phrase “related to” being “unrestricted.”

b. Clarification of Acceptable Reimbursement From the Beneficiary for Costs That Are the Responsibility and Primarily for the Benefit of the Worker

Comment: A professional association expressed support for the clarification that some costs to workers are acceptable if they are for the benefit of the worker and are the worker’s responsibility. An advocacy group also supported this new regulatory language, noting that it improves clarity and affirms that an employer is responsible for all costs related to an H–2 worker’s employment, other than those costs primarily for the benefit of the worker.

Response: DHS appreciates the commenters’ support for the rule’s clarification of certain fees that may be reimbursed by H–2 workers. As noted above, new 8 CFR 214.2(h)(5)(xi)(A) and

and 29 CFR as “DOL regulations” notwithstanding DHS’s joint issuance of some rules affecting these provisions.

8 CFR 214.2(h)(6)(i)(B), as modified, will clarify that the prohibited fees provisions do not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker. DHS is slightly modifying this provision from what was proposed by adding “from the beneficiary.” As noted in the proposed rule, it is not the Department’s intention to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker.

Comment: Many commenters, including trade associations, a research organization, and a joint submission, stated that DHS should provide additional guidance on what costs, in addition to government-required passport fees, may be considered “the responsibility and primarily for the benefit of the worker” such that they are acceptable for reimbursement by the worker. A professional association noted that “[p]assport fees are expressly excluded in the definition of prohibited fees” but that “there may be other fees that could benefit both employers and the workers not clearly addressed in the proposed rule.” The commenter noted that “[g]reater specificity would be helpful in the scope of the definition of prohibited fees, given that subsequent reimbursement would no longer remedy the error.”

Response: As explained in the NPRM and codified in this final rule, fees that are “related to” H–2 employment are those that are the responsibility of and primarily for the benefit of the employer and may not be collected at any time from a beneficiary of an H–2A or H–2B petition. See new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B); 88 FR 65040, 65052 (Sept. 20, 2023) (stating that fees that are “related to” H–2 employment include, but are not limited to, the employer’s agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs; however, such fees would not include those that are “the responsibility and primarily for the benefit of the worker, such as government-required passport fees.”). Thus, an employer may not seek reimbursement from a worker for fees that are related to H–2 employment. However, an employer may seek reimbursement from a worker for fees

that are “the responsibility and primarily for the benefit of the worker.” As finalized at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B), fees that are “the responsibility and primarily for the benefit of the worker” include “government-required passport fees.”³¹ This intentionally mirrors DOL’s language that its prohibited fee provisions do not “prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.” 20 CFR 655.20(o), 655.135(j). Since DOL’s regulatory language does not contain examples beyond government-required passport fees, DHS also will not provide other examples in new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).

However, to be responsive to commenters’ requests for additional guidance on what costs, in addition to government-required passport fees, may be considered “the responsibility and primarily for the benefit of the worker,” DHS hereby clarifies that such fees may also include H-4 visa fees for dependent family members and filing fees for Forms I-539, Application to Extend/Change Nonimmigrant Status, requesting extension of the same status for any H-4 dependents. There may be other instances in which a fee is considered primarily for the benefit of the worker, although, such instances will be limited in light of the fact that employers are responsible for all costs “related to” H-2 employment.

c. Clarification of Acceptable Reimbursement to the Beneficiary for Certain Costs That Are “Related to” H-2 Employment

Comment: A trade association urged DHS to allow employers to reimburse workers for meals and other costs associated with their travel to the United States, stating that this practice benefits workers. A joint submission expressed concern that leaving the proposed regulation vague about what other fees are acceptable for reimbursement could result in inconsistent application of the regulation. A professional association suggested that “visa application” should be removed from this section [of prohibited fees] because [visa application fees, that is the DS-160 fee]

is recognized elsewhere justifiably as a reimbursable cost.”

Response: DHS recognizes that it is permissible, in certain limited circumstances, for a worker to initially pay a fee related to H-2 employment and then to be reimbursed by the employer for that expense. In such a case, the fee is still the responsibility of the employer and may not be passed on to the worker, but reimbursement has been deemed to be an allowable mechanism by which the employer can fulfill its responsibility to pay the fee. For example, 20 CFR 655.20(j)(2) states with respect to H-2B workers that “[t]he employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker” Thus, all visa, visa processing, border crossing, and other related fees are the responsibility of the employer, but DOL allows for the employer to satisfy its obligation to pay these fees by reimbursing the worker within the first workweek.

DHS does not intend to prohibit reimbursement of fees where such reimbursement is specifically allowed by statute or regulations governing the H-2 programs. Therefore, DHS is modifying the regulatory text in this final rule at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to add that “This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations governing the [H-2A/H-2B] program.”

In addition, nothing in the regulation prevents an employer from seeking reimbursement from the worker after initially paying costs that are the worker’s responsibility and are primarily for the benefit of the worker (such as passport costs). In determining the employer’s responsibility to cover expenses related to H-2 employment, the question is not whether H-2 workers derive a benefit from payment of such fees, but whether, under applicable regulations and guidance, the payment is made primarily for the benefit of the employer.³²

³² See, e.g., 29 CFR 531.3(d)(1) (“The cost of furnishing ‘facilities’ found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.”); 80 FR 24042, 24063 (Apr. 29, 2015) (“DOL’s longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be

d. Prohibiting Breach of Contract Fees and Penalties

Comment: Several commenters, including multiple trade associations, a union, and a joint submission, generally supported the inclusion of a breach of contract or penalty as a prohibited fee but requested DHS to clarify what constitutes a prohibited breach of contract fee or penalty. For example, multiple trade associations and a joint submission requested that DHS clarify what would constitute a breach of contract fee or penalty in circumstances where workers abandon or are terminated for cause from their work. The commenters requested that DHS clarify that the employer would not be deemed to have charged a breach of contract fee for failing to offer guaranteed work hours or provide return transportation in those cases. The joint submission asked whether the new regulation would preclude an employer from incorporating into the H-2A or H-2B contract a “no complete, no rehire” clause stating that workers will not be rehired for future contracts if they resign without cause prior to the agreed-upon end date.

Response: DHS will not consider the petitioner’s failure to offer guaranteed work hours, provide return transportation, and pay subsistence costs as a breach of contract fee or penalty, where DOL or DHS regulations relieve a petitioner of its responsibility to offer guaranteed work hours, provide return transportation, and pay subsistence costs for a beneficiary who has voluntarily left employment or was terminated for cause. See, e.g., 20 CFR 655.20(y) (abandonment/termination of employment for H-2B workers); 20 CFR 655.122(n) (abandonment of employment or termination for cause for H-2A workers). Similarly, with respect to the commenters’ question about a “no complete, no rehire” clause for a beneficiary who voluntarily left employment or was terminated for cause, DHS will not consider this clause a prohibited “fee or penalty for breach of contract” under new 8 CFR 214.2(h)(5)(xi)(A) or (6)(i)(B) so long as the consequence to the worker is limited to not being rehired by the petitioner

recognized as reasonable and therefore may not be charged to the worker.”); see also DOL, “Travel and Visa Expenses of H-2B Workers Under the FLSA” (Aug. 21, 2009) (stating that in determining which pre-employment expenses incurred by the employee must be reimbursed back to the employee, “the question is whether these expenses for H-2B nonimmigrant workers are ‘an incident of and necessary to the employment, and therefore are primarily for the benefit or convenience of the employer’”), https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/FieldAssistanceBulletin2009_2.pdf.

³¹ See WHD, “Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program,” <https://www.dol.gov/agencies/whd/fact-sheets/78f-h2b-fees>; DOL, Field Assistance Bulletin NO. 2009-2 (Aug. 21, 2009).

and does not include a monetary or financial penalty or fee for such termination or voluntary departure. However, DHS cautions that while such a clause does not fall under the “prohibited fee” provisions, it may implicate other statutory or regulatory provisions such as DOL’s prohibition on discrimination or retaliation under the H–2A program at 29 CFR 501.4. Petitioners and employers should take these other provisions into account when adopting such a clause or taking actions pursuant to such a clause.

Comment: A State agency stated it is “understandable to not charge excessive fees for the worker not completing the contract,” but expressed concern that by prohibiting the charging of breach of contract fees, an employer could pay upfront several hundreds or thousands of dollars for a worker, just for the worker to leave the job after a short time without any consequences to the worker.

Response: DHS acknowledges that an employer may be required to invest significant resources in petitioning for H–2 workers. However, certain costs associated with participation in the H–2 program are the responsibility of the employer. These costs remain the responsibility of the employer even if the worker departs prior to the end of the petition period and the employer may not seek to recover these costs through a “breach of contract” fee or otherwise.

Comment: A few commenters, including advocacy groups and a professional association, expressed support for the proposed changes prohibiting breach of contract fees and penalties. An advocacy group recommended that USCIS strengthen this language even further by prohibiting non-monetary penalties or penalties imposed on a worker’s relations or anyone acting on behalf of the worker. The advocacy group also proposed specific language adjustments for section 214.2(h)(5)(xi)(A) with corresponding changes for section 212.4(h)(6)(i)(B), to specify that “Requiring a beneficiary or any person related to the beneficiary or acting on the beneficiary’s behalf to sign a negotiable instrument or grant a security interest in any collateral constitutes the collection of a prohibited fee.”

Response: In response to the comment from the advocacy group, DHS is adding text to clarify that a prohibited fee may not be collected from a beneficiary “or any person acting on the beneficiary’s behalf” at new 8 CFR 214.2(h)(5)(xi)(A) and (6)(i)(B). This language is meant to clarify that an employer may not circumvent these provisions by

collecting an otherwise prohibited fee from a third party (such as a family member) acting on the beneficiary’s behalf.

DHS declines to add the remaining suggested text to the final regulation regarding “a negotiable instrument or grant a security interest in any collateral.” While DHS agrees that prohibited fees may be collected in a variety of ways, including by requiring a beneficiary or someone acting on their behalf to grant a security interest in any collateral, the changes to 8 CFR 214.2(h)(5)(xi)(A) and (6)(i)(B) to prohibit any “other fee, penalty, or compensation (either direct or indirect), related to the H–2[A/B] employment” are sufficiently broad to cover this and similar types of scenarios. Additionally, while DHS agrees that requiring a beneficiary or someone acting on their behalf to sign a negotiable instrument (such as a promissory note) to pay a prohibited fee would not be permissible, the phrases “agreement to collect” and “agreed to pay” at 8 CFR 214.2(h)(5)(xi)(A)(1) and (6)(i)(B)(1), and 8 CFR 214.2(h)(5)(xi)(A)(2) and (6)(i)(B)(2), respectively, are sufficiently broad to cover this scenario and similar types of scenarios. There may be other fact patterns that could constitute the collection of or an agreement to collect a prohibited fee, and as such, codifying the technical terms “negotiable instrument,” “security interest,” and “collateral” is unnecessary.

e. Strengthening the Prohibited Fee Provisions

Comment: Citing reports and statistics showing the pervasiveness of prohibited fees, an advocacy group welcomed the Department’s efforts to strengthen enforcement against such fees. Another advocacy group, citing a statement from an H–2A worker, similarly expressed strong support for DHS’s efforts to provide more effective enforcement on recruitment fees and other unlawful fees. A union generally endorsed the Department’s efforts to increase accountability for employers who use foreign recruiters and other third-party agents through the proposed fee provisions.

An advocacy group similarly expressed support for the proposal to strengthen the existing prohibition on and consequences for charging certain fees to H–2A workers. The commenter concurred with the Department’s assessment that the consequences for employers charging prohibited fees could, in conjunction with the whistleblower protections, reduce disincentives for workers to report prohibited fees.

Citing various statistics and reports, a joint submission expressed broad support for DHS’s proposals with respect to prohibited recruiter fees. The commenters agreed with the Department’s rationale that targeting employers who charge prohibited fees would also help to target human and labor trafficking. The commenters concluded that the pervasiveness of trafficking in the H–2A program and the egregiousness of the associated crimes justify DHS’s proposals and require the rule’s swift implementation.

A union expressed strong support for DHS’s proposal to eliminate the current regulatory exemptions that allow employers to avoid liability for the charging of prohibited fees. The union reasoned that the current regulations provide too many exemptions and eliminating them would make it more difficult for employers to avoid the consequences of their actions, as well as the actions of their agents.

An advocacy group expressed overall support for the proposed language to strengthen the applicability of the prohibited fees provisions while citing provisions that would narrow the circumstances in which petitioners could avoid revocation or denial. The group acknowledged that the “very high standard” established in the regulations would require petitioners to take an active role in ensuring that their employees do not charge prohibited fees, and that a “mere lack of awareness” would not allow petitioners to avoid consequences. Citing examples, the commenter reasoned that many H–2 employers rely on employees to recruit new H–2 workers, without taking any steps to ensure that these employees are not charging fees to their recruits. The commenter additionally reasoned that H–2 petitioners are already obligated to ensure their employees comply with various legal obligations, so compliance with the H–2 regulations on prohibited fees should not be an exception. While similarly describing the standards under this section of the rule, another advocacy group emphasized the need for employers to discourage their agents and employees from charging prohibited fees, rather than allowing them to claim ignorance of fees to avoid penalties. The group concluded that the proposed affirmative obligations for employers would improve and maintain the integrity of the H–2 program.

Response: DHS appreciates the broad support offered by these commenters for the changes made in relation to strengthening the H–2 prohibited fees provisions. Despite existing regulatory provisions against charging certain fees

to H-2 employees, incidents of workers reporting prohibited fees were levied on them at some point during the recruitment and hiring process remain pervasive, as the commenters note. The changes proposed in the NPRM to enhance the integrity of the H-2 programs and provide additional worker protections are adopted in this final rule with some clarifying revisions; any amendments to those proposals based on public comment are discussed in detail under the appropriate section.

Comment: Multiple commenters expressed concern with DHS's proposal to eliminate exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS, as summarized below.

A joint submission wrote that, under current regulations, employers must take remedial action as a condition of approval, which provides employers with a reasonable opportunity to resolve and remedy violations that occur without their knowledge or involvement. The commenters said that the proposal to remove such opportunities is "unbalanced" and penalizes employers disproportionately. Similarly, a business association wrote that the proposal is concerning to businesses and would cause unnecessary disruptions for well-meaning employers that rely on the H-2 program to meet their workforce needs. A research organization wrote that the proposal to remove the exception to denial when an employer reimburses the fee before filing the petition is "unjustifiable," as it would create an automatic denial in every situation where a prohibited fee is identified anywhere in the chain of recruitment.

A few trade associations wrote that they supported strong enforcement against the unlawful collection of or threats to collect prohibited fees. However, they expressed concern that the proposal to eliminate these exceptions would prevent employers from accessing the program through correctional mechanisms (that is, through reimbursement or correctional action with DHS) whereby they can rectify situations in which the unlawful collection of fees occurred outside of their knowledge, or where it was "impossible" to prevent unlawful fee collection. A couple of these associations additionally wrote that DHS's proposal to eliminate the exceptions "takes a sledgehammer to an issue that requires a scalpel."

Another trade association similarly expressed support for enforcement against prohibited fee collection, but said that the proposal to eliminate the exemptions would prevent growers from accessing a program on which they depend due to reasons "far outside of their control," including actors deliberately and deceptively acting contrary to the employer's direction not to collect prohibited fees. A few trade associations additionally reasoned that the collection or threatened collection of prohibited fees often occurs in home countries, and U.S. employers have limited control in such situations, so it would be inappropriate to impose serious penalties any time a prohibited fee is discovered. Another trade association added that the Department's "shortsighted" proposal would disregard the totality of the implications in such situations and would negatively impact both employers and employees, rather than holding the parties conducting the unlawful collection of fees accountable.

A business association wrote that the Department did not consider other alternatives to removing the current exception, such as retaining the exception to avoid petition revocation or denial only if workers are fully reimbursed and where the petitioner had no knowledge of the unlawful fee, and only denying or revoking a petition for egregious cases where employers knowingly charged or threatened a prohibited fee. A joint submission suggested that the Department consider making an "exception contingent on the employer attesting, under penalty of perjury, that it had no actual or constructive knowledge of the fee scheme." The commenter further suggested that the Department make this exemption inapplicable if there is evidence demonstrating that the petitioner had direct involvement or actual knowledge of the scheme or benefitted from it financially.

Response: DHS declines to make any revisions based on these comments to its proposed strengthening of the H-2 prohibited fees provisions. The proposed changes in the NPRM, and now finalized in this rule, are meant to address, in part, two major vulnerabilities with respect to current regulatory provisions requiring reimbursement of beneficiaries as a condition of approval. First, DHS adopts these strengthened provisions in recognition of the potential harm to beneficiaries and in some cases their families who may have to borrow or otherwise incur debt to pay prohibited fees. Indebted noncitizen workers are more vulnerable to exploitation and

coercive actions of unscrupulous employers or agents working on the employer's behalf. So, despite later reimbursement of the fees charged to these workers, significant damage may have already occurred. Second, in finalizing these new provisions, DHS recognizes that under the current, long-standing regulatory framework, reports of prohibited fees paid by beneficiaries remain prevalent.³³ Current provisions allow petitioners to avoid any liability for these types of fees being charged in cases where they have reimbursed the worker, or if the worker is unavailable, they claim reasonable efforts have been made to locate the worker.

Though reimbursing workers charged prohibited fees is vital, and provisions adopted in this final rule require fully reimbursing such workers or their designees, DHS's intent here is to maximize incentives for petitioners to take affirmative measures to prevent workers from being charged or threatened with these fees in the first instance. The commenters' suggestions that DHS should maintain the current exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS, do not adequately recognize the harm already done to affected beneficiaries by having to come up with the funds to pay those fees upfront. Similarly, the commenters' suggestions to make an exception for petitioners who have no knowledge of or direct involvement in the prohibited fees do not adequately recognize the harm already done to affected beneficiaries, and furthermore, may even incentivize petitioners to remain ignorant about prohibited fee practices affecting their workers. These suggestions also do not adequately address the inadequacies of the current regulatory provisions which focus solely on reimbursement as the appropriate remedy rather than providing incentives for a petitioner to prevent these violations from occurring in the first place.

f. Similar Employment Services

Comment: Multiple trade associations expressed concern about a lack of clarity around "similar employment services."

³³ See, e.g., GAO, GAO-10-1053, "Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse" (2010) (describing various instances when employer charge excessive fees), <https://www.gao.gov/assets/gao-10-1053.pdf>; GAO, GAO-15-154, "Increased Protections Needed for Foreign Workers" (2015) (specifying instances of abuses during the recruitment process, including the charging of prohibited fees), <https://www.gao.gov/assets/gao-15-154.pdf>.

Some of these associations regarded the lack of a definition for “similar employment services” as concerning given the Department’s push for employers to recruit from Northern Central American countries through their Ministries of Labor. A few of the associations asked whether ministries of labor would count as “similar employment services.” Providing examples from recent cases of illegal activity within a Northern Central American ministry of labor and the Georgia State Workforce Agency, the commenters added that the vague provision surrounding “similar employment services” is concerning for employers.

Response: DHS thanks these commenters for their submissions regarding clarification for the phrase “similar employment services.” Noting that this phrase has long been included in DHS H–2A and H–2B regulations, it is reasonable to amend these provisions to offer clarification for what may constitute “similar employment services” in the context of the strengthened prohibitions on charging H–2 workers certain fees. Based on feedback from commenters, DHS is amending its regulatory provisions at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to now read, “The term ‘similar employment service’ refers to any person or entity that recruits or solicits prospective beneficiaries of the [H–2] petition.” In accordance with this clarification, this includes recruitment or employment services offered by private, nongovernmental individuals and entities, quasi-governmental entities (such as private entities working jointly with ministries of labor), and governmental entities (such as ministries of labor).

g. Due Diligence Standard

Comment: An advocacy group welcomed DHS’s clarification around the petitioners’ responsibility to conduct “due diligence” to ensure that recruiters and other agents in their labor supply chain are not charging prohibited fees. Another advocacy group wrote that workers were generally optimistic that the due diligence provisions would cause employers to be more cautious in the recruitment process, particularly with regard to fees charged by third-party recruiters and their own employees.

A joint submission generally acknowledged that under the proposed rule, H–2 employers would be responsible for conducting due diligence to ensure that their recruiters and other employees do not charge workers unlawful recruitment or other

fees. The commenters said that the proposed provisions would strengthen the enforcement of prohibitions on charging unlawful fees, which severely harm workers.

Response: DHS appreciates the support from these commenters. H–2 employers are responsible for ensuring that individuals and entities that recruit, or that otherwise act on behalf of the employer and/or the recruiter, comply with all H–2 program requirements, including the prohibition on collection of fees related to H–2 employment. Based on feedback requesting clarification as to what constitutes due diligence that DHS received on its proposed rule, DHS is revising the provisions introduced in the NPRM as discussed in detail below.

Comment: Numerous trade and business associations and a professional association expressed concern with the requirement that employers demonstrate to USCIS that they engaged in “due diligence” to prevent the collection of prohibited fees on the basis that the provision lacks a clear explanation for satisfying the requirement and is overly broad as to what “due diligence” would entail. A trade association urged the Department to address this concern in the final rule.

A joint submission wrote that the provisions do not offer a definition of “due diligence” or provide examples of what this requirement would look like, except to say that a written contract “by itself” is insufficient. The commenters said that the Department’s attempt to mitigate uncertainty through this statement is inadequate to protect against the provision’s overreach. The commenters wrote that, as the rule does not adequately apprise the regulated community as to its obligations, the rule is impermissibly vague and violates due process.

A couple of trade associations similarly remarked that the proposed rule is impermissibly vague and fails to define what specific objective steps must be taken to fulfill the “due diligence” requirement. The associations said that the proposed rule’s failure to discuss the applicable standard of proof and failure to establish an objective standard deprive the public of the opportunity to comment on the proposal.

A trade association reasoned that the “broad and vague” wording around due diligence would leave employers with a lack of understanding of agency expectations and would create challenges for employers to avoid penalties despite their “good faith efforts” to adhere to due diligence obligations. The association additionally

wrote that vague due diligence requirements without parameters would prevent the application of a consistent standard and raise the risk of penalization for employers depending on how the agency interprets the requirement in each situation.

Another association wrote that the proposed due diligence standard is unreasonably broad and unattainable such that employers would “never be able to reasonably meet its conditions.” The association further remarked that while the Department explains that a lack of knowledge of an incident or even explicit contract terms prohibiting such fees are not sufficient to meet the “due diligence” standard, it does not explain what measures it would deem sufficient.

A research organization stated that, under the proposed rule, “a mere lack of awareness” is no excuse for employers, yet the rule does not offer advice to employers on what constitutes “due diligence” to avoid mistakes or the collection of prohibited fees.

Response: DHS appreciates the attention paid by commenters on its proposed provisions on prohibited fees and reiterates its commitment that employers conduct due diligence to ensure all parties acting on the employers’ behalf comply with all H–2 program requirements. In light of commenters’ calls for additional clarity regarding the due diligence standard, however, the Department is revising proposed 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2) to offer greater clarification and simplification. Specifically, DHS is foregoing the proposed “did not know and could not, through due diligence, have learned” language and instead requiring the petitioner to demonstrate “ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process.” This revision is intended to clarify what “due diligence” means and better aligns the regulatory language at new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2) with new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1).³⁴ This revision also

³⁴ As will be discussed below, DHS is making corresponding revisions to new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) to clarify the standards under which a petitioner will be held accountable for its own prohibited fee-related violations or those of its employees. As finalized, new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) will require the petitioner to demonstrate that it “made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process.” This language replaces the

more clearly explains the petitioner's obligation to not only prevent prohibited fee collection or agreement, but also an ongoing obligation to prevent and learn of such fees, given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process. Although DHS is replacing "due diligence" with "ongoing, good faith, reasonable efforts" in light of comments requesting clarity on the "due diligence" standard, DHS emphasizes that is not a substantive change as "due diligence" and "ongoing, good faith, reasonable efforts" in this context require the same diligent level of effort by the petitioner.³⁵

Further, new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2) require the petitioner to take immediate remedial action as soon as it becomes aware of the payment of or agreement to pay the prohibited fee. While this requirement was initially proposed for 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), it was not initially proposed for 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2), and is now included in the final regulatory text to better ensure parity between 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), and 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). These changes also are responsive to comments about the importance of ensuring that the petitioner take immediate remedial action to resolve and remedy violations, which can include immediate termination of the relationship with the recruiter or agent (in addition to full reimbursement to the beneficiary or the designee). DHS agrees with these comments and, as reflected by these changes, emphasizes that a petitioner should take immediate remedial action as soon as it becomes aware of the

payment of or agreement to pay the prohibited fee, regardless of whether the prohibited fee payment or agreement to pay the prohibited fee was made to the petitioner, or to its agent, attorney, employer, facilitator, recruiter, or similar employment service, or joint employer as applicable.

To summarize, under new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2), if it is determined that the beneficiary paid or agreed to pay a prohibited fee related to the H-2 employment to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer as applicable, whether before or after the filing of the H-2 petition, the petition will be denied or revoked on notice unless the following factors are demonstrated through clear and convincing evidence:

(1) The petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process;

(2) The petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and

(3) The petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the beneficiaries' designees.

Overall, these changes clarify what specific steps a petitioner must take to avoid liability for prohibited fee collection or agreement by a third party. These changes should help alleviate the commenters' concerns about the proposed provisions being overly broad, vague, unattainable, or having undefined standards. To provide further clarity, DHS discusses additional non-exclusive examples of how a petitioner may demonstrate that it made ongoing, good faith, reasonable efforts in another comment response below. DHS assures petitioners that the intent of the "ongoing, good faith, reasonable efforts" requirement is to ensure the integrity of the H-2 programs and to provide worker protections by better ensuring petitioners exercise ongoing reasonable efforts, based on the totality of the circumstances, to prevent the payment or collection of prohibited fees.

Comment: A trade association said that placing the burden on employers to root out prohibited fee collection among various actors, is "unfairly strict and impractical." The group wrote that, under the proposed rule, employers could be held responsible for monitoring actions hundreds or thousands of miles away. A few

individual commenters remarked that "forcing" employers to show due diligence would be "onerous" and suggested that this work be carried out by enforcement on recruiters. An individual commenter stated that the provisions to deny or revoke H-2 petitions based on undefined standards are "heavy-handed and arbitrary." The commenter wrote that employers would have to go to "extreme lengths" to show due diligence that they worked to prevent prohibited recruitment fees under the proposed provisions. A professional association similarly regarded the proposed rule's standards as "extremely high" and "relentless" with respect to employer requirements, penalties, and limited opportunities for relief.

A trade association wrote that placing the burden on petitioners to "police" the payment of prohibited fees would be unreasonable and unfair. The association remarked that it would not be feasible for petitioners to conduct every step of recruitment themselves and thus, they must rely on foreign recruiters. The association, along with another trade association, said that, as proposed, DHS unfairly places the burden on petitioners to prevent the collection of prohibited fees and issues unjust consequences if they fail.

Other commenters claim that, by removing the knowledge requirement from the violation and abolishing the current safe harbor provision, the Department is proposing a "strict liability system" in which the mere allegation of the payment or solicitation of fees results in the petitioner being deemed guilty and then the petitioner must prove by an extraordinarily high burden that he is innocent. A trade association wrote that placing "strict liability" on U.S. employers for actions taken by a foreign recruiter is not an appropriate solution. Another association said that the broadly defined due diligence requirement would amount to "strict liability."

A joint submission wrote that employers would be limited in their ability to prevent wrongdoing by third parties, and they cannot guarantee compliance with the rules at all times by all persons. While acknowledging that the risk to employers may increase with the scale of the agent or facilitators they hire, the commenters warned that the proposed rule may have the opposite of its intended effect and instead incentivize employers to hire smaller, less reputable, less ethical agents or facilitators as they may be perceived to be easier to monitor, which would result in less compliance and more worker exploitation.

"significant efforts" language in proposed 8 CFR 214.2(h)(5)(xi)(A)(1), 8 CFR 214.2(h)(6)(i)(B)(1), and also the proposed "due diligence" language in proposed 8 CFR 214.2(h)(5)(xi)(A)(2), 8 CFR 214.2(h)(6)(i)(B)(2). These changes clarify that the proposed "significant efforts" and "due diligence" standards were not meant to be materially different from each other.

³⁵ One dictionary definition of "due diligence" is "action that is considered reasonable for people to be expected to take in order to keep themselves or others and their property safe." Cambridge Dictionary, "Due Diligence," <https://dictionary.cambridge.org/us/dictionary/english/due-diligence>; see also Merriam Webster Dictionary (defining "due diligence" as "the care that a reasonable person exercises to avoid harm to other persons or their property"), <https://www.merriam-webster.com/dictionary/due%20diligence>; Black's Law Dictionary (12th ed. 2024) ("The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.").

A professional association expressed opposition to the prohibited fee provision that would impose liability on employers for the actions of third parties. The association stated that employers would have to take affirmative steps to demonstrate that the third party was not engaging in prohibited conduct, or else be liable for the associated penalties. The association warned that such punitive measures would disincentivize employers to participate in the H-2 program to avoid the risk of liability for actions outside of their control.

While articulating the need for petitioners to take steps to monitor their supply chains, a professional association voiced concern that employers cannot reasonably know everything that is happening. The association said that petitioners should not be held liable for the actions of third parties if they took immediate remedial action upon learning about a potential violation.

Another trade association expressed concern that employers acting in good faith and engaging recruitment services from vetted entities would not be able to preclude the possibility of prohibited fees by any one employee of a third-party entity and, under the proposed provisions, would effectively be barred from the program no matter what preventative measures they took. The association urged the Department to be more judicious in considering what standards are fair to place on the regulated community. The association concluded that the Department should consider “reasonable” alternative measures, though offering no specific proposals, to reduce instances of prohibited fee payments while allowing employers to protect workers, rather than subjecting them to “strict liability” for unknown actions of third parties.

A couple of trade associations expressed concern that employers would be held liable for actions by individuals who are not in contractual privity with them. The associations also stated that the Department’s proposal fails to account for varying circumstances and different actors in the context of the collection of prohibited fees. For example, the associations indicated that under the proposed rule, employers would be liable for actions beyond their control, such as the collection of improper fees by foreign government officials. In considering these issues, the associations regarded DHS’s proposal to punish employers for actions by third parties beyond their control, including those with whom they have no

contractual relationship, as “imprudent” and “unreasonable.”

Response: DHS disagrees with commenters’ statements that the Department is being unfair, impractical, unreasonable, or imprudent in ensuring the burden is on petitioners to properly monitor and assume responsibility for the actions of third parties engaging in recruitment activities on its behalf. DHS acknowledges the comments that petitioners cannot always conduct each step of the recruitment process themselves and therefore often rely on foreign recruiters, agents, or other third parties to do so. Nevertheless, it is reasonable to place the burden on the petitioner to ensure that prohibited fees are not collected by such third parties. The petitioner, in hiring recruiters or other third parties, is in a position to condition the hiring of such parties upon the latter monitoring the activities of those further down the recruitment and hiring chain, even if the latter are located outside of the United States. In this regard, it is in the mutual interest of petitioners and recruiters to ensure against denials of petitions based on payment of prohibited fees. Furthermore, DHS reminds these commenters of the long-standing regulatory provisions against prohibited fees being charged to H-2 workers by foreign recruiters. It is therefore reasonable to expect that petitioners who currently work with foreign recruiters already have at least some practices in place in which to effectively monitor the activities of those recruiters and ensure compliance with H-2 regulations. In other words, the requirement to oversee or monitor the charging of prohibited fees is not new with the NPRM or with this final rule.

This final rule does adopt measures to better ensure petitioners are liable for the actions of the third parties they engage for recruitment services. It is possible, however, for petitioners to avoid liability and possible consequences of a finding of prohibited fees charged by third parties if they demonstrate through clear and convincing evidence that they made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process; they took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement; and that all affected beneficiaries or, in certain circumstances, their designees have been fully reimbursed. See new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). Therefore, DHS disagrees with some commenters’

characterizations of these provisions as creating a new “strict liability” standard that would effectively deny a petitioner “no matter what preventative measures they took.” To the contrary, the new provisions incentivize petitioners to exercise ongoing, good faith, reasonable efforts, based on the totality of the circumstances, to prevent the payment of prohibited fees in the first place.

Finally, regarding the concerns that these provisions may incentivize employers to hire smaller, less reputable, less ethical agents which would result in less compliance and more worker exploitation, or may even disincentivize employers from participating in the H-2 program, such an assertion is speculative. For the reasons stated above, DHS assumes that good faith employers and agents have and, under this rule, will continue to have a strong incentive to ensure compliance with the terms and conditions of the H-2 program.

Comment: Several commenters who opposed the proposed “due diligence” provisions expressed specific concerns about the negative impact these provisions would have on H-2 workers. For instance, a research organization articulated its concern that the proposed rule would not be a rights-enhancing provision for the impacted population. The organization further remarked that the rule would be unfair to workers who would lose their ability to work in the United States for an employer who wants to rectify the infraction. The commenter urged DHS to consider what would happen to workers who are unjustly denied a visa under the proposed rule and concluded that restricting the H-2 visa would lead to unauthorized immigration.

Another commenter, along with a joint submission, further remarked that the nature of the proposal is such that it would discourage workers from reporting fee violations for fear of losing employment or jeopardizing their relationships with the employer.

Other commenters said that the rule, as proposed, would harm domestic and H-2A farm workers by reducing employment opportunities and diverting employer resources away from workers by making employers spend more resources to prove that prohibited fee collections or agreements did not occur.

Response: DHS appreciates the commenters’ concerns about the potential negative effects of the proposed changes on H-2 workers. DHS anticipates that other provisions in this rule, such as the new whistleblower protections, grace periods, and permanent portability provisions, will

provide significant relief to affected workers by increasing their ability to seek new employment and potentially lessening the impact of reporting fee violations or otherwise jeopardizing their relationships with an employer.

With respect to the comment that the prohibited fee provisions of this rule would lead to unauthorized immigration, DHS disagrees with this assertion, which is speculative and assumes that participants in the H-2 program will be inclined to violate immigration laws rather than comply with the terms and conditions of the H-2 program. Regarding the comment asserting that the provisions would reduce employment opportunities and divert employer resources away from workers by making employers spend more resources to prove that prohibited fee collections or agreements did not occur, the commenter did not provide support for this assertion. While DHS anticipates this rule may result in some increased costs for employers in instances where there is evidence that prohibited fees may have been paid or agreed to, the commenter provides no basis for its claims that the costs in these limited instances will cause additional harm to workers, and the rule does not otherwise create any new reporting or evidentiary requirements for employers related to prohibited fees. Any employer costs incurred to prevent prohibited fees are not new costs imposed by this rule as the regulations this rule replaces already prohibits the collection of such fees and as such, petitioners were reasonably expected under the previous rule to have taken appropriate steps to ensure against the collection of such fees.

Comment: In light of concerns with respect to the proposed “due diligence” standard, a business association requested that the Department provide a definition of “due diligence” and asked DHS to clarify what documentation would suffice to demonstrate a petitioner’s efforts to meet this standard. The association requested that the Department consider allowances for situations in which a petitioner is not aware of an improper action by an agent, despite conducting due diligence and including expectations within the contract, and asked what courses of action are available for petitioners when a third party is not responsive.

A trade association urged the Department to define “measurable, reasonable ‘affirmative steps’” employers could take to prevent the collection of prohibited fees while recognizing the good practices that employers already use. The association also recommended that the Department

consider which mitigating factors would be appropriate to avoid debarment. A joint submission similarly requested that DHS articulate specific guidance around due diligence, such as specifying whether it is sufficient to require agents and facilitators to ask workers during intake whether they have paid or been solicited to pay fees, or have workers sign a written attestation that they have not paid fees.

A trade association suggested that DHS clarify that an employer’s documented, good faith vetting of third parties would allow them to avoid liability for conduct outside of their knowledge. The association provided examples of this due diligence, such as written inquiries with responses from the third party, requests to review employment documents, and payment ledgers between visa applicants.

While discussing the due diligence provisions, a member farm organization stated the need to establish reasonable expectations as to what an employer can do from the United States when recruiters may be “hundreds and even thousands of miles away.” The group requested that DHS reconsider what it considered to be overly strict provisions and work with agricultural employers to find a “healthy middle ground” that benefits all parties.

Some advocacy groups responded to DHS’s request for comment regarding the types of due diligence activities that employers should be required to undertake. The advocacy groups suggested that employers:

- Create mechanisms to communicate with workers directly during the recruitment process and promptly investigate any reports of prohibited fees;
- Seek out ways to be available to workers during the recruitment process and create procedures for addressing abuses promptly (for example, through a designated Compliance Officer who reports to the employer and investigates and addresses unlawful fee collection);
- Take immediate remedial action in the event a petitioner discovers that a recruiter or agent has charged or entered into an agreement to charge a prohibited fee (including, at a minimum, full reimbursement and immediate termination of the relationship with the recruiter or agent);
- Implement rigorous vetting and monitoring procedures, such as through: (1) obtaining the agent’s financial records, documentation of compliance with applicable laws, and records related to their prior recruitment of H-2 workers; (2) identifying agents or intermediaries upon which recruiters rely, and creating processes to identify

agents or intermediaries not voluntarily disclosed; (3) conducting periodic audits of recruiters’ practices and finances and communicating policies against recruitment fees; and

- Ensure that all agreements with recruiters provide for a realistic fee structure that will not incentivize recruiters to pass costs to workers to remain profitable.

The other advocacy group endorsed the above commenters’ recommendations in their submission and wrote that the first recommendation would be especially critical for the proposed rule to benefit workers.

A professional association expressed concerns with the examples of relevant documentation provided in the NPRM, including “evidence of communications showing the petitioner inquired about the third party’s past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources.” In this regard, the association said it should not be mandated for disclosure to DHS “for a [f]ishing expedition” and that DHS must show cause on an individual basis prior to soliciting this type of “proprietary” information.

Response: DHS acknowledges the concerns raised by these commenters regarding the potential need for additional clarity as to the steps employers should implement to exercise appropriate due diligence. As clarified elsewhere, DHS is responding to feedback on its NPRM by revising and clarifying the proposed due diligence provisions. Specifically, DHS is removing the term “due diligence” from the regulatory text to instead state that petitioners must have made ongoing, good faith, reasonable efforts throughout the recruiting and employment period to prevent and learn of the collection of a prohibited fee. DHS emphasizes again that this revision is not intended to be a less stringent standard than the proposed due diligence requirement, but instead the change is offered as a more descriptive process than the provision included in the NPRM.

DHS is particularly appreciative of those commenters who provided specific examples in response to the NPRM’s request for public input in the NPRM. Indeed, the Department anticipated some interest and feedback on this provision, and in the NPRM explicitly requested public input regarding specific types of evidence that may be relevant and available to meet the proposed changes. 88 FR 65040,

65055 (Sept. 20, 2023). Based on these comments, DHS is providing the following examples of non-exclusive factors that may demonstrate whether a petitioner has made ongoing, good faith, reasonable efforts to prevent such fees. These factors may include, but are not limited to (1) whether the petitioner was providing compensation to the third party entity such that the third party would have no incentive to pass on costs to workers; (2) whether the petitioner had procedures to contact and monitor the performance of relevant parties in the recruitment chain, whether located in the United States or abroad; and (3) whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees. As noted above, the determination under new 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2) will be made on a case-by-case basis, taking into consideration all of the facts presented.

To show that a petitioner was providing compensation to the third party entity such that it would have no incentive to pass on costs to workers, the NPRM provided examples of documentation that could be submitted including “communications showing the petitioner inquired about the third party’s past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources.” 88 FR 65040, 65054–55 (Sept. 20, 2023). Contrary to a commenter’s claim that “[t]his type of information is proprietary and should not be mandated to be disclosed to DHS for a [f]ishing expedition,” these are merely examples of the types of evidence a petitioner may submit to demonstrate due diligence (which DHS now calls “ongoing, good faith, reasonable efforts”). New 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2) do not mandate the submission of any specific document nor the disclosure of any specific financial or proprietary information. Further, the petitioner may redact or sanitize a document in a manner that the document is still sufficiently detailed and comprehensive yet does not reveal sensitive financial or proprietary information. These clarifications should alleviate the petitioner’s concerns about providing proprietary or sensitive financial information to DHS. DHS therefore disagrees with the commenter’s suggestion that in providing these

examples in its NPRM as to evidence that may meet the proposed due diligence requirement that the Department would solicit proprietary information to engage in a “[f]ishing expedition.”

To show what procedures a petitioner has in place to properly vet and monitor the recruiters, agents, or other third parties that it utilizes to recruit H–2 workers, commenters provided various examples such as: written inquiries with responses from the third party, requests to review relevant employment documents, evidence that agents/facilitators asked workers during intake whether they have paid or been solicited to pay fees; evidence that the petitioner asked recruiters to identify agents or intermediaries upon which the recruiters rely and created processes to identify agents or intermediaries not voluntarily disclosed; and evidence that the petitioner conducted periodic audits of recruiters’ practices and finances and communicate policies against recruitment fees. DHS agrees with these examples, and notes that they are non-exhaustive examples of the types of documentation a petitioner may submit under this factor; no one document will be dispositive, and all of the circumstances will be considered as a whole. DHS reminds petitioners that, under new 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2), a written contract between the petitioner and the third-party agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to demonstrate reasonable efforts. While the language of such a contract may be considered, additional documentation must be provided.

To show whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and promptly investigate any reports of prohibited fees, commenters suggested that a petitioner could submit evidence that it has a designated Compliance Officer who reports to the employer and investigates and addresses unlawful fee collection. A commenter further suggested that a petitioner could submit evidence that they require their recruiters to provide the Compliance Officer’s contact information to workers as part of the initial job offer, as well as information about their rights in the recruitment process and assurances against retaliation for reporting any concerns. Again, these are just illustrative examples of the types of documentation a petitioner may submit under this factor; no one document will be dispositive, and all of the

circumstances will be considered as a whole.

Comment: An advocacy group and a union supported the proposed specification that the prohibited fee provisions would also apply to joint employers in the H–2A context and any employers in addition to the petitioner in the H–2B context.

Response: DHS appreciates these commenters’ support and adopts the proposed specifications that prohibited fee provisions apply to joint employers in the H–2A context, and any employer if different from the petitioner in the H–2A and H–2B context, in this final rule.

Comment: A few trade associations indicated that they cannot support the proposed regulations regarding joint employers and due diligence as proposed. These commenters said that while they support employers performing due diligence, an innocent member of an association of U.S. agricultural producers should not have their enterprise jeopardized by a “bad actor” within the association.

Response: As noted by the commenters, the provision at new 8 CFR 214.2(h)(5)(xi)(A) prohibits fees collected by any joint employer including a member employer if the petitioner is an association of U.S. agricultural employers. Further, under new 8 CFR 214.2(h)(5)(xi)(A)(2), a USCIS determination that a beneficiary has paid or agreed to pay such a fee to a member employer will result in a denial or revocation unless the petitioner (in this case the association U.S. agricultural employers) can establish that it qualifies for the limited exception in that provision, which among other things, requires evidence that it engaged in ongoing, good faith, reasonable efforts to prevent and learn of its member employers’ collection of prohibited fees. It is reasonable to expect that any petitioner filing on behalf of both itself and joint employers, including an association of U.S. agricultural employers acting as petitioner, will take steps to ensure that the representations it makes on other entities’ behalf are accurate, and that such entities in fact comply with program requirements.³⁶

DHS recognizes that, under the new rule, a member employer who complies with H–2 program requirements with

³⁶ When filing the Form I–129 petition, an association of agricultural employers certifies to the accuracy of the information in the petition, including the representations it makes on behalf of its joint employers, and agrees to the conditions of H–2A employment. Each joint employer also signs the petition, assuming responsibility for the representations in the petition and agreeing to the conditions of H–2A eligibility.

respect to its own workers could nonetheless be impacted by the prohibited fee violation of a different employer listed on the same petition. Specifically, such a prohibited fee violation may ultimately lead to denial or revocation of the entire petition if the petitioner is unable to demonstrate eligibility for the narrow exception. It is worth noting, however, that the 1- to 4-year denial period following a denial or revocation for prohibited fees would apply to the petitioner—that is, the U.S. association of agricultural producers—and not to each member employer listed as a joint employer on the petition. Regardless, DHS notes that member employers have the option to file individual petitions, and it is DHS's expectation that employers will exercise care in determining with which, if any, entities they will file jointly.

Comment: Several commenters cited examples of prohibited fees being charged by government officials of countries where the United States government has helped to promote recruitment of H-2 workers. The commenters provided these examples to ask for more clarity regarding the due diligence standard.

Response: DHS acknowledges the concerns regarding instances of prohibited fees by some ministry of labor officials in foreign governments which the United States government partnered with to promote the H-2 programs. DHS clarifies that it may consider whether the petitioner used one of these recruitment systems as a relevant factor in determining whether the petitioner engaged in ongoing, good faith, reasonable efforts. However, the fact that a petitioner used a recruitment system developed in partnership with the U.S. government will not by itself excuse an employer's failure to engage in the requisite reasonable and ongoing efforts to ensure against the payment of such prohibited fees. In all cases, DHS will make its determination with respect to the question of prohibited fees based on all of the facts presented.

Comment: Regarding the due diligence standard, a joint commenter asked whether it would matter if “the agent or facilitator has been certified by a third-party such as the Equitable Food Initiative, the U.N. Global Compact, or other organizations.”

Response: DHS declines to address third party certifications, as the commenter did not provide any additional information about the referenced certification programs nor demonstrate these programs' relevance to how a petitioner might demonstrate due diligence, now phrased as “ongoing, good faith, reasonable

efforts,” under new 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2).

Comment: A professional association recommended that, instead of placing the burden on employers to perform due diligence, DHS should provide safe harbor for employers who use recruiters included in DOL's H-2B Foreign Labor Recruiter List.

Response: DHS declines to adopt the suggestion to provide safe harbor for employers who use recruiters included in DOL's H-2B Foreign Labor Recruiter List. As stated on DOL's Foreign Labor Recruiter List web page, by providing the information on this list, DOL “will be able to verify whether a recruiter is recruiting for legitimate H-2B job opportunities in the United States.”³⁷ However, the web page expressly states that DOL “does not endorse any foreign labor agent or recruiter included in the Foreign Labor Recruiter List, nor does inclusion on this list signify that the recruiter is in compliance with the H-2B program.” DHS disagrees, therefore, that use of recruiters from the list is a sufficient factor to provide a safe harbor for petitioners, in part because DOL does not endorse any foreign labor agent or recruiter included in the list and inclusion on the list does not signify that the recruiter is in compliance with the H-2B program, and because DHS does not verify this recruiter list or vet any of the individual recruiters listed therein.

Comment: An advocacy group suggested that the Federal Government provide more information about and control over the H-2 hiring process overall and work to develop a multilingual, accessible platform providing access to vetted employers and verified job offers. While quoting a member of the affected population, the commenter reasoned that such an application would eliminate the need for recruiters, thereby eliminating prohibited recruitment fees.

Response: DHS is not implementing this suggestion in this final rule. While appreciative of the goal of eliminating prohibited recruitment fees, it is not the intent of this final rule to eliminate the use of recruiters. Nor does DHS intend to be involved in matching or otherwise facilitating recruitment between an H-2 worker and a prospective H-2 employer. However, nothing in this rule prevents the private, nonprofit, or voluntary sector from creating such a platform.

³⁷ DOL, Employment and Training Administration, “Foreign Labor Recruiter List,” <https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list>.

h. Legal Authority and Burden of Proof Relating to the Requirements on Prohibited Fees

Comment: Some trade associations said that DHS's proposal to make employers “strictly liable” for any payment of, or any allegation of payment of, an improper fee by a worker lacks statutory authority. The commenters went on to say that the proposal fails to establish any clear or objective standard, thus denying a petitioner notice of what conduct is required to satisfy the law and depriving the public of an opportunity to comment on the complete proposal.

Response: DHS disagrees that it lacks the authority to promulgate its regulations governing the H-2 programs, including the provisions related to prohibited fees. The Legal Authority sections of both the NPRM and this final rule clearly address the DHS Secretary's authority to administer and ensure compliance with the immigration laws and to issue regulations necessary to carry out that responsibility. Specific to the H-2 programs, the HSA transferred to DHS the authority to by regulation set the condition for the admission of H-2 nonimmigrants and to adjudicate petitions for H-2 nonimmigrant status including establishing the form and content of such petitions. *See* INA 214(a)(1) and (c)(1), 8 U.S.C. 1184(a)(1), (c)(1), and INA 103(a)(1), (a)(3), 1103(a)(1), (a)(3); and, with respect to the H-2B classification, INA 214(c)(14)(A), 1184(c)(14)(A); *see also* 6 U.S.C. 202(3), 271, 557. The HSA also established the Bureau of Citizenship and Immigration Services, now USCIS, and transferred to USCIS the authority over petitions adjudicated by service centers (including H-2 nonimmigrant petitions), establish policies for performing that function, and set national immigration services policies and priorities. *See* HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). Reading the expansive delegated authority over immigration and H-2 programs, including its administration, to include the authority to strengthen the prohibited fee provisions (that have been a part of the H-2 regulatory scheme since 2008),³⁸ and thus prevent

³⁸ In a response to public comments on the 2008 H-2A final rule, DHS explained that it has plenary authority to determine conditions for the admission of all nonimmigrants, including H-2A workers. 73 FR 76891, 76899 (Dec. 18, 2008) (“Under section 214(a) of the INA, 8 U.S.C. 1184(a), DHS has plenary authority to determine the conditions of admission of all nonimmigrants to the United States, including H-2A workers. It is within the authority of DHS to bar the payment by prospective workers of recruitment-related fees as a condition of an alien worker's admission to this country in H-2A.”).

the exploitation of H–2 workers, is the best reading of that authority, as it is consistent with the plain language of the statutes and will enhance the integrity of the H–2 programs and thus further this important statutory purpose.³⁹

DHS also disagrees with other assertions from the commenters. Firstly, the commenters fail to recognize that the provisions finalized in this rule do not impose strict liability on petitioners but provide limited ways for petitioners to avoid liability for prohibited fees. The ways in which petitioners may avoid potential denial or revocation of a petition differ depending on whether the beneficiary was charged by the petitioner itself or one of its employees, or whether the beneficiary paid or agreed to pay a third party recruiting on behalf of the petitioner. See new 8 CFR 214.2(h)(5)(xi)(A), 214.2(h)(6)(i)(B). See also the detailed description of these provisions in the comment response below. As noted above, this final rule in general, and these provisions in particular, are being promulgated in order to ensure the integrity of the H–2 programs and worker protections. Furthermore, DHS disagrees that it has deprived the public of the opportunity to comment on the complete proposal, and notes that the NPRM expressly sought comments on all of DHS’s proposals, and explicitly requested public input on different aspects of several of its proposals, including specifically on the types of evidence that may be relevant to meet the proposed due diligence requirement and the clear and convincing standard that the petitioner did not know or could not have known of a third-party charging beneficiaries prohibited fees. DHS is making revisions to several of its proposals based on the comments it received on the NPRM, as discussed in

2A classification.”). Similarly, in response to public comments on the 2008 H–2B final rule DHS stated that the “this provision is necessary to ensure that the actual wages specified on the temporary labor certification will, in fact, be paid to the H–2B worker, thereby ensuring the validity of the labor market test and compliance with section 101(a)(15)(H)(ii)(B) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(B). The choice whether to use recruiters or facilitators and the terms and costs for such services is left entirely to the employer.” 73 FR 78104, 78113 (Dec. 19, 2008).

³⁹ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes expressly delegate” to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’” (cleaned up)).

these comment responses and in Section III which shows that petitioners understood DHS’s proposals pertaining to the prohibited fee provisions and were able to provide salient and helpful feedback.

Comment: Several commenters, including a professional association and a few individual commenters, expressed concerns that employers would be “forced” to prove their innocence under the proposed regulations, which would be incongruent with the U.S. justice system. A few commenters additionally expressed concern that the proposed rule would be based on the idea that all H–2 employers should be presumed guilty, or that it would defy the concept of “innocent until proven guilty.” A couple of trade associations, echoing these remarks, added that the “illegal” regulatory scheme surrounding the prohibited fees provisions would deny petitioners of basic due process. The professional association urged the Department to discard—or, at minimum, revise—the worker protection provisions to allow DHS to enforce regulations against prohibited fees without forcing employers to prove their innocence.

Response: DHS disagrees that the proposed prohibited fees provisions, finalized in this rule with minor revisions, are counter to the concept of “innocent until proven guilty” or otherwise deny petitioners of basic due process. These provisions do not purport to assign “guilt” or “innocence,” but instead address those situations where, as a factual matter, workers have paid or agreed to pay prohibited fees. Nothing proposed in the NPRM and finalized in this rule departs from DHS’s current regulatory framework whereby USCIS may approve a benefit request only if the petitioner establishes eligibility for the requested benefit.⁴⁰ If the evidence fails to establish eligibility, the benefit request will be denied on that basis, generally preceded by an RFE or a notice of the agency’s intent to deny, with the opportunity for the benefit requester to provide additional evidence in response to the request or notice and an

⁴⁰ See 8 CFR 103.2(b)(1) (“An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.”); see also USCIS, Policy Manual Chapter 4, “Burden and Standards of Proof” (“The burden of proof to establish eligibility for an immigration benefit always falls solely on the benefit requestor. The burden never shifts to USCIS.”), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-4#:~:text=The%20burden%20of%20proof%20to%20establish%20eligibility%20for,or%20she%20has%20made%20a%20prima%20facie%20case.>

opportunity to appeal any such denial.⁴¹ H–2 petitioners continue to be afforded this process under the provisions of this final rule.

i. Extraordinary Circumstances

Comment: Several comments requested clarity concerning what constitutes “extraordinary circumstances,” noting that this term is not defined in the proposed regulation nor does DHS explain how it plans to evaluate the facts in making its decision. Several trade associations commented that the Department did not explain what “extraordinary circumstances” would allow an employer to avoid liability for prohibited fees charged “by a third-party.” Additionally, a professional association wrote that the framework proposed by DHS to enforce the prohibition of fees requires greater detail to the required showing of circumstances that were “rare and unforeseeable.” A joint submission, providing detailed remarks on DHS’s proposal and offering suggestions, recommended that the Department soften the “extraordinary circumstances” and “rare and unforeseeable” requirements to more lenient standards (for example, “took reasonable steps”).

Response: In light of these comments, DHS is revising the regulatory text at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) to clarify the “extraordinary circumstances” framework. As described above, as well as in Section III, DHS is finalizing the proposed provisions at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) to state, in pertinent part, that if USCIS determines that a petitioner or any of its employees,⁴² whether before or after the filing of the H–2 petition, has collected or entered into an agreement to collect a prohibited fee related to the H–2 employment, USCIS will deny or revoke the petition on notice unless the petitioner demonstrates through clear and convincing evidence that, among other things, “the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee

⁴¹ See generally 8 CFR 103.2(b)(8), 103.3.

⁴² DHS notes an inaccuracy in some of the comments that confuse an important distinction in how the new prohibited fees provisions treat instances of prohibited fees charged by petitioners or its employees and such fees charged by third parties. The “extraordinary circumstances” determination is applicable only to instances of prohibited fees charged by the petitioner itself or by its employees, not in situations where such fees are charged by third party entities. Prohibited fees charged by third party entities are covered by new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2).

collection or agreement by its employees throughout the recruitment, hiring, and employment process” and that “extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees.” Specifically, DHS is eliminating the part of the proposed regulatory text referring to “rare and unforeseeable” circumstances. This phrase may have caused unnecessary confusion, as DHS had always meant the phrase “rare and unforeseeable” to specifically explain the meaning of “extraordinary circumstances,” not to create another standard separate and apart from “extraordinary circumstances.”

Further, DHS is eliminating the part of the proposed regulatory text stating, “To qualify for this exception, a petitioner must first establish. . . .” That proposed language was intended to refer back to how to demonstrate “extraordinary circumstances,” not to create another exception.

These changes are intended to clarify that there is only one exception for a petitioner to avoid liability for prohibited fees by itself or its employees. DHS is also deleting “and that it has fully reimbursed all affected beneficiaries or the beneficiaries’ designees” because this is duplicative of the sentence, “Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees,” which is being retained.

To summarize, under new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), if it is determined that a petitioner or any of its employees, whether before or after the filing of the H-2 petition, has collected or entered into an agreement to collect a prohibited fee related to the H-2 employment, the petition will be denied or revoked on notice unless the following factors are demonstrated through clear and convincing evidence:

(1) The petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees through the recruitment, hiring, and employment process;

(2) Extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees;

(3) The petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and

(4) The petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the affected beneficiaries’ designees.

With respect to comments specifically requesting clarification of the phrase “extraordinary circumstances,” this phrase is currently used in other areas of immigration administration and therefore is not ambiguous or ill-defined as commenters have asserted.⁴³ Based on the plain meaning of “extraordinary,” extraordinary circumstances are “very unusual, special, unexpected, or strange”⁴⁴ (in other words, rare and unforeseeable). To provide an example for illustrative purposes only, the unexpected death, serious illness, or incapacity of the petitioning entity’s supervisor or other key employee with responsibility for recruiting beneficiaries and ensuring against the payment of prohibited fees may qualify as “extraordinary circumstances” beyond the petitioner’s control, although a minor illness or short-term incapacity likely would not qualify. In evaluating whether the circumstances in a particular case were “extraordinary” and “beyond the petitioner’s control,” USCIS will take into account all relevant information and evidence, including but not limited to who within the organization collected or entered into an agreement to collect prohibited fees, and the relationship of the asserted circumstances to the actions of such individual(s). It is worth emphasizing that demonstrating the existence of extraordinary circumstances beyond the petitioner’s

⁴³ For example, the concept of “extraordinary circumstances” beyond the petitioner or applicant’s control is found in regulatory provisions relating to certain extension of stay or change of status requests, *see* current 8 CFR 214.1(c)(4) and 248.1(b)(1), and in a precedent decision of the Board of Immigration Appeals and respective guidance implementing provisions of the Child Status Protection Act, Pub. L. 107–208 (2002). *See* INA secs. 203(h); *see also* *Matter of O. Vasquez*, 26 I&N Dec. 817, 821 (BIA 2012), USCIS Policy Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within One Year of Visa Availability Pursuant to the Child Status Protection Act” (June 6, 2014); *cf.* 8 CFR 208.4(a)(5) (defining “extraordinary circumstances” for purposes of the one-year filing deadline for asylum applications). DHS recognizes those examples are not related to H-2 prohibited fees, but the point remains that the phrase “extraordinary circumstances” is generally well understood.

⁴⁴ Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/extraordinary>; *see also* Merriam Webster Dictionary (defining “extraordinary” as “going beyond what is usual, regular, or customary”), <https://www.merriam-webster.com/dictionary/extraordinary>; Black’s Law Dictionary (12th ed. 2024) (“Beyond what is usual, customary, regular, or common.”).

control is only part of the exception under new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). Not only does a petitioner need to demonstrate extraordinary circumstances beyond the petitioner’s control, but the petitioner must also establish that these circumstances “resulted in the petitioner’s failure to prevent collection or entry into agreement for collection of prohibited fees,” as required under new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). Circumstances that had no connection to the petitioner’s failure to prevent collection or entry into agreement for collection of prohibited fees, such as a serious illness that occurred after the prohibited fee had already been collected, would not be sufficient to meet the regulatory standard.

Additionally, the petitioner needs to demonstrate that it meets the remaining factors of the exception at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B), specifically: that the petitioner had made ongoing, good faith, reasonable efforts to prevent and learn of such prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and that the petitioner fully reimbursed all affected beneficiaries or, in certain circumstances, the beneficiaries’ designees. Overall, this exception is intentionally narrowly drawn as it is critical in furthering the primary intent of this final rule, which is to better ensure the integrity of the H-2 programs and to provide protections to H-2 workers.

j. Significant Efforts

Comment: Several commenters, including numerous trade and business associations and a professional association, requested clarity concerning what constitutes “significant efforts to prevent prohibited fees prior to the collection or agreement to collect such fees.”

Response: As discussed above, DHS is finalizing the proposed provisions at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) to offer greater clarification and simplification. Specifically, new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) eliminates the phrase “significant efforts” and instead provides that the petitioner must demonstrate that it “made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its

employees throughout the recruitment, hiring, and employment process.” Although DHS is replacing “significant efforts” with “ongoing, good faith, reasonable efforts” in light of comments requesting clarity, DHS emphasizes that is not a substantive change as “significant efforts” and “ongoing, good faith, reasonable efforts” in this context requires the same level of effort by the petitioner. This change clarifies what DHS initially meant by “significant,” and more effectively explains the petitioner’s obligation to not only prevent prohibited fees prior to the collection of or agreement to collect such fees, but also undergo an ongoing obligation to prevent and learn about such fees given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process.

This change better aligns the provisions at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) with the provisions at new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). As finalized, all of these provisions require petitioners to demonstrate their ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process, regardless of whether the prohibited fee collection or agreement was made by the petitioner (including its employees) or by third parties.⁴⁵ These changes clarify that the proposed “significant efforts” and “due diligence” standards were not meant to be materially different from each other.

Similar to the examples of non-exclusive factors that DHS offered for “ongoing, good faith, reasonable efforts” at new 214.2(h)(5)(xi)(A)(2) and 214.2(h)(6)(i)(B)(2), DHS is offering the following examples of factors that may demonstrate “ongoing, good faith, reasonable efforts” at new 214.2(h)(5)(xi)(A)(1) and 214.2(h)(6)(i)(B)(1). These factors include: (1) whether the petitioner had procedures to contact and monitor the performance of relevant parties in the recruitment chain, whether located in

the United States or abroad; and (2) whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees. As noted above, the determination under new 214.2(h)(5)(xi)(A)(1) and 214.2(h)(6)(i)(B)(1) will be made on a case-by-case basis, taking into consideration all of the facts presented.

k. Clear and Convincing Evidence Standard

Comment: A professional association said that it opposed the imposition of a “clear and convincing” standard concerning an employer’s burden of proof to demonstrate that a failure to prevent an inadvertent payment resulted from extraordinary circumstances beyond the employer’s control. The association reasoned that the standard would be unduly burdensome. An attorney additionally expressed concern that the Department proposed to adopt the “little-understood” “clear and convincing” standard without justification and with “virtually no guidance” to meet this standard. While stating that there is no way that a U.S.-based employer would know what another agent or recruiter is doing, the attorney concluded that the proposed rule would amount to “a trap for the most conscientious.”

A joint submission, providing detailed comments, remarked that the proposed evidentiary standards would be too high of a threshold for petitioners to satisfy “even under the best of circumstances.” The commenters said that it is not clear from the proposed rule what evidence a petitioner may provide to demonstrate its lack of knowledge and said that it would be unreasonable to require evidence under the clear and convincing standard to prove a negative. The commenters wrote that it would be unlikely that any petitioner could satisfy the proposed standard, leading to inequitable outcomes for employers. Therefore, the commenters recommended that the Department reduce the standard of proof to a “preponderance of the evidence standard.”

Additionally, while providing alternative regulatory text, the joint commenters suggested that the Department, at minimum, consider scaling back the rigidity of the proposed rule and propose that USCIS maintain discretion to evaluate a petitioner’s unique circumstances. Such an approach, the commenters reasoned, would allow the petitioner to provide evidence in their defense and demonstrate possible mitigating

circumstances. The commenters further reasoned that this approach would align with due process obligations and avoid unduly penalizing employers.

With respect to the vetting of third parties, a trade association suggested that DHS establish a “reasonable” clear and convincing standard so that the impermissible actions of H–2B facilitators cannot constitute grounds for punishment of an employer except under extraordinary circumstances.

Response: DHS declines to change the “clear and convincing” evidentiary standard at new 8 CFR 214.2(h)(5)(xi)(A) or 8 CFR 214.2(h)(6)(i)(B). DHS does not agree that the standard is “little understood.” Rather, it is a longstanding term in the law that is generally understood to mean “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”⁴⁶ Further, the “clear and convincing” standard is currently used in other areas of immigration administration, including in the H–2B regulations with respect to an exception to the limitation on the period of admission,⁴⁷ so some employers likely already have experience in the application of this standard in H–2B petitions.

Nor does DHS agree that the “clear and convincing” standard is unduly burdensome for employers. The heightened standard appropriately balances the importance of strengthening protections for H–2 workers and preventing prohibited fees, with employers’ ability to provide the necessary evidence to meet an exception to the requirement, in the event that USCIS determines that H–2 workers have paid or agreed to pay prohibited fees. As stated in the NPRM, DHS recognizes that despite current regulations on prohibited fees, significant numbers of H–2 workers have reported paying prohibited fees, and that stronger protections are needed for the nonimmigrant workers who participate in the H–2 programs. 88 FR 65040, 65050 (Sept. 20, 2023). The current regulations on prohibited fees, which petitioners can currently satisfy under the preponderance of the evidence standard, have not adequately deterred against prohibited fees. By ensuring that petitioners are taking proactive measures to prevent the collection of prohibited fees, the heightened evidentiary standard will help ensure that petitioners will avoid liability for prohibited fees only where they have taken necessary steps to avoid

⁴⁵ As discussed earlier, the requirement to demonstrate that the petitioner “made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process” replaces the proposed “due diligence” language in proposed 8 CFR 214.2(h)(5)(xi)(A)(2), 8 CFR 214.2(h)(6)(i)(B)(2). Although DHS is replacing “due diligence” with “ongoing, good faith, reasonable efforts” in light of comments requesting clarity on the “due diligence” standard, DHS emphasizes that is not a substantive change as “due diligence” and “ongoing, good faith, reasonable efforts” in this context requires the same level of diligent effort by the petitioner.

⁴⁶ Black’s Law Dictionary (11th ed. 2019), “Evidence.”

⁴⁷ 8 CFR 214.2(h)(13)(v).

the collection of prohibited fees and have reimbursed workers who have paid prohibited fees.

Where petitioners have taken proactive measures to prevent the collection of prohibited fees, it is reasonable to expect that these measures could be documented sufficiently to satisfy the “clear and convincing” evidentiary standard. For example, under new 8 CFR 214.2(h)(5)(xi)(A)(1)-(2) and 8 CFR 214.2(h)(6)(i)(B)(1)-(2) a petitioner may avoid denial of its petition by showing, among other things, “that it had made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement.” In addition to the examples discussed above of relevant evidence suggested by commenters, it is reasonable to expect a petitioner to be able to provide evidence such as documentation relating to compensation paid to a recruiter, documentation of the procedures implemented by the petitioner to monitor the performance of relevant parties in the recruitment chain and to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees.

l. Requirement to Comply With Prohibited Fee Provisions as a Condition of Approval

Comment: A joint submission objected to the proposal for petitioners to comply with the prohibited fee provisions as a condition of their approval, reasoning that the proposal would be “unduly punitive.” The commenters expressed concern that the proposed provision would result in “automatic denial of a petition” even where there was no harm to workers.

Response: The phrase “condition of approval” does not mean that USCIS would automatically deny a petition. The regulations at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) clearly state that the petition “will be denied or revoked on notice” unless the petitioner demonstrates eligibility for the limited exception allowed under those regulations. As with current practice, USCIS will generally afford a petitioner an opportunity to demonstrate that its petition should not be denied or revoked in accordance with 8 CFR 103.2(b). Thus, DHS disagrees with the commenter that the new regulations would not afford employers an “opportunity to resolve and remedy violations.” DHS also disagrees with the commenter’s characterization that the new regulations would be “unduly punitive.”

m. Consequences of a Denial or Revocation Based on Prohibited Fees

Comment: A union wrote that employers and recruiters who charge prohibited fees must be “barred” from the program.

A couple of commenters endorsed the Department’s proposed timelines for “debarment.” An advocacy group wrote that the timelines for the denial periods, as proposed, are appropriate, given the harm that prohibited fees cause workers and the need for improved deterrence. In addition, a joint submission urged DHS not to reduce the proposed timeframes for the denial periods.

A group of Federal elected officials wrote that, under current regulations, employers and recruiters are incentivized to break the law with respect to charging prohibited fees. The elected officials said that the proposed rules would put an end to these practices by heightening the consequences for charging prohibited fees, including debarment for up to 4 years after a violation has been found. An advocacy group similarly stated that the proposed denial periods related to prohibited fees would reduce violations by employers and reduce harm to workers. The commenter added that the consequences and remediation measures should apply to petitioners whether they were directly involved in the charging of prohibited fees, or it occurred through a third party if the petitioner was to benefit from the worker’s presence.

Response: DHS appreciates these commenters’ support for the provisions strengthening the consequences of a denial or revocation based on prohibited fees being charged to H–2 employees. The provisions finalized in the rule reflect the seriousness of prohibited fee violations and the significant harm caused to workers who are charged such fees.

Comment: An advocacy group said that while it supported the imposition of consequences on employers for charging prohibited fees, DHS should find ways to incentivize and encourage workers to report prohibited fees, reasoning that H–2 workers who lose their jobs as a result of these consequences “bear the brunt of their employer’s violation.”

Response: DHS appreciates the commenter’s concern and acknowledges that the provisions of this rule do not eliminate the risk that H–2 workers who report prohibited fees may need to seek new employment if the petition filed on their behalf is ultimately denied or revoked. This rulemaking does, however, include several provisions that

are meant to increase worker flexibility in ways that mitigate such disincentive to reporting prohibited fees and other abuses. Specifically, the whistleblower protection and extended grace periods for revocation and cessation of employment, in conjunction with the changes to portability, should facilitate the ability of a worker facing abuse to seek and transfer to a new employer.⁴⁸

Finally, the prohibited fee provisions in this rulemaking include strong reimbursement incentives, with petitioners facing up to a 4-year period of denial unless all affected beneficiaries have been reimbursed. The increased likelihood that reporting a prohibited fee will lead to a full reimbursement for affected workers may also serve to encourage whistleblowers to come forward.

Comment: Multiple commenters wrote that the proposed consequences for petitioners are severe, significant, overly punitive, strict, or not commensurate with the alleged violation, particularly in cases where the petitioner has reimbursed the worker in full, or the behavior is unintentional, unknown, and out of the petitioner’s control. An individual commenter stated that the proposal would create “extreme penalties for potentially minor violations.”

Many commenters remarked on the negative impacts of this proposal on employers and others who rely on them. For example, a State Government agency said that DHS’s proposed 1- to 4-year debarment would hinder the hiring of workers. Furthermore, several commenters including trade associations and a joint submission expressed concern that a year without access to the H–2 program could result in irreparable harm to U.S. employers and put them out of business, which would impact the nation’s food supply and national security.

Multiple commenters, including a few professional associations and several individual commenters, additionally expressed concern that the proposed consequences would penalize employers for “doing the right thing.”

⁴⁸ The H–2 NPRM referenced a GAO report’s statement that the incidence of abuses in the H–2A and H–2B programs may currently be underreported, in part due to workers’ fear of retaliation by their employer, and noted that “[t]he proposed whistleblower provision, in conjunction with other proposed changes in this rulemaking, including those related to grace periods and portability, may help mitigate the above-discussed structural disincentives that workers could face with respect to reporting abuses.” *Modernizing H–2 Program Requirements, Oversight, and Worker Protections*, 88 FR 65040, 65062 (Sept. 20, 2023) (citing GAO, GAO–15–154, “Increased Protections Needed for Foreign Workers,” p. 37 (2015), <https://www.gao.gov/assets/gao-14-154.pdf>).

The commenters said that employers who take corrective action or report prohibited recruitment fees would be penalized by possible denial or revocation, or debarment from the program, with limited exceptions.

While describing a detailed scenario, a joint submission said that under the Department's proposed framework, a single fee violation occurring at any level could cause significant harm to an enterprise if an employer cannot meet the "impossibly high" standards of evidence. Precluding an entire corporate structure from utilizing the H-2 program for 1 year, the commenters said, would amount to an "extreme punishment" resulting in "catastrophic financial losses" and downstream economic consequences for the employer and the totality of its workforce. Thus, the commenters continued, the Department's proposal may cause workers more harm, contrary to the proposed rule's objective, due to the disruption in employment and lack of earning potential. Further, the commenters stated that a "prohibited fee death sentence" could translate into missed career opportunities for skilled U.S. workers who benefit from employers' abilities to fill their entry-level labor needs through the H-2 programs.

The joint commenters additionally emphasized that employers are not in a position to solve endemic corruption, and most do not have the financial resources to investigate recruitment activities outside of the United States. In expressing their view that no amount of due diligence is a perfect safeguard against bad actors, the commenters said that employers would inevitably come across a fee violation or potential violation at some point in their H-2 program history. The commenters further remarked that bad actors unaffiliated with employers have engaged in fraudulent activities under their clients' names, which would make it difficult for an employer to prove that they were not involved in such activity and could lead to "wrongful convictions." Thus, the commenters concluded that the Departments' "rigid" proposal would be "completely untenable" and represent a "massive overreach."

Response: DHS acknowledges the significance of the potential consequences of a petition denial or revocation based on a USCIS finding that an associated H-2 beneficiary paid or agreed to pay prohibited fees. The Department disagrees, however, that the consequences are "overly punitive" and not commensurate with a violation of the prohibited fees provisions. Instead,

the consequences as finalized in this rule recognize the seriousness of these types of offenses and the severity of situations in which beneficiaries go into debt before obtaining an employment opportunity and the urgent need to ensure that beneficiaries not be subject to exploitation or other forms of coercion as a result of incurring such debt.

DHS also acknowledges the potential financial losses some employers may experience if they are precluded from utilizing H-2 workers under the finalized 1-year and additional 3-year periods. These more robust consequences are not intended to force petitioners to remedy all "endemic corruption" prevalent in noncitizen worker recruitment and are intended to incentivize petitioners to take appropriate responsibility for their own employees, or any third party entities it engages, as well as those further downstream, in the recruitment process and in obtaining workers under the H-2 programs.

Finally, DHS disagrees with the comments that this rule "penalize[s] employers for 'doing the right thing.'" Instead, in recognizing some petitioners may still encounter bad actors, DHS is putting in place mechanisms such that petitioners may avoid liability under certain circumstances, by taking proactive steps to prevent the collection of such fees and taking immediate remedial action, as described in multiple areas in this preamble.

Comment: Numerous commenters, including a joint submission and several associations, encouraged DHS to re-evaluate the proposed enforcement measures or its handling of circumstances involving prohibited fee violations. Specifically, instead of focusing on denials and revocations, the commenters urged the Department to propose clear, reasonable alternatives for public comment that constitute a comprehensive strategy to protect workers while balancing employers' challenges to preventing the unlawful collection of fees with their need to access the program. Similarly, another trade association encouraged the Department to consider measures that would allow employers to protect workers, rather than subjecting them to "strict liability" for unknown actions of third parties.

Several commenters offered specific alternatives to the proposed regulations around denials and revocations for the collection of prohibited fees, detailed below.

Numerous commenters suggested reduced or graduated penalties for fee violations. For example, a joint

submission wrote that the denial of one petition and the inability to secure workers pursuant to that petition would constitute an appropriate punishment for a fee violation. The joint commenters recommended that the Department consider making the 1-year "bar" applicable only to willful violations, repeat occurrences, or cases where the employer did not take affirmative steps to comply with the regulations. The commenters suggested that this punishment not extend to first-time violators or instances where the employer undertook reasonable efforts to comply or promptly rectified the issue.

A few trade associations and a professional association encouraged the Department to "gradient" penalties commensurate with the circumstances of the violation and reserve denials or revocations for repeat, "intentional" or "egregious" violations. The business association added that denial or revocation must only occur after the petitioner has the opportunity to rebut adverse information. Instead of a "one-size-fits-all" approach that removes agency discretion to evaluate cases based on their merits, a business association similarly suggested a graduated scale of penalties, owed by the petitioner to the Department and based on the company's track record. The association said that such penalties would be reasonable if the petitioner "directly committed" or was a "knowing accomplice" to the questionable activity. The association remarked that a harsher penalty of a denial or revocation would be fitting in situations where the imposition of fees could be deemed a pattern, but the Department's "one-size-fits-all" approach that removes the discretion to evaluate cases based on their merits is unnecessarily punitive and should be abandoned.

A professional association recommended that the Department impose fines for first-time violations when it determines that the H-2 beneficiary has paid or agreed to pay a prohibited fee.

A trade association suggested, instead of a denial or revocation, that DHS require a mutual attestation for an employee's file, whereby both the petitioner and the worker sign an agreement that prohibited fees were not charged. If the worker discloses that fees were charged, then the petitioner would be required to follow the current reimbursement requirements.

A research organization said that the proposed denial periods for charging prohibited fees are "far in excess of the infraction in many cases," as the

prohibited fee could constitute “a very small percentage of total remuneration for the worker.” The commenter suggested that, in cases where the prohibited fees are less than 5 percent of the total value of the contract, DHS should not impose a “bar” and instead should afford an opportunity for the employer to make the worker whole.

Response: DHS declines to make the changes as articulated by the commenters and disagrees that the provisions finalized in this rule are excessive or lead to a “one-size-fits-all” approach. With respect to the commenter’s assertion that the 1-year denial period should only apply to “willful” violations, for the reasons discussed in an earlier response, DHS considers a denial or revocation for prohibited fees to constitute a substantial failure to meet conditions of the petition, that is, a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition. Furthermore, it is inaccurate to state that USCIS decisions will not be based on the merits of any specific case. In making a determination as to whether a violation of the prohibited fees provisions has occurred, USCIS evaluates each case based on the totality of the submitted evidence to determine whether: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; all affected beneficiaries, or designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed; and, if applicable, that extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees. Where DHS intends to either deny or revoke a petition, the petitioner will be notified and afforded the opportunity to respond to the agency’s intent to deny or revoke the petition, as provided under 8 CFR 103.2(b)(8).

In declining to adopt the commenters’ specific suggestions for amending the consequences for prohibited fee violations, such as reserving denial or revocation of petitions based on “egregious” infractions, only denying petitions filed by repeat offenders, or fining first-time offenders instead of denying their petition, DHS finalizes the proposals from the NPRM in the belief that the provisions will be more effective when the potential

consequences of such violations are clear and unambiguous. Basing the severity of the consequences on a gradient basis, or denying or revoking only certain petitions even after determining that a prohibited fee was collected, would unacceptably introduce ambiguity and uncertainty and risk inconsistent adjudications, thereby potentially weakening the deterrent effect intended by these provisions. Further, where a petitioner can demonstrate that it was truly acting in good faith to prevent and/or remedy a prohibited fee violation, the new regulations will provide those petitioners with a mechanism to avoid denial or revocation of their petition.

DHS further declines to adopt the suggestion to require a mutual attestation whereby both parties sign an agreement that no prohibited fees were paid or agreed to by workers. As noted in the NPRM, DOL already requires employers to contractually forbid third parties whom they engage for the recruitment of workers from seeking or receiving payments or other compensation from prospective employees. 88 FR 65040, 65054 (Sept. 20, 2023). See 20 CFR 655.9(a), 20 CFR 655.20(p), and 20 CFR 655.135(k). Accordingly, USCIS’ acceptance of such a contract alone would mean that nearly all petitioners could avoid liability by simply requiring their prospective or current worker to sign such an agreement.

Finally, the suggestion to allow the petitioner to simply reimburse a beneficiary when the prohibited fees are less than 5 percent of the total value of the contract, without facing any other consequence, fails to recognize the harm already done to a beneficiary who has incurred debt to pay such fees and fails to deter this harm from occurring in the first place, as intended by this provision.

Comment: A couple of commenters suggested more aggressive penalties for violations of the prohibited fee provisions. A union urged DHS to take more aggressive action and increase denial periods in light of the pervasiveness of prohibited fee collection. The commenter recommended increasing the penalties beyond what is proposed in the rulemaking and provided detailed modifications to the proposed regulatory language. Specifically, the union recommended increasing the denial period under section 214.2(h)(6)(i)(C) from 1 year to 3 years and increasing the denial period under section 214.2(h)(6)(i)(D)(1) to 2 years, for a total potential 5-year bar. Citing 8 U.S.C. 1184(c)(14)(A)(ii), the union said

that DHS can deny petitions based on a failure to meet program requirements for a period of up to 5 years and, as such, DHS would not be fully exercising its authority to deny petitions for charging prohibited fees unless it increases the proposed denial periods.

A research organization recommended that DHS increase what the commenter refers to as the “debarment” periods to a 5-year minimum for a first offense and permanent debarment for all other offenses, reasoning that a 1-year debarment following an H–2 denial or revocation based on prohibited fees is insufficient to deter employers from engaging in such conduct. The organization, citing DHS’s justification in the proposed rule, reasoned that recruitment fees put workers at risk of debt bondage, human trafficking, and other abuses. The commenter further remarked that payment of such fees by workers strengthens incentives for employers to prefer a foreign workforce over U.S. workers, which would violate the law and congressional intent behind the H–2 programs (INA sec. 101(a)(15)(h)(ii)). Conversely, the commenter reasoned that raising the penalty for collecting such fees would protect workers and better reflect the seriousness of these violations.

Response: DHS appreciates these comments but declines to adopt the suggested revisions. As finalized in this rulemaking, the consequences of a denial or revocation for prohibited fees within the time period prescribed in this final rule strikes an appropriate balance in creating a reasonable and strong deterrent against employers or entities working on their behalf charging prohibited fees to H–2 workers, while also recognizing that employers or entities may make lasting changes to practice, policies, and personnel over time to remedy deficiencies. The rule also adopts robust measures to incentivize the full reimbursement of such fees to H–2 beneficiaries or their designees in those instances where such improper fees have already been paid.

Comment: A union wrote that the Department must ban recruitment fees in ways that do not penalize workers and encouraged agencies to work together to reverse the policy of denying visas to workers who admit to being charged such prohibited fees. In addition to other measures, the union suggested that USCIS grant humanitarian parole and work authorization to workers for at least a year following the identification of a prohibited fee violation. The union additionally suggested that the Department take steps to ensure that

employers do not continue to use foreign labor recruiters who have charged prohibited fees, such as by issuing a notice to employers who may have used that recruiter.

Response: DHS appreciates the commenter's feedback but is not making any changes based on this comment. Regarding beneficiary reluctance to admit to being charged prohibited fees, this rule adopts several provisions that are meant to remove some of the disincentives to reporting such violations. Specifically, the permanent adoption of portability provisions, as well as new whistleblower protections and extended grace periods in cases of revocation and cessation of employment, provide workers with flexibility to find new H-2 employment and certain protections from potential employer retaliation for reporting program violations. Additionally, the strengthened prohibited fee provisions in this rulemaking should increase the likelihood that reporting a prohibited fee will lead to a full reimbursement for affected workers and may also serve to encourage those workers to report these violations. DHS acknowledges that these provisions would mainly benefit workers already in the United States, however, the suggestion to reverse the existing policy of denying visas to workers who admit to being charged illegal fees would require Department of State action and is outside the scope of this rulemaking.

Further, DHS declines to adopt the suggestion to create a new process of issuing notices to employers who may have used foreign recruiters identified as having charged prohibited fees, as such a notification process would prove overly difficult for DHS to implement, accurately matching foreign recruiters accused of wrongdoing to specific employers outside of the normal petition adjudication process. However, DHS notes that, if during the adjudication of a petition USCIS received information that an employer may have used a foreign labor recruiter found to have charged illegal fees, USCIS could issue a notice to the employer and request additional evidence on that basis. In addition, DHS is adopting in this rulemaking robust provisions that require petitioners to conduct ongoing, good faith, reasonable efforts to ensure against the collection of prohibited fees throughout the recruitment, hiring, and employment process. These provisions should address the commenter's concern that petitioners will use recruiters who have been identified as having charged prohibited fees.

With respect to the grant of humanitarian parole with work authorization to workers subject to the payment of prohibited fees, DHS notes that parole based on urgent humanitarian reasons may be granted based on certain factors such as, but not limited to, whether the circumstances are pressing, and the degree of suffering that may result if parole is not authorized. A grant of parole is a discretionary authorization by USCIS to be given on a case-by-case basis and is not addressed in or limited by this rulemaking, which only focuses on the H-2 programs.

n. Reimbursement of Prohibited Fees to Workers

Comment: A few trade associations, a union, and a professional association expressed general support for the reimbursement of unlawfully collected fees.

Response: DHS agrees that it is important to require reimbursement of prohibited fees. Bearing in mind the serious nature of prohibited fee violations and the significant harm to beneficiaries who are charged such fees, it is appropriate in such circumstances to provide strong incentives to ensure that beneficiaries or their designees are fully reimbursed. In addition to requiring reimbursement, this final rule aims to provide strong incentives to prevent the payment or agreement to pay prohibited fees in the first place, given the concerns regarding beneficiaries incurring a debt burden in order to obtain H-2 employment.

Comment: A union suggested that petitioners who are unable to reimburse the beneficiary or their designee within the proposed 4-year period should thereafter be required to contribute the entirety of the fee to a fund for victims of H-2 violations as a condition for regaining access to the program.

Response: DHS declines to require petitioners to contribute to a fund for victims when a beneficiary or designee cannot be reimbursed as this suggestion would require DHS to create a new process and regulatory scheme that would separately be subject to notice and comment rulemaking, particularly since DHS would need to define the universe of "victims of H-2 violations," determine eligibility for receiving payments from the fund, including the amounts that would be distributed and how those would be set, create a process to request or initiate reimbursement, as well as create an appeal/dispute resolution process. In addition, DHS may need additional statutory authorities to both expend resources to establish this process, as well as to

collect and hold unlawfully collected fees, and distribute funds to victims of H-2 violations. The commenter's proposal would also be operationally difficult and costly to administer because DHS may need to locate victims abroad.

Comment: While expressing overall support for the proposed prohibited fee provisions, an advocacy group encouraged the Department to expand the reimbursement requirements to include full compensation for all monetary damages associated with the unlawful collection of fees. The commenter reasoned that prohibited fees cause H-2 workers to incur debt with high interest rates and ensuring that reimbursement must cover all damages would achieve the goal of making workers whole. The commenter suggested the following regulatory text, to be added to 8 CFR

214.2(h)(5)(xi)(A)(1) and 212.4(h)(6)(i)(B)(1): "To fully reimburse a beneficiary who was charged a prohibited fee, the petitioner must reimburse the beneficiary for the prohibited fee in full plus any actual damages the beneficiary incurred as a result of the prohibited fee, such as interest."

Response: DHS appreciates this comment but declines to make any changes with respect to the requirement to fully reimburse all beneficiaries or their designees for any collected prohibited fees. DHS acknowledges that the collection or agreement to collect a prohibited fee has the potential to harm an H-2 worker even if the fee is later reimbursed or the agreement is cancelled prior to collection, such as by causing the worker to go into debt related to the payment, or anticipated payment, of the fee. Thus, DHS is finalizing the regulatory provisions at 8 CFR 214.2(h)(5)(xi) and 8 CFR 212.4(h)(6)(i) in order to incentivize petitioners to prevent the collection of prohibited fees and to require reimbursement of beneficiaries (or, in limited circumstances, a designee) in the event that such fees are collected. However, DHS declines to extend the reimbursement requirement to damages or interest beyond the prohibited fees themselves as it would be too difficult for USCIS to determine the amount of such damages or interest, as well as the connection of any possible collateral harm to the worker resulting from payment of the prohibited fees. Nothing in this final rule, however, is intended to prevent a worker from seeking damages for such harms in a private cause of action against an offending employer or other person or entity.

Comment: In light of concerns related to the strengthened prohibited fees provisions and the proposed consequences, a few trade associations encouraged DHS to work with petitioners to identify and establish proper safeguards and protocols to prevent the extortion of workers and establish methods for swift reimbursement. One of the associations wrote that employers should be assessed based on their policies to prevent prohibited fees from being charged or threatened, and whether they respond properly upon discovery of a problem by reimbursing the worker and appropriately dealing with the offending party (for example, the employee or recruiter). One of the associations further suggested, as an alternative to denial or revocation, that DHS require reimbursement in situations where the petitioner did not have knowledge of the prohibited fee.

Response: The provisions at 8 CFR 214.2(h)(5)(xi) and 8 CFR 214.2(h)(6)(i)(B), as finalized, appropriately balance concerns about proper safeguards to prevent the collection of prohibited fees and recognize the limitations of petitioners. New 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) provide narrow exceptions under which petitioners may avoid liability for prohibited fees. These narrow exceptions recognize the reality that petitioners may not always be able to prevent prohibited fees, while also recognizing the importance of the petitioner taking proactive measures to prevent the collection of fees in the first place as well as full reimbursement to the beneficiary or, in limited circumstances, a designee regardless of whether one of these exceptions applied.

Specifically, where USCIS determines that a petitioner or any of its employees collected a prohibited fee, USCIS will deny or revoke an H–2 petition on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it had made ongoing, good faith, reasonable efforts to prevent and learn of prohibited fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. The petitioner must also demonstrate that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. New 8 CFR

214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1).

Where USCIS determines that a prohibited fee has been collected by a third party, USCIS will deny or revoke the H–2 petition on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it made ongoing, good faith, reasonable efforts to prevent and learn of such payment or agreement throughout the recruitment, hiring, and employment process. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement. The petitioner must also demonstrate that all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, their designees have been fully reimbursed. Thus, the petitioner will have the opportunity to avoid denial or revocation of a petition by demonstrating its policies and efforts to prevent the collection of prohibited fees in the first place, as well as what remedial actions it took including full reimbursement of affected beneficiaries or their designees, as described in these provisions. New 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2).

Comment: A professional association suggested that, in circumstances when there is no evidence that the employer knew or should have known about a recruiter’s violation of the prohibitions against the collection and payment of fees, the recruiter should reimburse the workers, rather than the employer. The association added that H–2 employers should not be responsible for reimbursing payments collected by attorneys who also fail to advise the employers or who otherwise act without the employer’s knowledge in the collection of legal or other fees.

Response: Unlike the provisions regarding prohibited fees charged by the petitioner or its own employees at 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), which specifically require evidence that the petitioner itself has fully reimbursed all affected beneficiaries or their designees in order to avoid denial or revocation, the provisions at 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2) require evidence “that all affected beneficiaries or their designees have been fully reimbursed” without specifying the reimbursing party. This wording accounts for the possibility that in some cases the offending recruiter or third party may provide the reimbursement. Ultimately, however, it is the petitioner’s responsibility as the H–2

program user to ensure that the reimbursement takes place.

As the party seeking the benefit of using the H–2 program to employ temporary workers, it is the petitioner—not any third party it may engage to assist in the process—who is required to certify their agreement to abide by the conditions of the H–2A or H–2B program.⁴⁹ It is therefore both appropriate and reasonable to require the petitioner to ensure its H–2 workers are reimbursed in the event that the workers are charged a prohibited fee by a third party that the petitioner engaged.

Comment: A professional association expressed concern regarding the proposal to require reimbursement as a condition of approval of H–2B petitions following the denial or revocation of a petition for prohibited fees. Specifically, the commenter was concerned with the requirement that “all” workers be fully reimbursed and asked what the outcome would be for employers who “have trouble contacting” former employees from 2 or 3 years prior and whether the employer would be “debarred for life.” The association discouraged DHS against using absolute terms in the regulatory language that could unjustly penalize employers.

Response: DHS declines to make any changes to these provisions based on this comment which appears to have misunderstood the provision and its consequences. Even when USCIS determines that the petitioner collected or entered into an agreement to collect a prohibited fee under new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), the petitioner would not have its petitions denied “for life.” Where a petitioner is found to have collected or entered an agreement to collect prohibited fees, USCIS will deny or revoke the petition unless the petitioner can demonstrate that it meets the exception at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). Where a beneficiary has paid or agreed to pay a prohibited fee to a third party, USCIS will deny or revoke the petition unless the petitioner can demonstrate it meets the exception at new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). USCIS will deny any H–2 petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2 petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B). See 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).

⁴⁹ See USCIS, Form I–129, “Petition for a Nonimmigrant Worker,” <https://www.uscis.gov/i-129> (last updated June 3, 2024).

Subsequently, USCIS will deny any H–2 petition filed by the same petitioner or successor in interest for an additional 3-year maximum period, unless the petitioner or successor in interest demonstrates to USCIS that each beneficiary or designee has been fully reimbursed. If the petitioner or successor in interest demonstrates to USCIS that each beneficiary or designee has been fully reimbursed, they can avoid a subsequent denial of their petition during this 3-year period. The commenter is correct that, during the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D), a petitioner will need to demonstrate reimbursement as a condition of approval of an H–2 petition. However, DHS notes that the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) is a maximum of 3 additional years, and thus would not result in an employer having its petitions denied “for life.” Further, there is nothing requiring a petitioner to wait to reimburse beneficiaries or designees until the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) has passed. Indeed, under this final rule, the petitioner should make every effort to reimburse beneficiaries or designees as soon as the prohibited fee is discovered. By promptly reimbursing the beneficiary or designee, a good faith petitioner may avoid denial or revocation of the petition (provided all the other conditions of the exception are met), and even in the event of denial or revocation, avoid a subsequent denial during the time period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D).

The commenter is also correct that a failure to reimburse due to “trouble contacting” beneficiaries or their designees will not satisfy the requirements of 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). However, DHS is firmly of the view that it is both appropriate and reasonable to require the petitioner to ensure its H–2 workers are reimbursed, given the harm already done to workers who incurred debt to pay the prohibited fees. As noted in the NPRM, petitioners are expected, as a matter of best practice, to obtain in writing the beneficiary’s full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, to better ensure the petitioner’s ability to fully reimburse the beneficiary, or the beneficiary’s designee(s), for any sums

the petitioner may be liable to pay the beneficiary.

o. Beneficiary Designees

Comment: An advocacy group encouraged the Department to finalize the language defining “designee” as currently proposed at 8 CFR 214.2(h)(5)(xi)(A)(1), 212.4(h)(6)(i)(B)(1). The group reasoned that while many workers will choose to identify designees, some may prefer non-governmental organizations or other entities due to concerns about retaliation against family members.

Response: DHS is finalizing the definition of “designee” as originally proposed at 8 CFR 214.2(h)(5)(xi)(A)(1) and 212.4(h)(6)(i)(B)(1), although it is incorporating the definition at new 8 CFR 214.2(h)(5)(xi)(A)(3) and 212.4(h)(6)(i)(B)(3) to clarify that it applies to all prohibited fee provisions at paragraph (h)(5)(xi) and (6)(i) of this section. As noted by the commenter, the definition enables beneficiaries to provide an individual or entity as their designee, which accommodates those who may choose to use a non-governmental organization as their designee.

Comment: A few trade associations endorsed the proposal that employees would identify beneficiary designees during the initial application and recruitment processes for the purposes of reimbursement but expressed concern with the application of the beneficiary designee provision in practice. For example, the associations stated that it is most likely that a petitioner would be required to reimburse a beneficiary or designee following the end of a petition period and that it is unclear from the proposed rule the length of time or efforts the employer would need to undergo to “maintain and update” the designees following a petition’s validity period. The associations additionally remarked that the proposed rule lacks a description of “exhaustion of efforts” to locate the worker or designee. The commenters encouraged the Department to establish a clear procedure to satisfy this criterion and steps to reimburse the worker or beneficiary designee. Alternatively, a couple of these commenters suggested that DHS instead require petitioners to take “reasonable steps” to reimburse the worker or designated beneficiary, with one association suggesting that DHS define “reasonable steps.” The commenters concluded that the “Department must establish a clear procedure to provide notice to petitioners of what reasonable steps must be taken to attempt to reimburse the worker or beneficiary designee.”

Response: DHS declines to make changes based on these comments. Although commenters expressed concern that a petitioner would most likely be required to reimburse a beneficiary or designee following the end of a petition period, that would generally not be true in the case of a petition denial. While a revocation could take place after the petition period, this generally would not occur long after the petition period, thus it would not be unreasonable to expect a petitioner to retain records that would allow them to reimburse a beneficiary or designee as necessary. DHS expects each petitioner to determine its own best practices on how to comply with this provision. DHS also declines to codify an exception to the reimbursement requirement for “exhaustion of efforts” or “reasonable steps” to attempt to reimburse the worker or beneficiary, as it is not clear how such an exception would be materially different than the regulations that were in effect prior to the effective date of this final rule which allowed petitioners to satisfy the requirement that it reimburse the beneficiary based on reasonable efforts to locate the beneficiary, including contacting the beneficiary’s known addresses. See current 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D).

Comment: A couple of trade associations expressed concern that the proposed beneficiary designee provisions could negatively impact enterprises in cases where a beneficiary has passed away before appointing a designee, in which case the employer would be unable to comply with the requirement.

Response: As noted in the preamble to the NPRM, upon finalization of this provision, DHS expects petitioners to inform the beneficiary early in the recruitment process of the beneficiary’s ability to independently name a designee, to obtain full designee information, and to maintain and update such information as needed to ensure that the petitioner has in fact complied with the reimbursement requirement. 88 FR 65040, 65056 (Sept. 20, 2023). Taking these measures as a matter of best practice will help alleviate the risk of the scenario envisioned by the commenters.

p. Successors in Interest

Comment: A union articulated its strong endorsement of the proposal to apply the consequences for the collection of prohibited fees to successors in interest, reasoning that this approach, in combination with other related prohibited fee provisions,

would be an important first step to root out abusive farm labor contractors. The union mentioned its own experiences with H-2A farm labor contractors found to have committed extensive violations of the H-2A regulations as a result of court actions or investigations by Federal agencies, but who continue to operate, usually with an associate or family member becoming the formal employer.

Response: As recognized by the commenter, applying the consequences for prohibited fees to a petitioner's successor in interest is intended to address the issue of petitioning entities avoiding liability by changing hands, reincorporating, or holding itself out as a new entity.

Comment: A trade association expressed concern that, as proposed, the provisions precluding a petitioner or successor in interest from participation in the H-2 programs on the basis of prohibited fees would extend to "legitimate" successors in interest, who the commenter said are "completely uninvolved with the underlying violation." Providing examples, the association wrote that this consequence is "excessive," "too broad," and "fails to provide any additional protection to workers." The association further reasoned that the proposed provision requires no discretion on DHS's part and that the Department's enforcement authority "is more than capable" of undertaking an investigation to determine whether a successor in interest is a "reinvented version" of its predecessor. Finally, the association wrote that it is unclear whether other petitions of a successor in interest who already employed H-2 workers would be implicated and expressed concern with the harmful consequences of such an approach. The association concluded that the Department should reject the successor in interest provisions altogether.

A professional association wrote that the "overly broad" definition of a successor in interest, which assigns liabilities to new entities that have not succeeded to all the rights and liabilities of the predecessor entity, could negatively impact other visa categories. The association expressed concern that, should the proposed definition be promulgated and subsequently applied to other visa categories without petitioners' knowledge or opportunity to provide input, the definition could violate the Administrative Procedure Act (APA). Furthermore, the association wrote that imputing liability upon purchasing a business defies an employers' free will to engage in business transactions, and it unfairly

assigns liability to employers that did not participate in the predecessors' business conduct. The commenter concluded that the successor-in-interest relationship should apply only when the employer that is carrying on the business of a previous employer has agreed to succeed to all of the rights and liabilities of the predecessor entity via a written contract. The professional association additionally expressed concern about what it calls the overbroad definition of a successor under proposed 8 CFR

214.2(h)(6)(i)(D)(2) for the purposes of applying the 1-year bar on subsequent approvals. The association appreciated USCIS' consideration of multiple enumerated factors to determine a successor in interest but suggested additional language "regarding notice and knowledge a successor had or could have had regarding a prior determination resulting in a 1-year ban."

An attorney wrote that the expansive definition of a successor in interest "virtually guarantees" that an affected employer would be unable to sell their business, "even in an arms-length transaction."

Response: DHS declines to make any changes as a result of these comments. As noted above, applying the consequences for prohibited fees to a petitioner's successor in interest is intended to address the issue of petitioning entities avoiding liability by changing hands, reincorporating, or holding itself out as a new entity. In such cases, the successor in interest may be considered a continuation of the petitioner and applying the consequences to the successor in interest would be appropriate. Thus, new 8 CFR 214.2(h)(5)(xi)(C)(2) clarifies that an entity will only be considered a successor in interest where it is "controlling and carrying on the business of a previous employer." Successor liability is a longstanding concept and has been applicable to H-2 employers since 2008, when DOL codified it in H-2A and H-2B regulations.⁵⁰ DHS notes that the definition of successor in interest and factors listed in new 8 CFR 214.2(h)(5)(xi)(C)(2) and 8 CFR 214.2(h)(6)(i)(D)(2) are substantially similar to the definition and factors that have been in the DOL H-2 regulations. Therefore, the regulation is sufficiently clear and is generally familiar to the regulated public.

DHS disagrees with the suggestion that the successor in interest provision

should apply "only when the employer that is carrying on the business of a previous employer has agreed to succeed to all of the rights and liabilities of the predecessor entity via a written contract." Adopting such a high standard would essentially create an easy loophole for a successor entity to avoid liability and could defeat the goal of preventing petitioners from easily avoiding liability simply by entering into a formal contract with the predecessor entity disclaiming certain liabilities. Further, regarding the suggestion to include "notice and knowledge a successor had or could have had regarding a prior determination" in the factors, DHS does not believe this is necessary. This would be too high of a standard and create an easy loophole for a successor entity to avoid liability by choosing to remain ignorant of the previous employer's actions. Again, the provision is intended to address situations where a petitioner has sought to avoid liability by simply changing hands, reincorporating, or holding itself out as a new entity. It is reasonable to assume that, as part of a legitimate arms-length transaction, a successor entity would, as a matter of course, familiarize itself with applicable law, including this rule that might affect its rights and obligations. It is further reasonable to assume that a successor in interest would make inquiries into any outstanding liabilities of the predecessor entity, and that the predecessor entity would make appropriate disclosures. Requiring DHS to consider all circumstances as a whole will prevent the unfair assignment of liability on an unrelated entity. In this regard, while an entity can be a successor whether or not it possesses knowledge of a prior determination, the presence of some of the factors listed at new 8 CFR 214.2(h)(5)(xi)(C)(2) and (6)(i)(D)(2) indicate that the successor entity had or could have had notice and knowledge of a prior determination, such as if there was similarity of supervisory personnel, or the former management or owner retains a direct or indirect interest in the new enterprise, or familial or close personal relationships between predecessor and successor owners of the entity.

DHS disagrees with the comment that the successor in interest provision "requires no exercise of discretion from the Department." The regulation explicitly states that "all of the circumstances will be considered as a whole." This "totality of the circumstances" approach necessarily involves some level of discretion in which DHS must assess the weight to

⁵⁰ See, e.g., 20 CFR 655.5, 655.103(b); 29 CFR 503.4.

give facts as applied to the regulatory factors in order to determine whether an employer is a successor in interest.

Finally, with respect to the concern that the definition of a successor in interest at new 8 CFR

214.2(h)(5)(xi)(C)(2) and 8 CFR

214.2(h)(6)(i)(D)(2) could “negatively impact other visa categories” and potentially violate the APA, DHS reiterates that this definition is limited to the H–2 programs.

2. Mandatory and Discretionary Denials for Past Violations

a. General

Comment: A couple of advocacy groups and a research organization expressed support for the proposed provisions, reasoning it would increase accountability, curb employer violations and abuse, reduce harm faced by workers, and level the playing field for employers who obey the law. Similarly, a union expressed support for the proposed provisions, in particular the mandatory denials for administrative determinations, criminal convictions, or civil judgments. A group of Federal elected officials wrote that in addition to the consequences based on prohibited fees, barring employers for other violations for several years would put an end to illegal employer and recruiter practices, as it would no longer be cheaper for them to break the law than to comply with it.

Response: DHS agrees that the proposed provisions, and the provisions as finalized in this rule, are important steps to increasing employer accountability, curbing employer violations and abuse, reducing harm faced by workers, and leveling the playing field for employers who obey the law. DHS also generally agrees that these provisions will help put an end to illegal and abusive employer and recruiter practices, although DHS cannot verify the commenter’s assertion that it will no longer be cheaper for H–2 employers and recruiters to break the law than to comply with program requirements as the commenter did not provide corroborating details or data about the costs for compliance versus non-compliance.

Comment: A religious organization expressed support for the proposed provisions, reasoning that they would be important to improve program integrity, protect H–2 workers, and deter potential petitioners who have previously committed labor law violations or H–2 program abuse. The commenter suggested that DHS consider taking additional steps to strengthen these provisions by referencing U and T

visa grants when considering whether an employer should be barred, adding that these visa applications may lead to investigations but not prosecutions for fraud, but that they should be considered against an employer’s participation in the H–2 program.

Response: DHS agrees that the provisions are an important step to encourage employers to comply with all applicable H–2 requirements, improve program integrity, and deter employers from engaging in labor law violations and abuse of the H–2 program. However, DHS declines to expand the mandatory and discretionary denial provisions to include consideration of grants of U and T nonimmigrant status visas that were based on investigations into H–2 employers. Information relating to noncitizens who are applying for or have been granted U or T nonimmigrant status visas is subject to strict confidentiality protections that would generally preclude DHS from disclosing such information to an H–2 petitioner. *See* 8 U.S.C. 1367(a)(2). Further, an investigation into fraud, standing alone, would not trigger the new mandatory and discretionary denial provisions because an investigation by itself would not constitute a “final” determination as required under new 8 CFR 214.2(h)(10)(iv).

Comment: Several commenters, including a professional association, stated that the provisions that would allow for the denial of H–2 petitions for employers that have been found to have committed labor law violations or other violations of H–2 program regulations were “overly broad and vague.” Some of these commenters stated that the provision was vague and did not provide the public with the ability to evaluate and comment on what would result in a denial or the standards against which an employer’s conduct would be measured. A few individual commenters stated that the proposed rule would grant DHS the authority to deny and revoke H–2 petitions based on “arbitrary, undefined standards” such as perceived labor violations or an employer’s lack of cooperation with an agency. The commenters asked whether an incorrect pay stub would be grounds for denial or revocation of a petition under the proposed rule. As a result, these commenters urged the department to reconsider its implementation of the proposed section.

Similarly, a couple of trade associations provided an example of an inspector entering the employer’s worker housing and seeing that workers had removed a battery from a smoke detector to stop it from going off during meal preparation. The commenters

questioned whether this violation would be subject to a mandatory or discretionary denial. Additionally, while discussing the recently issued DOL “Adverse Effect Wage Rate” regulation, the commenters expressed concern that violations under that regulation would subject the petitioner to mandatory or discretionary denials.

Response: DHS disagrees that the provision is overly broad or vague. Rather, the mandatory grounds for denial in new 8 CFR 214.2(h)(10)(iv)(A) are specific and focused on violations that show a petitioner’s past inability to abide by the requirements of the H–2 programs and, that due to their severity, are alone sufficient to conclude that the petitioner lacks the requisite intent and ability to comply with the requirements of the H–2 programs in the future. Likewise, the discretionary grounds for denial discussed in new 8 CFR 214.2(h)(10)(iv)(B) enumerate specific violations pertaining to the petitioner’s compliance with immigration and employment laws. Because these still very serious violations could potentially be less egregious in nature or less directly related to the H–2 programs than the mandatory grounds, DHS recognizes that this would require additional analysis before determining whether application of one of the discretionary grounds is warranted.

In addition to delineating the applicable violations that could give rise to a discretionary denial, the proposed rule also provided detailed information on how USCIS will examine the applicable violations to determine whether a denial should apply. As described in the proposed rule, specific considerations include: the recency and number of violations; the egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers; overall history or pattern of prior violations; the severity or monetary amount of any penalties imposed; whether the final determination, decision, or conviction included a finding of willfulness; the extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers; timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations. *See* 88 FR 65040, 65106 (Sept. 20, 2023).

With respect to the specific examples raised by commenters, DHS notes that the mandatory grounds for denial only

apply in three limited circumstances: (1) when there is a final debarment determination by DOL or GDOL; (2) where there is a final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that included a finding of fraud or willful misrepresentation of a material fact with respect to a prior H-2A or H-2B petition; and (3) when there is a final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition. With respect to discretionary denials, DHS declines to state in absolute terms whether the violations in those examples would or would not trigger a discretionary denial. Providing specific examples is not advisable because USCIS will evaluate each violation together with all the other relevant factors on a case-by-case basis. By including a very broad scope for the types of violation determinations that may lead to a discretionary denial under 8 CFR 214.2(h)(10)(iv)(B) generally and the catch-all provision under 8 CFR 214.2(h)(10)(iv)(B)(3) specifically, DHS recognizes that the violations underlying these determinations can vary widely in nature and severity.

Comment: Several commenters expressed concerns about the impact of petition adjudication delays as a result of these provisions, noting that these provisions will result in an increase in RFEs, denials, and appeals which could take several weeks to resolve. For example, a couple of trade associations expressed concern that the proposed section did not consider the time-sensitive nature of H-2 petitions, stating that refusing to process an employer's petition serves as an "effective debarment from the program for at least a year." The commenters added that because the current appeal process is "slow," a denial or a refusal to process a petition prevents an employer from obtaining an approved petition regardless of whether an appeal is successful. Another commenter noted that the time needed to resolve these requests for evidence is "time that petitioners do not have in seeking their critical workforce for jobs related to perishable commodities." Some commenters urged DHS to guarantee "expeditious timelines" of these adjudications. Another commenter urged DHS to consider "the opportunity for an expedited appeal process."

Response: DHS understands that H-2 petitions are time sensitive and strives to adjudicate each H-2 petition in a timely manner. However, DHS will not "guarantee expeditious timelines during

periods of alleged consequences" nor create a new "expedited appeal process" as suggested by some commenters. DHS already provides expedited processing of Form I-129 for H-2A petitioners without requiring an additional fee.⁵¹ This final rule does not change this practice. If an H-2B petitioner seeks expedited processing of their H-2B petition, they may file Form I-907, Request for Premium Processing Service, with fee, with USCIS.⁵²

With respect to comments about DHS "refusing to process an employer's petition," the commenters appear mistaken as to what was proposed. DHS is not refusing to process an employer's petition but rather finding that prior violations can be so significant as to indicate the petitioner's inability and lack of intent to comply with the requirements of the H-2 programs, such that denial of the petition is warranted under either the mandatory or discretionary provisions. DHS will not neglect to process the petition but will rather take adjudicative action consistent with the new regulations. Regarding the appeal process, DHS understands that the seasonal nature of some H-2 petitions could be impacted by appeals processing timelines. However, that is not unique to or caused by these provisions. This is something faced by any petitioner who fails to demonstrate eligibility for the benefit sought such that their petition is denied or revoked by USCIS.

Comment: While voicing concerns that the proposed rule does not address abuse by recruiters and preparers, an individual commenter stated that the regulations should specify clearly how recruiters and preparers can be "debarred," reasoning that it is often recruiters or preparers, not employers, who collect prohibited fees. The commenter also encouraged USCIS to specify that a failure to list a recruiter when one has been used can be considered a "material misrepresentation" for purposes of the mandatory and discretionary grounds for denial. Additionally, the commenter suggested that the prior use of prohibited recruiters or preparers could serve as a discretionary basis for precluding approval of an employer's petition.

⁵¹ USCIS, "H-2A Temporary Agricultural Workers" (stating "USCIS provides expedited processing of Form I-129 for H-2A petitions"), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last updated Sept. 11, 2024).

⁵² Form I-907, "Request for Premium Processing Service," <https://www.uscis.gov/i-907> (last updated June 3, 2024).

Response: DHS appreciates the opportunity to clarify that new 8 CFR 214.2(h)(10)(iv) does not create a "debarment" process for recruiters, nor does it create any type of official registry or list of recruiters who may participate in the H-2 programs. Recruiters do not register or directly file for benefits with DHS. DHS currently has no existing framework to exclude or identify a recruiter as "prohibited" from the H-2 program in a registry or similar list, and creating such a framework is outside the scope of this rule. While DOL's Office of Foreign Labor Certification (OFLC) currently publishes an H-2B "Foreign Labor Recruiter List," which includes the name and location of persons or entities identified on the TLC as an agent or recruiter, DOL clearly states that it "does not endorse any foreign labor agent or recruiter included in the Foreign Labor Recruiter List, nor does inclusion on this list signify that the recruiter is in compliance with the H-2B program."⁵³ Without a mechanism for a petitioner to identify a specific recruiter as "prohibited," DHS currently lacks the means to implement the commenter's suggestion to codify the prior use of a "prohibited" recruiter as part of new 8 CFR 214.2(h)(10)(iv).

Notwithstanding the above, if a petitioner fails to disclose on the H-2 petition that it has used a recruiter to locate and/or recruit the intended beneficiaries, USCIS may consider this to be a material misrepresentation or omission, depending on the circumstances. With this final rule, the Form I-129 is being revised to ask H-2 petitioners whether they used or plan to use an agent, facilitator, recruiter, or similar employment service to locate and/or recruit the H-2A/H-2B workers that they intend to hire by filing the petition. The Form I-129 is also being revised to ask H-2 petitioners to provide the name(s) and address(es) of all such persons and entities regardless of whether the petitioner has a direct or indirect contractual relationship with them, and regardless of whether such person or entity is located inside or outside the United States or is a governmental or quasi-governmental entity. If the petitioner used a recruiter prior to submitting the Form I-129, but did not disclose that information on the petition, or gave false information about the recruiter they used on the Form I-129, USCIS may deny or revoke the petition on the basis that the statements on the petition misrepresented or

⁵³ DOL, OFLC, "Foreign Labor Recruiter List," <https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list>. This DOL-published list is specific to the H-2B program.

omitted a material fact under existing 8 CFR 214.2(h)(10)(ii) or (11)(iii)(A)(2), respectively. In turn, this may trigger a discretionary denial under new 8 CFR 214.2(h)(10)(iv)(B)(2) or new 8 CFR 214.2(h)(10)(iv)(A)(2). As new 8 CFR 214.2(h)(10)(iv) already gives USCIS the ability to consider the failure to disclose a used recruiter on an H-2 petition, DHS declines to specifically codify language about a prior recruiter in new 8 CFR 214.2(h)(10)(iv).

With respect to the comments about debarred agents and preparers, DOL currently publishes a list of agents and attorneys who are debarred from the H-2A and H-2B labor certification programs.⁵⁴ Also, the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) maintains a List of Currently Disciplined Practitioners who are not authorized to practice before DHS, the Board, and the Immigration Courts.⁵⁵ If USCIS discovers that an H-2 petition was filed by or associated with a debarred agent or attorney, depending on the circumstances, USCIS may consider this information in determining the credibility of the overall petition. However, DHS also recognizes that each petition must be adjudicated on its own merits, and in the absence of other factors indicating that the petition is not approvable, an agent or attorney's debarment may not have an impact on the eligibility of the petition, as the agent or attorney's debarment may have nothing to do with the petitioner or the underlying reason for the prior debarment may no longer be at issue. Therefore, DHS declines the commenter's suggestion to codify the prior use of a debarred preparer as a factor for discretionary denial in new 8 CFR 214.2(h)(10)(iv).⁵⁶

Comment: An individual commenter expressed concern that this section would result in the "debarment" of employers without a hearing. The commenter added that case law requires hearings for "debarment." The commenter stated that Congress requires a hearing, willfulness, and substantiality, all of which DOL has

recognized but this NPRM specifically denies.

Response: DHS disagrees with the commenter's assertion that the provisions in this rule result in "debarment" of employers without a hearing. USCIS provides petitioners with an opportunity to challenge the denial of their petitions pursuant to 8 CFR part 103, including the ability to bring their case before USCIS' Administrative Appeals Office (AAO) and request oral argument to present their case. Specifically, USCIS will be using its existing adjudications and appeals processes to satisfy this "notice and opportunity for a hearing" requirement. *See* 8 CFR 103.2, 103.3; 88 FR 65040, 65057 (Sept. 20, 2023).⁵⁷ Each denial determination in new 8 CFR 214.2(h)(10)(iv) would take place within a nonimmigrant petition adjudication, and as a result would provide "notice and opportunity for a hearing" within that informal framework. *See* 8 CFR 103.2, 103.3. To issue a USCIS denial under new 8 CFR 214.2(h)(10)(iv), an Immigration Services Officer (ISO) would generally issue a NOID or RFE to the petitioner, providing up to 12 weeks to file a response. 8 CFR 103.2(b)(8). Upon considering the petitioner's response and any rebuttal evidence, the ISO could deny the petition in a written decision that would explain the specific grounds for the denial. 8 CFR 103.3(a)(1)(i). With respect to mandatory grounds for denial in new 8 CFR 214.2(h)(10)(iv)(A), the notice would inform the petitioner of their right to appeal, and indicate that the denial is based upon a mandatory ground for denial and that the petitioner's pending and subsequently filed petitions would also be subject to denial based on the same ground, during the applicable period. New 8 CFR 214.2(h)(10)(iv)(E)(1). With respect to the discretionary grounds for denial, the notice would inform the petitioner that the discretionary ground may also apply in the adjudication of any pending or future-filed petitions during the applicable time period. New 8 CFR 214.2(h)(10)(iv)(E)(2). If the petitioner refiles during the discretionary denial period, they will have the opportunity to establish that they have the ability and intent to comply, notwithstanding a prior denial. As with a denial notice issued under new 8 CFR 214.2(h)(10)(iv)(E)(1), a denial notice

issued under new 8 CFR 214.2(h)(10)(iv)(E)(2) would also inform the petitioner of the right to appeal the denial, which may include a request for oral argument, pursuant to 8 CFR 103.3.⁵⁸ Upon issuance of the decision, the petitioner would have 30 days (plus applicable mailing time) to appeal the denial of the petition to the Administrative Appeals Office (AAO). 8 CFR 103.3(a)(2)(i) and 8 CFR 103.8(b). In support of an appeal, the petitioner may submit a brief, additional evidence, and a request for oral argument before the AAO. *See generally* 8 CFR 103.3.⁵⁹ Thus, this final rule provides sufficient procedural safeguards to ensure a fair and reliable proceeding to ensure that a petitioner has notice and opportunity for a hearing.

DHS notes, in response to the comment regarding the statute's use of the term "notice and opportunity for hearing," that INA section 214(c)(14)(A)(ii) does not require, in the event of a denied H-2B petition and/or appeal of a denied H-2B petition, a formal hearing under 5 U.S.C. 554 or 556. Rather, DHS's existing adjudications and appeals processes, described above, satisfy the "notice and opportunity for a hearing" requirement. In this regard, DHS notes that the plain language of INA section 214(c)(14) does not require an "on the record" hearing or otherwise indicate that Congress expected an adversarial, trial-type hearing referenced in 5 U.S.C. 554(a) and 556. Statutes calling for a "hearing," a "public hearing," or an "appeal," without using the words "on the record," are implicit delegations to the agency to determine the meaning of those terms, and DHS has determined that "notice and an opportunity for a hearing" does not require a hearing on the record.⁶⁰

Finally, with regard to the commenter's statement regarding willfulness and substantiality, as explained in an earlier comment

⁵⁴ DOL, "Program Debarments," https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf.

⁵⁵ EOIR, "List of Currently Disciplined Practitioners," <https://www.justice.gov/eoir/list-of-currently-disciplined-practitioners> (last updated June 13, 2024).

⁵⁶ As noted above, however, it remains the responsibility of the employer to continually exercise ongoing efforts to ensure against payment of prohibited fees, and an employer's engaging a recruiter or similar service that has previously collected such fees could be a factor that DHS would consider in determining whether the employer is subject to the discretionary denial provisions.

⁵⁷ *See also* Michael Asimow, Admin. Conference of the U.S., "Federal Administrative Adjudication Outside the Administrative Procedure Act" (2019) (discussing informal adjudication), <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf>.

⁵⁸ The denial notice would also inform the petitioner of the ability to file a motion under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

⁵⁹ *See* INS Gen. Counsel, GenCo Op. No. 91-23, *Determination of Date of Final Decision in Denied Cases*, 1991 WL 1185134 (Feb. 21, 1991).

⁶⁰ *See Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006) (finding that the prior court's decision that there is a presumption in the APA for an evidentiary hearing was created because of an absence of congressional intent and that basing a statutory interpretation on a negative finding is "antithetic to a conclusion that Congress's intent was clear and unambiguous"); *Accrediting Council for Indep. Colleges & Schs. v. DeVos*, 303 F. Supp. 3d 77, 110 n.11 (D.D.C. 2018) (concluding that the phrase "after notice and opportunity for a hearing" in a statute does not trigger APA requirement for formal adjudication).

response, each of the violations triggering new denial periods in this final rule, as applied to H–2B petitions, stems from a willful failure to comply with program requirements or a willful misrepresentation of material fact. Accordingly, the provisions are consistent with INA section 214(c)(14), as well as INA sections 103(a), 214(a)(1), and 214(c)(1).

b. Discretionary and Mandatory Denials Related to Other Agencies' Determinations

Comment: Several commenters expressed concerns with DHS's legal authority to deny an H–2 petition based on the findings of another agency. For example, a couple of trade associations stated that the proposal to deny a petition based upon the finding of another agency was “misguided” and lacked statutory authority. Some commenters suggested that the Department rework the proposed rule to ensure it is not interpreting and enforcing DOL regulations, adding that it would potentially be “arbitrary and capricious” of DHS to do so. A trade association expressed concern that USCIS officers are not experts in labor law or regulations and that the analysis required under this section would require these officers to make individual judgments about the underlying decision and merit of a claim, resulting in an interpretation that would be arbitrary and capricious. A different trade association suggested that DHS ensure that its employees are not overreaching and attempting to “supplant the regulatory authority” of other government authorities. A professional association similarly expressed concern that “DHS is also playing enforcer of other agency laws and rules when, in fact, those other agencies should be enforcing their own standards.”

Some commenters said that if another Department, such as DOL, investigates an employer, determines a violation occurred, and imposes a penalty, DHS lacks the legal authority to impose an additional penalty on the employer in the form of what it describes as the discretionary or mandatory bar to approval. A couple of trade associations stated that the proposal to deny petitions of petitioners on the basis that they paid civil money penalties to another agency for a violation lacked a statutory basis, as the Department cannot penalize an employer for a violation that has already been resolved. The commenters added that employers typically pay fines for alleged minor violations because it is cheaper than challenging the violations, but that the

proposal would cause employers to potentially face debarment as a result of this practice.

A trade association wrote that in situations where other agencies have determined that debarment is not necessary, the Department should factor in those agencies' decisions when deciding whether to deny a petition. Similarly, another trade association stated that when other agencies have decided a violation does not warrant debarment, DHS “has no basis to refuse to approve a petition and thereby effectively impose a debarment penalty.”

A research organization expressed opposition to the section, saying it was unreasonable of DHS to second-guess a DOL determination that debarment was not necessary for a violation. The research organization said DOL's labor certification stage, rather than the petition stage, was the correct place to enforce program requirements because it is earlier in the process and DOL is more accustomed to violation evaluations. The organization also urged DHS to extend the deference it has made to its own past determinations to the determinations of other agencies, including DOL. The commenter stated that this provision is “unnecessary or duplicative of DOL regulations or proposed regulations.”

Several trade associations and a couple of advocacy groups expressed concern with the Department's proposal to deny petitions from employers who have been subject to an administrative action by DOL's WHD or other Federal, State, or local agency that did not require debarment. The commenters reasoned that if an agency's investigation determined that debarment was not necessary, then the Department should not deny an employer's petition, as it would effectively debar them from H–2 programs. Similarly, a trade association stated that DHS should honor the outcome of an investigation and administrative action by WHD. The commenter added that the provision allowing for an additional investigation following WHD's initial actions would create unnecessary expenses for employers.

Response: DHS disagrees with commenters' claims that it lacks statutory authority to consider findings of violations made by other agencies when determining whether to deny an H–2 petition. DHS also disagrees with the comments about it supplanting other agencies' authority, seeking to enforce or interpret other agencies' laws, and purporting to be an expert in other agencies' laws. As discussed in the

proposed rule, as well as elsewhere in this final rule, DHS has broad authority to deny petitions requesting H–2 workers pursuant to its general authority under INA secs. 103(a)(1) and (3), and 214(a)(1) and (c)(1), as well as its specific authority under INA sec. 214(c)(14)(A)(ii). *See* 88 FR 65040, 65056 (Sept. 20, 2023). Neither the general nor the specific authority Congress delegated to DHS to administer immigration laws and approve or deny status to an H–2 worker upon petition by the importing employer, including authority to establish the information required on the petition, preclude DHS, or limit its authority, from denying H–2 petitions based on the final determinations of serious violations made by DOL or other agencies. As discussed in response to public comments in part IV.C.1, where the facts warrant, DHS has the authority to deny H–2 petitions in the manner provided in this rule. Implicit in these delegations is the obligation that DHS ensure the integrity of H–2 programs.

In carrying out its authority and responsibility to promulgate regulations under the above-referenced statutory provisions, DHS has determined that there are instances where the violations are so severe or egregious, and so related to the question whether the petitioner has the ability and intent to comply with the H–2 program requirements so as to preclude approval of a petition for a specific period. Accordingly, reading DHS' statutory authorities as including the authority to promulgate regulatory provisions mandating the denial of H–2 petitions based on final determinations of egregious violations made by DOL, other agencies, as well as U.S. courts in the case of criminal convictions, is the best reading of DHS's broad statutory authority and responsibility to administer and ensure the integrity of the H–2 program. Similarly, the statute is best understood as authorizing DHS to consider final determinations of lesser violations on a discretionary basis, along with all aggravating or mitigating factors, relating to whether a petitioner has the intent and ability to comply with the H–2 program requirements. These comments seem to be based on a misunderstanding of the nature and purpose of DHS's consideration of other agencies' findings. In considering violations found by other agencies, DHS is not re-adjudicating the merits of those findings. Rather, DHS's analysis is limited to whether those violations, along with all relevant factors, indicate to DHS that the petitioner is unwilling or unable to comply with the

requirements of the H-2A or H-2B program, which is squarely within the scope of DHS's authority.

DHS is not proposing to "second-guess" the determination of the other agencies. Rather, DHS is deferring to their expertise to determine if a violation under their authority has occurred. If another agency or a court has determined that one or more of the violations listed in new 8 CFR 214.2(h)(10)(iv)(B) has occurred, USCIS will then consider that finding of violation in relation to USCIS' authority in the H-2 program to determine whether, in USCIS' discretion, the violation is significant enough and so related to the H-2 program that it undermines the petitioner's claim of intent and ability to comply with H-2 program requirements. USCIS may also consider the violation in assessing the overall credibility of the petitioner's statements in the petition. Although another agency such as DOL may investigate a violation and determine that that specific violation does not warrant debarment, USCIS may still consider the violation in the larger context of the petitioner's recent actions. Further, USCIS' focus is not just on how the violation relates to the petitioner's claim of intent and ability to comply with H-2 program requirements but also encompasses other information that could not be or was not considered in the other agency's proceedings, such as prior misrepresentations in the H-2 petition context or lack of corrective action. As is made clear by the regulatory text at new 8 CFR 214.2(h)(10)(iv)(C), USCIS will look at the totality of the petitioner's circumstances, not just the facts concerning a violation in isolation. While USCIS officers will evaluate whether the petitioner, more likely than not, will comply with H-2 requirements, USCIS officers will not revisit the merits of the underlying final administrative or judicial determination against the petitioner.

Similarly, USCIS would not revisit or re-adjudicate a final determination by another agency or a court that one or more violations listed under new 8 CFR 214.2(h)(10)(iv)(A)(1) or (3) had occurred. Rather, USCIS would determine whether the final determination was made against the petitioner or its successor in interest, and whether it was made during the relevant period. As explained in the NPRM, "[t]he violation findings set forth in proposed 8 CFR 214.2(h)(10)(iv)(A) are, by nature, so egregious and directly connected to the H-2 programs that they warrant

mandatory denial." 88 FR 65040, 65057 (Sept. 20, 2023).

Comment: Some commenters expressed procedural concerns with giving USCIS the ability to issue a discretionary denial based on the findings of another agency. A commenter said the section fails to provide a method for adequate due process, including for petitioners to offer evidence about the claim. Another trade association expressed concern that by barring petitioners or successors in interests from the program as a result of a violation adjudicated by other agencies, the proposal would ignore due process mechanisms set in place to protect regulated entities.

A professional association said that giving USCIS "discretion to deny an employer from filing an H-2 petition based on the findings of another agency makes it almost impossible for employers to defend themselves" and is violative of employers' due process rights. The commenter further stated that the ability of USCIS to issue a discretionary denial when USCIS had not been party to the proceedings finding violations is arbitrary and unfair. Moreover, the commenter said that the proposed rule does not include a provision allowing employers to make corrections for future petitions after a denial or debarment, thus denying the employer its right to "establish its intention or ability to comply" with program requirements under proposed 8 CFR 214.2(h)(10)(iv)(B). The commenter concluded that USCIS should not be able to issue a discretionary denial under 8 CFR 214.2(h)(10)(iv)(C), but if DHS insists on maintaining the language in the final rule, USCIS should consider "all relevant factors" when making determinations and have a thorough review process.

Response: DHS disagrees with these comments. Again, it appears that the commenters misunderstand the nature and purpose of USCIS' consideration of other agencies' findings. Within the context of the H-2 petition adjudication, there is no need for USCIS to provide the petitioner with an opportunity to offer evidence to dispute or "defend themselves" against the merits of the underlying violation because USCIS will not re-adjudicate the underlying violation. It is reasonable to assume that, if the petitioner had wanted to dispute or defend themselves against the merits of the underlying violation, they would have done so during the proceedings leading to the final determination of the violation and would not raise these matters for the first time during the H-2 petition process. It is also reasonable to assume

that the other agency afforded the petitioner adequate due process during the proceedings leading to the final determination of the violation and that the petitioner would have raised any such matters during those prior proceedings before the relevant administrative or judicial entity issued its final determination.

USCIS will comply with all procedural safeguards outlined in 8 CFR 103.2(b), including generally providing the petitioner an opportunity to respond to derogatory information pursuant to 8 CFR 103.2(b)(16)(i). Thus, before denying a petition under the new mandatory or discretionary ground at new 8 CFR 214.2(h)(10)(iv), USCIS generally will first issue a request for evidence or NOID the petition and provide an opportunity for the petitioner to respond. Further, upon a determination that one of the mandatory or discretionary grounds at new 8 CFR 214.2(h)(10)(iv) warranted a denial of the petition, USCIS will issue a denial notice informing the petitioner of the right to appeal the denial to USCIS' AAO, including the ability to request an oral argument. *See* new 8 CFR 214.2(h)(10)(iv)(E)(1)–(2). The commenters did not explain what part of these procedures they believe will violate their due process rights.

Also, the commenters did not explain what they meant by "including a provision allowing employers to make corrections for future petitions after a denial or debarment" for purposes of the new discretionary bar. If a petitioner took corrective actions subsequent to a denial under new 8 CFR 214.2(h)(10)(iv)(B), that petitioner may file a new H-2 petition requesting USCIS to consider those corrective actions as positive factors that demonstrate its intent and ability to comply with H-2 program requirements. Under new 8 CFR 214.2(h)(10)(iv)(B)(7)–(8), USCIS specifically factors in whether the petitioner has made "timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s)" and "other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations." DHS reaffirms that, under new 8 CFR 214.2(h)(10)(iv)(B), USCIS will consider all relevant factors and have a thorough review process when making determinations. Further, new 8 CFR 214.2(h)(10)(iv)(E)(2) specifies that, with respect to denials under the discretionary ground, the denial notice will indicate that the discretionary ground of denial "may also apply in the adjudication of any other pending or

future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.” New 8 CFR 214.2(h)(10)(iv)(E)(2) does not, however, state that the discretionary ground of denial “will” apply to any other pending or future H–2 petitions filed by the petitioner or a successor in interest during the applicable time period.

Comment: Some commenters expressed concern that the proposal does not include details of how violations adjudicated by other agencies would be communicated to or verified by the Department.

Response: Revisions to the Form I–129 associated with this final rule require the petitioner to answer questions regarding serious labor law violations or other violations. If the petitioner answers “yes” to these questions, they must submit a complete copy of the final administrative or judicial determination with the Form I–129. Once USCIS reviews a copy of the final administrative or judicial determination, USCIS will rely on those findings and will not re-adjudicate such final determination.

Note that in some instances, such as a DOL debarment or an INA sec. 274(a) violation, DOL or other Federal agencies will provide documentation of the violation directly to USCIS. In other instances, USCIS may come across information from another source (for example, open sources like a press release or a newspaper article, a tip submitted to the ICE online tip form, or an administrative site visit information) suggesting the petitioner was found to have committed a relevant violation. In those cases, USCIS may request evidence of the final administrative or judicial determination (for example, a certified court disposition) from the petitioner if it has not already been submitted with the Form I–129. In all cases, however, it remains the petitioner’s burden to truthfully answer all the questions on Form I–129 and submit all required evidence. By signing the Form I–129, the petitioner (and any employer and joint employer, as applicable) certifies, under penalty of perjury, that it has reviewed the petition and that all the information contained on the petition, and in the supporting documents, is complete, true, and correct.

Comment: Some commenters expressed concern that imposing the mandatory or discretionary bar based upon a debarment action that is not final and the employer did not have an opportunity to appeal is a denial of due process. Without providing specific examples, the commenter claimed to be

aware of “several recent cases” where DOL initiated a process of debarment, and where USCIS refused to approve an employer’s petition despite the DOL adjudication not being finalized.

Response: The proposed rule preamble and regulatory text make clear that the mandatory grounds for denial at 8 CFR 214.2(h)(10)(iv)(A) are applied only to determinations or findings that are final. Specifically, each violation listed in 8 CFR 214.2(h)(10)(iv)(A), as proposed and finalized, includes the word “final” when discussing the nature of the findings that will trigger the mandatory ground for denial.⁶¹ Additionally, DHS’s intent was to propose that all of the discretionary triggering events would also be final determinations. However, based on the comments received, the regulatory text could be made clearer in this regard. As such, DHS is adding the word “final” to new 8 CFR 214.2(h)(10)(iv)(B)(2) so that it is clear that all violations listed under 8 CFR 214.2(h)(10)(iv)(B) refer to a final determination.⁶² Regarding the commenter’s unsubstantiated claim of the impact of pending debarment under the current regulations, DHS cannot respond because the commenter did not provide any specific information about this claim. However, as noted above, the mandatory and discretionary denial provisions under the new regulations are triggered only by a final determination from DOL to debar a petitioner.

Comment: A few trade associations requested clarification of the interplay between new 8 CFR 214.2(h)(10)(iv) and 8 CFR 214.1(k). Specifically, these commenters requested DHS to clarify whether 8 CFR 214.1(k) would apply, or if new 8 CFR 214.2(h)(10)(iv) would result in a “one-time denial or revocation.”

Response: As stated in the NPRM, DHS is retaining the provision at 8 CFR 214.1(k) and believes the addition of new 8 CFR 214.2(h)(10)(iv) will complement that provision. DHS is unclear about the commenters’ reference to a “one-time denial or revocation” under new 8 CFR 214.2(h)(10)(iv) because the new provision addressing H–2 petition denial during debarment, specifically 8 CFR 214.2(h)(10)(iv)(A)(1), does not indicate a “one-time denial or revocation,” but rather is a prohibition on petition approval during the

debarment period. In so far as the commenters are concerned about the possible overlap between 8 CFR 214.1(k) and new 8 CFR 214.2(h)(10)(iv)(A)(1), the new provision at 8 CFR 214.2(h)(10)(iv)(A)(1) provides clarity on how USCIS will exercise its ability to deny H–2 petitions filed by petitioners that are debarred from the H–2 programs. Specifically, while 8 CFR 214.1(k) provides that USCIS “may” deny petitions for workers in the H (except for H–1B1), L, O and P–1 nonimmigrant classifications during the period of debarment (for a period of 1 to 5 years) upon DOL debarment under 20 CFR 655, new 8 CFR 214.2(h)(10)(iv)(A)(1) clarifies that USCIS “will” deny H–2 petitions filed or pending during the period of debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 as specified by DOL, or during a period of debarment specified by the Governor of Guam. New 8 CFR 214.2(h)(10)(iv)(A)(1) will only apply to H–2 petitions filed on or after the effective date of this rule, with a debarment period beginning on or after the effective date of this rule. If new 8 CFR 214.2(h)(10)(iv)(A)(1) does not apply, USCIS may still apply 8 CFR 214.1(k) to deny H–2 petitions filed by petitioners subject to DOL debarment.⁶³

c. Comments Specific to Mandatory Denials Under 8 CFR 214.2(h)(10)(iv)(A)

Comment: A professional association said that involving WHD determinations in DHS decisions would be an overstep of the boundaries between agencies, and suggested DHS only deny employers based on what it discovers in its own investigations.

Response: DHS declines the suggestion to limit the scope of the new mandatory grounds for denial to only violations that DHS discovers in its own investigations. Such a suggestion would be unnecessarily restrictive compared to what DHS can already do. For example, under current 8 CFR 214.1(k), USCIS may already deny H–2 petitions for a period of at least 1-year but not more than 5 years upon a finding of debarment by DOL. Moreover, it is contrary to the statutory and regulatory scheme, which specifically contemplates DOL’s role in assisting

⁶¹ As explained in the NPRM, a “final” USCIS decision means that there is no pending administrative appeal or the time for filing a timely administrative appeal has elapsed. 88 FR 65040, 65058 (Sept. 20, 2023).

⁶² As proposed and finalized, 8 CFR 214.2(h)(10)(iii)(B)(1) and (3) already contains the word “final.”

⁶³ For instance, H–2 petitions filed prior to the effective date of this rule, or with a debarment period beginning prior to the effective date, may still be denied under 8 CFR 214.1(k). In addition, USCIS may deny an H–2 petition under 214.1(k) when the petitioner has been debarred by DOL from a non-H–2 program, whereas new 8 CFR 214.2(h)(10)(iii)(A)(1) does not extend to the denial of an H–2 petition in such a case.

DHS in determining the approvability of H–2 petitions.⁶⁴

d. Comments Specific to Discretionary Denials Under 8 CFR 214.2(h)(10)(iv)(B)

Comment: Several commenters opposed proposed 8 CFR 214.2(h)(10)(iv)(B) on the basis that the consequences of this provision may not be commensurate with violations that are “minor,” “minimal,” “technical,” “trivial,” “innocent,” or otherwise insignificant in nature. For example, a trade association stated that the provision was overbroad, increases the impact of determinations by other agencies, and creates a situation where employers could lose access to the H–2 program based on “minor employment law violations that have no impact on the health or safety of workers.” Other commenters expressed that H–2 employers should not be effectively debarred for minor violations and were concerned with the perceived lack of guardrails in the proposed rule to ensure that citations for “minor” infractions would not result in DHS denying or revoking a petition under its discretionary authority.

A joint submission expressed concern that, despite the proposed rule’s assertion that DHS would not exercise its authority for “de minimis” violations, its discretionary authority would be “open ended” and extend to any legal or regulatory violation, regardless of its severity. Discussing the proposed rule’s “intention or ability to comply” analysis that it said the Department provided as a “balancing test,” the commenter said this test does not apply to the “threshold provision” that determines whether its discretionary denial is applicable. The commenter provided various examples of violations of “minimal significance,” including violations that an employer would not seek to appeal given the cost would exceed the violation penalty itself, but that DHS could use to show a large “number of violations” or a

“pattern of violations” and invoke the section. The commenter stated that as a result, the Department’s discretionary denial authority is “unfair, excessive, and overly punitive.”

Similarly, a union expressed concern that the application of USCIS’ discretionary authority might be overbroad and extend to minor violations that might have occurred as a result of administrative errors. The commenter stated that employers might face discretionary denials for violations that “do not call into question the ability or intention” of petitioners to comply with H–2 program requirements. An attorney stated that the phrase “calling compliance into question” must be removed for vagueness, as any violation, no matter how trivial, could penalize a petitioner under this provision for “the most innocent act.” A trade association strongly opposed proposed 8 CFR 214.2(h)(10)(iv)(B) in its entirety but said that, if maintained in the final rule, DHS should clarify and provide examples of violations that would trigger a denial or revocation of a petition under the proposed discretionary authority.

A joint submission urged the Department to “soften” the proposed rule’s language regarding violations that would trigger a discretionary denial. The commenter suggested the rule include qualifications to limit actions to “severe or egregious violations involving worker health and safety,” referencing similarities to other Federal regulations. The commenter concluded that this would provide additional layers of due process protections and prevent employers from being penalized for minor violations while still protecting workers. Other commenters suggested DHS limit the nature of the violations exclusively to violations of USCIS H–2 regulations.

Response: DHS appreciates the commenters’ concerns but declines to make changes to the discretionary grounds for denial at new 8 CFR 214.2(h)(10)(iv)(B) based on these comments.⁶⁵ DHS maintains that the factors enumerated in 8 CFR 214.2(h)(10)(iv)(C) make it clear that no single factor, standing alone, will be considered sufficient to warrant denial because the analysis includes consideration of all relevant factors, including the number of violations, egregiousness of the violation(s), overall history or pattern of prior violations,

and the severity of the penalties imposed, among others. As stated in the NPRM, a single factor, standing alone, will not be outcome determinative, but may be weighted differently depending on the circumstances of each case; such that one factor could be given significant weight in reviewing the totality of the facts presented, even if other listed factors were absent. 88 FR 65040, 65060 (Sept. 20, 2023).

For example, as illustrated in the NPRM, USCIS would likely not consider a single de minimis Occupational Safety and Health Administration (OSHA) violation or a single Department of Transportation (DOT) violation for poor vehicle maintenance that did not result in risk or harm to workers as necessarily relevant to the petitioner’s intention or ability to comply with H–2A program requirements. 88 FR 65040, 65059–60 (Sept. 20, 2023). On the other hand, if a petitioner has, for instance, a history of serious OSHA violations for failure to provide workers with personal protective equipment or a history of DOT violations for poor vehicle maintenance and those vehicles were continually used to transport the company’s H–2 workers, resulting in the death or injury of (or risk of death or injury to) H–2 workers, then USCIS would likely consider those violations relevant to the petitioner’s intention and/or ability to comply with H–2A or H–2B program requirements under proposed 8 CFR 214.2(h)(10)(iv)(B)(3). These examples illustrate that new 8 CFR 214.2(h)(10)(iv)(B) reflects a totality-of-the-circumstances consideration in which USCIS will consider all relevant factors.

Some commenters provided specific examples of violations which they characterized as “minor,” “minimal,” or otherwise of an insignificant nature, implying that these violations should never trigger a discretionary denial under new 8 CFR 214.2(h)(10)(iv)(B). These examples included violations because a petitioner failed to list the company’s Federal Employer Identification Number on the worker’s pay statement, failure to properly calculate the hours offered in the earnings records, or “fail[ure] to pay a nickel’s worth of backpay.” However, DHS does not agree that the violations in these examples should always be considered “minor,” “minimal,” or otherwise of an insignificant nature such that they should never be relevant to the petitioner’s intention and/or ability to comply with H–2 program requirements. For instance, a petitioner’s failure to properly calculate the hours offered in the earnings records may not be relevant to the petitioner’s

⁶⁴ See, e.g., INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1) (the question of importing an H–2 worker “shall be determined by [DHS], after consultation with appropriate agencies of the Government,” and that for H–2A nonimmigrants, the term “‘appropriate agencies of Government’ means the Department of Labor and includes the Department of Agriculture”); 8 CFR 214.2(h)(5)(ii) (“The temporary agricultural labor certification process determines whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements”); 8 CFR 214.2(h)(6)(iii)(A) (“Prior to filing a petition with the director to classify an alien as an H–2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor [or the Governor of Guam]”).

⁶⁵ Note that DHS did make edits to these provisions to clarify their application based on public comments discussed elsewhere in this final rule.

intention and/or ability to comply with H-2 program requirements if it is an isolated incident and the petitioner immediately took corrective action to correct the mistake. However, it may be relevant if the failure to properly calculate the hours resulted in significant financial loss to that worker and the petitioner refused to take corrective action. Similarly, a single, isolated violation of a petitioner failing to pay “five cents” worth of backpay to a worker would likely not be relevant to the petitioner’s intention and/or ability to comply with H-2 program requirements, but it may be relevant if this violation is part of a pattern of the petitioner intentionally failing to pay backpay and failing to take any corrective action despite being ordered to do so. These examples demonstrate how the relevance of each violation will depend on the circumstances of each case, making it inadvisable to draw a hard line on which violations would always or never trigger a discretionary analysis under new 8 CFR 214.2(h)(10)(iv)(B).

For the same reason, DHS declines to provide absolute examples of what would or would not trigger the discretionary analysis pursuant to a commenter’s suggestions. Providing specific examples of violations is not advisable because USCIS will evaluate each violation together with all the other relevant factors on a case-by-case basis. By including a very broad scope for the types of violation determinations that may lead to analysis under the discretionary denial provision at 8 CFR 214.2(h)(10)(iv)(B) generally and the catch-all provision at 8 CFR 214.2(h)(10)(iv)(B)(3) specifically, DHS recognizes that the violations underlying these determinations can vary widely in nature and severity.

DHS declines to adopt a commenter’s suggestions to limit the reach of this provision to only “severe or egregious violations involving worker health and safety.” As proposed, new 8 CFR 214.2(h)(10)(iv)(C)(2) specifically lists “the egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers” as one of the relevant factors USCIS will consider.

Finally, DHS declines to limit new 8 CFR 214.2(h)(10)(iv)(B) exclusively to violations of USCIS H-2 regulations. As stated in the NPRM, this provision is consistent with existing DOL regulations requiring H-2 petitioners to comply with all applicable Federal, State, and local laws and regulations,

including health and safety laws⁶⁶ and recognizes that numerous Federal, State, and local agencies have authority in areas affecting H-2 employers and workers.

Comment: A few commenters suggested that USCIS should revise the discretionary denial provisions so that there is a system of graduated penalties. For example, a commenter suggested that USCIS should “truncate” the scope of violations that trigger additional reviews. Other commenters suggested that DHS evaluate alternative consequences that better align with the nature of the violation, including a “tier system of escalating consequences and fines” and a “remediation system.”

Response: The commenters did not provide specific suggestions on how a system of truncated violations, a tier system of escalating consequences and fines, or a remediation system, could work. If the commenters were suggesting that DHS modify proposed 8 CFR 214.2(h)(10)(iv)(B) so that the length of time a petition is denied would vary based on the severity of the violation(s) similar to the approach in current 8 CFR 214.1(k), DHS declines such an approach. New 8 CFR 214.2(h)(10)(iv)(B) gives USCIS the ability to consider the nature of the prior violation(s)—within the context of the petitioner’s other actions and all other relevant factors—to determine whether the petitioner has the intent or ability to comply with H-2 program requirements and the petitioner’s overall credibility. Since USCIS will consider all relevant factors to determine the petitioner’s intent and ability to comply, it does not make sense to truncate the application of new 8 CFR 214.2(h)(10)(iv)(B) based on the severity of the violation. Further, the finalized approach provides more clarity because it specifies exactly how long the petitioner’s petitions could potentially be denied (“during the pendency of the petition or within 3 years prior to filing the petition”) if USCIS determines that the petitioner has not established its intent or ability to comply with H-2 program requirements, as opposed to leaving the petitioner unsure of how long they could potentially be denied under new 8 CFR 214.2(h)(10)(iv)(B).

Comment: A few trade associations expressed concern with the language of 8 CFR 214.2(h)(10)(iv)(B), reasoning it would result in petitioners “being penalized for the same violation twice (equating to double jeopardy)—or more, if the petition denial is repeated in multiple years.”

⁶⁶ 20 CFR 655.20(z), 20 CFR 655.135(e).

Response: In light of these comments, DHS is making the following regulatory changes to clarify that, under the following facts, USCIS will not deny certain petitions for the same underlying violation(s), recognizing that such a denial would be unduly burdensome to the petitioner. Specifically, new 8 CFR 214.2(h)(10)(iv)(F) states that, if USCIS has previously determined that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H-2A or H-2B program requirements in the course of adjudicating a petition involving violation determinations under paragraph (h)(10)(iv)(B), USCIS will not seek to deny a subsequently filed petition under paragraph (h)(10)(iv)(B) of this section based on the same violation(s), unless USCIS becomes aware of a new material fact (for example, a previously undiscovered violation(s) or new violations that occurred during the applicable time period), or if USCIS finds that its previous determination was based on a material error of law. In cases where USCIS becomes aware of a new material fact or determines its previous determination was based on a material error of law, petitioners will generally have the opportunity to challenge an intended denial.

e. Final Determinations Against Individuals Under 8 CFR 214.2(h)(10)(iv)(D)

Comment: A union expressed support for proposed 8 CFR 214.2(h)(10)(iv)(D) which specifies when USCIS may treat a criminal conviction or final administrative or judicial determination against an individual as a conviction or final administrative or judicial determination against the petitioner or successor in interest, reasoning it would strengthen accountability for employers who try to shield themselves from penalties by “hiding behind” recruiters and other agents who violate the law. The commenter added that because H-2 workers’ status is tied to their employment with a particular employer, they are economically dependent on their employers and “view situations from that vulnerable perspective.” The commenter stated that as a result, the provision to consider the perspective of an employee under proposed 8 CFR 214.2(h)(10)(iv)(D)(2) “appropriately takes that reality into consideration” when assessing whether an employee is acting on behalf of its petitioning entity.

Response: DHS appreciates the comment that accurately reflects the provision’s goals of strengthening

accountability for employers and acknowledging an H-2 beneficiary's vulnerability to exploitation from their employer or persons allegedly acting on the employer's behalf.

Comment: A couple of trade associations stated that DHS should "carefully weigh whether the Due Process considerations" of accused petitioners are "adequately protected" by proposed 8 CFR 214.2(h)(10)(iv)(D). A joint submission expressed concern that the proposed rule did not adequately consider "the balance of the interests" in both attributing the misconduct of individuals to the petitioner and increasing the penalties for misconduct. The commenter concluded that the provision is an overreach and suggested that DHS provide "additional procedural protections" for petitioners and provide them with a "greater degree of leniency to the extent that they have taken steps to remedy the violation(s) and prevent them from occurring in the future."

Response: DHS disagrees with the commenters. It is not reasonable to allow a petitioner to avoid liability for the actions of an individual who is acting on behalf of that petitioner, as a petitioner could then knowingly engage in unlawful activity simply by instructing another individual to perform the unlawful activity on their behalf. Further, it is reasonable to expect that an employer will monitor the activities of its employees whom the employer has empowered to act on its behalf.

It is not entirely clear what the commenters meant by their vague references to "additional procedural protections" or "Due Process considerations." Regardless, DHS reiterates that USCIS will comply with all procedural safeguards outlined in 8 CFR 103.2(b), including generally providing the petitioner an opportunity to respond to derogatory information pursuant to 8 CFR 103.2(b)(16)(i). Thus, before denying a petition under the new mandatory or discretionary ground at new 8 CFR 214.2(h)(10)(iv), USCIS generally will first issue a request for evidence or NOID the petition and provide an opportunity for the petitioner to respond. For example, in response to the request for evidence or NOID, the petitioner will have the opportunity to demonstrate that the underlying conviction was against an individual who was not acting on behalf of the petitioner, or if the conviction was against an employee of the petitioning entity, that a reasonable person in the H-2A or H-2B worker's position would not believe the

individual was acting on behalf of the petitioning entity.

Comment: Referencing proposed 8 CFR 214.2(h)(10)(iv)(D)(2), a professional association expressed support for actions that attempt to ensure accountability among employers but stated that a "reasonable person" standard should not be applied with respect to an individual who an H-2 worker believes is acting on behalf of the petitioning entity. The commenter instead suggested that USCIS "rely on whether an oral or written agreement was entered into." Another commenter, a joint submission, urged DHS to "afford petitioners a greater degree of leniency to the extent that they have taken steps to remedy the violation(s) and prevent them from occurring in the future" and asserted that the "reasonable person standard" safeguard is inadequate for reasons such as the high rate of fraud and impersonation of employers via the internet and social media.

Response: The provision at 8 CFR 214.2(h)(10)(iv)(D) allows a criminal conviction or final administrative or judicial determination against an individual to be considered a conviction or final determination against the petitioner in some circumstances. First, under 8 CFR 214.2(h)(10)(iv)(D)(1) this can occur when an individual (such as the petitioner's owner, employee or, a contractor) was in fact acting on the petitioner's behalf when engaging in conduct that resulted in the conviction or final administrative determination. In addition, under the provision referenced by the commenters, 8 CFR 214.2(h)(10)(iv)(D)(2), a conviction or final determination against an individual can be considered a conviction or final determination against the petitioner for the purposes of discretionary denial when the individual was the petitioner's employee and a reasonable person in the H-2 worker's position would believe the individual was acting on the petitioner's behalf.

It is not entirely clear what is meant by the commenter's suggestion that, instead of a reasonable person standard, liability under 8 CFR 214.2(h)(10)(iv)(D)(2) should depend on "whether an oral or written agreement was entered into." To the extent that the commenter is suggesting USCIS should rely on whether there is an oral or written employment agreement between the petitioner and the individual, DHS notes that the provision only applies to the petitioner's employees, who generally would have entered into an oral or written employment agreement with the petitioner.

If, on the other hand, the commenter is suggesting that the existence of a written or oral contract prohibiting the violation-related conduct alone should in all cases be sufficient for the petitioner to avoid liability for its employee's actions, DHS disagrees and believes it is appropriate to consider the relevant facts and circumstances on a case-by-case basis. As noted in the preamble to the NPRM, because liability for this population will be limited to the discretionary denial provision, petitioners will have an opportunity to provide information regarding the circumstances of the employee's actions, and USCIS will consider all relevant factors in determining whether the petitioner had established its intention and ability to comply with H-2 program requirements. 88 FR 65040, 65061 (Sept. 20, 2023).

With regard to the suggestions in the joint submission comment, DHS agrees that steps taken by the petitioner to remedy the violations and prevent them from occurring in the future are important and relevant considerations, and notes that such steps will be considered in determining whether a denial is warranted. *See* 8 CFR 214.2(h)(10)(iv)(C)(8). DHS disagrees, however, with the suggestion that the "reasonable person standard" in 8 CFR 214.2(h)(10)(iv)(D)(2) is inadequate to safeguard against fraud and impersonation of employers via the internet and social media. Even if an H-2 worker reasonably believed that the individual engaging in fraud or impersonation was acting on behalf of the employer, the petitioner could not be held accountable under 8 CFR 214.2(h)(10)(iv)(D)(2) unless the individual was its employee in which case, as discussed above, all relevant circumstances will be considered.

Comment: A professional association suggested treating a conviction or determination of an individual as a conviction or determination against a petitioner only in "the most egregious circumstances." The commenter questioned the Department's rationale that employers would be knowledgeable of the actions of all individuals in its recruitment chain, calling it "aspirational but also not realistic." Similarly, a few trade associations stated that in many cases petitioners may not have knowledge of another party's behavior, particularly in the case of contractors. The commenters also urged the Department to clarify whether criminal convictions or final administrative or judicial determinations must be related to labor violations, H-2-related job duties, or corresponding employees. Finally, these

commenters suggested the Department develop alternative approaches to denial and revocation that include corrective action but indicated that, if the provision is retained, they support the use of reasonable person analysis, an opportunity to provide evidence prior to determination, and opportunity to appeal to a neutral body in order to prevent unfounded denials.

Response: As noted above, 8 CFR 214.2(h)(10)(iv)(D)(1) allows convictions and final determinations against some non-employees (for example contractors and others) to be treated as convictions and final determinations against the petitioner, but only to the extent that the individual is acting on the petitioner's behalf. DHS believes it is both realistic and appropriate to expect petitioners to have knowledge of, and a degree of control over, third party individuals' actions taken on their behalf.

DHS appreciates the commenters' request for clarity regarding whether the convictions and final determinations covered by 8 CFR 214.2(h)(10)(iv)(D) must relate to labor violations, H-2 employment, and H-2 workers. First, DHS notes that the provision only applies to certain final determinations and convictions that are relevant to petitioner's compliance with H-2 program requirements as enumerated in 8 CFR 214.2(h)(10)(iv)(A) and (B). DHS also emphasizes that, because 8 CFR 214.2(h)(10)(iv)(D)(1) only applies to an individual who is "acting on behalf of the petitioning entity," it would not apply to a conviction or final determination for actions the individual took on behalf of a different employer, or for conduct that is otherwise unrelated to the individual's work on behalf of the petitioner. Finally, as discussed above, the provision at 8 CFR 214.2(h)(10)(iv)(D)(2) applies only to an employee of the petitioner who a reasonable person in the H-2 worker's position would believe is acting on the petitioner's behalf, and in such cases, petitioners will have an opportunity to provide information regarding the circumstances of the employee's action. USCIS will consider all relevant factors—including corrective and preventative measures the petitioner has taken—in determining whether the petitioner has established its intention and ability to comply with H-2 program requirements. As with all denials under 8 CFR 214.2(h)(10)(iv), such decisions will be appealable to the USCIS Administrative Appeals Office.

f. 3-Year Timeframe ("Lookback Period")

Comment: Several commenters discussed the 3-year timeframe for

mandatory and discretionary denials based on certain violations. An advocacy group said a 3-year look back period would be sufficient to ensure approval of H-2 petitions would not be detrimental to the rights of workers or the integrity of the program. An advocacy group and a joint submission urged DHS to not reduce the proposed 3-year timeframe.

Response: DHS appreciates these comments and agrees that a 3-year lookback is appropriate for the relevant provisions of 8 CFR 214.2(h)(10)(iv)(A) and (B).

Comment: While expressing opposition to the denial of petitions for certain violations, a couple of trade associations said that if the section was maintained, the Department could not impose penalties until 3 years after the provision became effective and employers received notice. Another commenter stated that denying employers retroactively for conduct that occurred prior to the rule's implementation was unconstitutional due to the retroactivity doctrine.

Response: DHS did not propose to deny petitions in a way that is impermissibly retroactive or without adequate notice. In general, DHS applies its regulations prospectively. DHS is aware that the U.S. Supreme Court has held that "statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms."⁶⁷ It is also aware that retroactive rules alter the past legal consequences of past actions.⁶⁸ DHS also recognizes that a rule operates retroactively if it takes away or impairs vested rights.⁶⁹ In addition, DHS recognizes that if a new rule is "substantively inconsistent" with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively.⁷⁰ However, an agency rule that alters the future effect, not the past legal consequences of an action, or that

upsets expectations based on prior law (which may be characterized as secondary retroactivity), is not necessarily impermissibly retroactive.⁷¹

Here, DHS proposed to, in certain circumstances, alter the future effect of past actions by adding program integrity measures to address certain violations that occurred in the past. As such, the proposed rule might have raised questions regarding secondary retroactivity.⁷² Rules that have a secondary retroactive effect can be valid if they are reasonable.⁷³ As discussed in more detail below, the provisions included in this final rule are reasonable because they ensure that petitioners have adequate notice of consequences of certain conduct while giving DHS the ability to hold program users accountable. Namely, while DHS is uniformly applying the new rules to agency actions that take place on or after the effective date of the final rule, the additional consequences imposed by this rule will in some cases attach to prohibited conduct that occurred before the effective date of this final rule. DHS believes that this approach is reasonable because the conduct covered by these provisions is already prohibited, and as such, petitioners could have no reasonable expectations that such egregious conduct could not subsequently be taken into account in petition adjudications.

While DHS did not specifically address in the NPRM how the provisions relating to the denial or revocation of petitions for prohibited fees, as well as the mandatory and discretionary denials of H-2A and H-2B program violators would apply, DHS is clarifying in this final rule that it will apply certain provisions in a manner that balances the strong interest in enhancing H-2 program integrity and protection of H-2 workers with the interests of petitioners to have adequate notice of new future effects applicable

⁷¹ *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006); see *Bowen*, 488 U.S. at 220 (Scalia, J., concurring); see also *Alexander*, 979 F.2d at 864 ("Member schools have no 'vested rights' to future eligibility to participate in the GSL program. Although we do not doubt AACCS's submission that the schools expected to be eligible in the future, such an expectation did not constitute vested interest.").

⁷² *Bowen*, 488 U.S. at 220 (Scalia, J., concurring) ("A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthwhile substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' see 5 U.S.C. 706, and thus invalid. In reference to such situations, there are to be found in many cases statements to the effect that where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.").

⁷³ *Bowen*, 488 U.S. at 220 (Scalia, J., concurring).

⁶⁷ *Georgetown Univ. Hosp. v. Bowen*, 488 U.S. 204, 208 (1988).

⁶⁸ *Bowen*, 488 U.S. at 219 (Scalia, J. concurring).

⁶⁹ See *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (*National Mining I*) (quoting *Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992)).

⁷⁰ See *Arkema Inc. v. EPA*, 618 F.3d (D.C. Cir. 2010) (vacating an EPA rule in part on impermissible retroactivity grounds because the rule attached new legal consequences to events completed before its enactment) (quoting *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002)); see also *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (explaining "[r]etroactive rules 'alter[] the past legal consequences of past actions'" (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring))).

to certain conduct. Consistent with this discussion, DHS has added language to the applicable regulatory provisions to clarify how they will apply, as discussed in more detail below.

(1) Denial and Revocation of H–2 Petitions for the Collection of Prohibited Fees

DHS is clarifying that USCIS will deny or revoke H–2 petitions filed on or after the effective date of this final rule based on the revised prohibited fees provisions in 8 CFR 214.2(h)(5)(xi)(A) and (h)(6)(i)(B). Petitions filed before the effective date of the final rule will be denied or revoked based on the prohibited fee provisions in effect before this final rule.

(2) The 1- and 3-year Periods of Denial for the Collection of Prohibited Fees and Failure To Reimburse

DHS, under this final rule, will deny additional H–2A and H–2B petitions for a period of 1 year based on denials or revocations that resulted from a violation of prohibited fee provisions contained in this final rule. Under regulations in place before the effective date of this final rule, employers in both H–2A and H–2B programs were prohibited from charging workers certain prohibited fees and are required to reimburse workers when such fees have been charged. If an H–2A or H–2B petition is denied or revoked for violating the provisions in place before the effective date of this final rule, petitioners filing petitions in the same program within 1 year of the denial or revocation must demonstrate to the satisfaction of USCIS that the workers were reimbursed or that the employer made reasonable efforts to locate the workers but has failed to do so. 8 CFR 214.2(h)(5)(xi)(C) and (h)(6)(i)(C). If this obligation is not met, the subsequent petition is denied. The obligation attaches to all subsequent petitions filed during the 1-year period. Under the NPRM and this final rule, a denial that occurs during the 1-year period following a USCIS denial or revocation based on a prohibited fee violation applies across H–2A and H–2B programs and does not allow the petitioner to avoid a denial during the relevant 1-year period simply by the petitioner reimbursing the affected workers or making reasonable efforts to do so.

While petitioners do not necessarily have a right to approval of their petitions, DHS understands that petitioners may not be in a position to remedy or provide reasons for their past actions in a manner that complies with the new regulations (for example,

establish by clear and convincing evidence that the petitioner engaged in good faith, ongoing efforts to prevent the collection of such fees) such that they can overcome this ground for denial or revocation and thereby avoid the 1-year denial period following such a decision. As such, without the clarification included in this final rule, the NPRM might have been construed as having proposed the imposition of new future consequences on petitioners for past actions that have already concluded. Therefore, DHS is clarifying that it will apply the expanded 1-year denial provisions based on initial denial or revocation decisions involving prohibited fees that are issued on petitions filed only on or after the effective date of this rule. In other words, DHS will apply this provision prospectively from the effective date of this final rule, not retroactively.

With respect to the 3-year mandatory denial period, the obligation to reimburse is not new and is a requirement under regulations that have been in place since 2008. The period of denial, however, will be longer under this final rule, will eliminate the option to merely demonstrate reasonable efforts to locate a beneficiary, and will explicitly impose obligations on successors in interest with respect to ensuring the integrity of the H–2 program and H–2 worker protections. Therefore, similar to the 1-year denial provision, DHS will apply the 3-year additional denial period to petitioners, including successors in interest, based on initial denial or revocation decisions issued on petitions filed on or after the effective date of this final rule. For petitions denied or revoked under previous regulations, the 1-year denial period in place before the effective date of this final rule will apply.⁷⁴

(3) Mandatory Denial of Petitions Filed by H–2 Petitioners

As noted above, DHS recognizes that denying petitions under the three mandatory denial provisions may result in unforeseen new effects attaching to past conduct. Specifically, for denials based on DOL or GDOL debarment, unlike the existing provision in 8 CFR 214.1(k), the new mandatory denial provision requires rather than permits USCIS to deny petitions on this basis but operates similarly to 8 CFR 214.1(k)

in that it is triggered by a DOL debarment even if such debarment takes place while the petition is already pending with USCIS and supported by a valid TLC. Under existing regulations and this final rule, if the debarment of a petitioner prevented the petitioner from obtaining a TLC, USCIS would not be able to approve such petition.

Similarly, DHS recognizes that issuing a mandatory denial of the H–2A or H–2B petition based on prior USCIS decisions finding fraud or misrepresentation, may attach new effects to already prohibited conduct. Under the NPRM and without further clarification, these new effects could have attached without providing the petitioner the ability to overcome this ground based on new facts or evidence that may have occurred since the initial decision. The same is true of denials based on violations of section 274(a) of the Act.

For these reasons, DHS is clarifying how the mandatory denial provisions will apply:

(1) For mandatory denials involving DOL or GDOL debarment, DHS will apply these provisions only to petitions filed on or after the effective date of this final rule and when the final administrative debarment decision is made on or after the effective date of this final rule. For petitions filed before the effective date of the rule involving DOL or GDOL debarment, USCIS may continue to deny under the existing provision at 8 CFR 214.1(k).

(2) For mandatory 3-year denials based on the USCIS denial or revocation of an H–2A or H–2B petition for fraud or material misrepresentation, these provisions will apply only to initial denial or revocation decisions issued on petitions filed on or after the effective date of this rule.

(3) For mandatory denials involving violations of section 274(a), USCIS will deny H–2A or H–2B petitions filed on or after the effective date of the final rule and based on final determinations of violations of section 274(a) of the Act that are made on or after the effective date of this final rule. With respect to determinations of section 274(a) violations made before the effective date of this final rule, DHS will apply the 2-year denial provision in current 8 CFR 214.2(h)(5)(iii)(B).

This approach operates prospectively, and provides petitioners with sufficient notice of the additional consequences of these egregious violations.

⁷⁴ The failure to reimburse workers for fees collected prior to the effective date of this final rule may be considered, among the totality of facts presented, with respect to whether to deny such petitions on a discretionary basis under new 8 CFR 214.2(h)(10)(iii) regardless of whether the petition is filed before, on, or after the effective date of this rule.

(4) Discretionary Denial of Petitions Filed by H-2 Petitioners Based on Violation Determinations That Occurred During the Pendency of the Petition or the Previous 3 Years

These new provisions provide for the consideration of certain violations and other relevant factors in adjudicating H-2 petitions. These provisions do not mandate denial. DHS is clarifying that these provisions will apply to H-2A or H-2B petitions that are filed on or after the effective date of this rule based on determinations of past violations that occurred during the pendency of the petition or the previous 3 years, regardless of whether they occurred before, on, or after the effective date of this final rule. This rule provides H-2 program violators with sufficient notice and opportunity to demonstrate their intention and ability to comply with program requirements and obligations. DHS acknowledges the commenters' concern that some employers may have agreed to pay a civil monetary penalty for alleged minor violations because they were unaware at the time of their agreement that this could be a violation potentially leading to a petition denial. However, because the new discretionary provisions do not mandate denial, these petitioners would have the opportunity to explain why they agreed to pay fines which USCIS would then take into consideration, along with all relevant factors including the egregiousness of the violation(s) and the severity or monetary amount of the fines paid, in determining whether the petitioner has the intent and ability to comply with H-2 program requirements and obligations. In exercising its discretion, DHS will consider all of the facts presented and in doing so, will accord appropriate weight to an employer's previous violations and actions based on the nature and severity of such violations and actions.

Comment: A professional association expressed concern with the "3-year lookback period" with respect to the proposal for mandatory denials based on certain violations and suggested that DHS should only look at the current year instead of a 3-year lookback period.

Response: DHS will not make any changes based on this comment. Initially, DHS notes that the "3-year lookback" period does not apply to all of the grounds for mandatory denial. In the NPRM, DHS proposed new 8 CFR 214.2(h)(10)(iv)(A), under which USCIS would deny an H-2 petition filed by a petitioner, or successor in interest to a petitioner, that has been the subject of one or more of the three actions enumerated in the provision. One such

action, under 8 CFR 214.2(h)(10)(iv)(A)(1) as proposed, is a final administrative determination by DOL or GDOL debaring a petitioner. However, this mandatory ground for denial applies only during the period of debarment. DHS did not propose a 3-year lookback period for this provision.

Under 8 CFR 214.2(h)(10)(iv)(A)(2) as proposed, a petition will be denied where a petitioner has been subject to "[a] final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that included a finding of fraud or willful misrepresentation of a material fact with respect to a prior H-2A or H-2B petition." The 3-year period in this provision is appropriate for the reasons explained in the NPRM: that is, that a 3-year timeframe captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements, and is generally sufficient to ensure that approval of an H-2 petition would not be detrimental to the rights of H-2 workers or the integrity of the H-2 program. 88 FR 65040, 65058 (Sept. 20, 2023). The commenter recommends that USCIS "look at the current year instead of a 3-year lookback period," but provides no further explanation as to why limiting review to the "current year" would be appropriate or whether the "current year" meant the current calendar year or fiscal year. Regardless, DHS declines to adopt this approach. Limiting review to the current year could render this provision largely ineffective, as such a short timeframe may not enable USCIS to consider the eligibility implications of a past H-2 program violation during adjudication of a subsequent petition, as intended. Thus, limiting this review could have little deterrent effect on a petitioner whose petition for a given year was already denied.

There is also a 3-year lookback under 8 CFR 214.2(h)(10)(iv)(A)(3) which, as proposed, applies with respect to "[a] final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition." Again, the commenter did not explain why limiting review to the current year would be appropriate. DHS is similarly concerned that limiting the review period to "the current year" with respect to this provision could render it largely ineffective and have little deterrent effect. Further, limiting 8 CFR 214.2(h)(10)(iv)(A)(3) to only 1 year would actually be more lenient than current 8 CFR 214.2(h)(5)(iii), which

states that a petitioner cannot establish requisite intent for 2 years after a violation of section 274(a) of the Act. DHS maintains that a 3-year period is more appropriate as this period captures an employer's reasonably recent activity and will generally be sufficient to ensure that approval of an H-2 petition will not be detrimental to the rights of H-2 workers, or the integrity of the H-2 program. Therefore, DHS will not make any changes as a result of this comment.

Comment: A couple of advocacy groups, a research organization, and a union stated that while first-time offenders should be subject to a 3-year timeframe under proposed 214.2(h)(10)(iv)(A), repeat offenders should be permanently banned from the H-2 programs.

Response: DHS does not believe that a permanent "ban" would be reasonable, even for repeat offenders, as it would fail to account for changes in practice, policies and personnel by an employer which may become less relevant as the underlying violation becomes more remote in time. As discussed in the NPRM and noted above, DHS believes that a 3-year timeframe is appropriate as it captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements. Therefore, DHS declines to adopt the suggestion.

Comment: A union supported a mandatory denial of petitions based on a final debarment determination by DOL for violations of H-2 regulations and contractual obligations. The union suggested that DHS modify proposed 8 CFR 214.2(h)(10)(iv)(A)(1) to impose a mandatory denial based on a final determination of debarment that was issued by DOL within 5 years of filing a new H-2 petition, rather than only if a petitioner files with DHS "during the debarment period, or if the debarment occurs during the pendency of the petition." The commenter concluded that these revisions would help ensure "bad actors" stay out of the H-2 program. Similarly, while discussing the grounds for denial or revocation under proposed 8 CFR 214.2(h)(10)(iv)(A)(2) and (3), the union also suggested that rather than the proposed 3-year timeframe, the Department require a 5-year look-back period for all actions, convictions, and determinations included under the proposed section. The commenter reasoned that this change would further encourage compliance by employers and agents and promote consistency with INA's

statutory 5-year limit on DHS's ability to deny petitions. Another union that supported the mandatory and discretionary denial provisions similarly urged that the look back period for violations be extended from 3 to 5 years.

Response: DHS declines to modify 8 CFR 214.2(h)(10)(iv)(A)(1) in this final rule to impose a mandatory denial based on a final determination of debarment that was issued by DOL within 5 years of filing a new H-2 petition. In the final rule, as in the proposed rule, denial by USCIS will be mandatory only "if the petition is filed during the debarment period, or if the debarment occurs during the pendency of the petition." Limiting mandatory denials to the period of debarment is appropriate because it will be consistent with the debarment period imposed by DOL. Beyond the mandatory denials during the period of debarment, USCIS may still consider the debarment under the circumstances described in 8 CFR 214.2(h)(10)(iv)(B) and (C) if it finds that the debarment calls into question a petitioner's or successor's intention and/or ability to comply with H-2 program requirements.

DHS also declines to impose a 5-year lookback period under new 8 CFR 214.2(h)(10)(iv)(A)(2) and (3). As discussed in the NPRM and noted above, DHS believes that a 3-year timeframe is appropriate as it captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to their current intention and ability to comply with program requirements, while also recognizing that employers may make changes to practice, policies, and personnel over time to remedy deficiencies.

Comment: A couple of advocacy groups and a research organization generally supported proposed 8 CFR 214.2(h)(10)(iv)(B) and suggested that DHS should not limit this provision to a 3-year look-back timeframe. The commenters reasoned that a "severe labor violation 5 years ago" could indicate an ongoing "inability or unwillingness" to comply with H-2 program requirements, while a "relatively minor one" might not. The commenters also stated that the 3-year timeframe should be removed, as recency is already a factor that USCIS would be instructed to consider.

Response: DHS declines to adopt this suggestion. While, as noted by the commenters, "recency" is a relevant factor listed in 8 CFR 214.2(h)(10)(iv)(C), DHS recognizes that employers have an interest in knowing that, at some point, a long-ago violation,

standing alone, will no longer be a basis for calling into question their ability and intent to comply with H-2 program requirements. Establishing a set timeframe is appropriate because it recognizes the employer's interest in certainty and accounts for changes in practice, policies and personnel by an employer which may become more relevant as the underlying violation becomes more remote in time.

g. Other Comments Related to the Mandatory and Discretionary Denial Provision

Comment: A couple of advocacy groups and a union expressed support for the mandatory and discretionary denial provisions that will apply to petitioners and successors in interest. The advocacy group referenced a comment from its members that it said showed employers commonly sidestepped legal consequences by reorganizing under new corporate entities and continuing abusive employment practices. The commenter stated that by extending the mandatory and discretionary denial provisions to successors in interest, the Department would address these situations.

Response: DHS appreciates these comments and agrees that the provisions at 8 CFR 214.2(h)(10)(iv) should also apply to successors in interest.

Comment: A trade association expressed support for DHS's statement in the proposed rule preamble that USCIS would distinguish between a single or minor violation of OSHA requirements versus a pattern of serious non-compliance. The commenter also expressed support for the relevant factors USCIS stated it would consider in 8 CFR 214.2(h)(10)(iv)(C). However, the commenter suggested that DHS "reinforce this position by providing detailed guidance following issuance of a final rule," reasoning it would benefit petitioners and DHS staff.

Response: As explained above, the provision at 8 CFR 214.2(h)(10)(iv)(B)(3), as finalized in this rule, covers "any applicable employment-related laws or regulations." This provision allows USCIS to consider discretionary denial for a wide variety of administrative or judicial determinations that are relevant to a petitioner's intention or ability to comply with H-2 program requirements. DHS believes that this provision is sufficiently clear. However, USCIS may consider providing additional policy guidance related to this provision, similar to the guidance provided in the NPRM and in this final rule, on the uscis.gov website or in the

USCIS Policy Manual. Similarly, DHS believes that the provision at 8 CFR 214.2(h)(10)(iv)(C) is clear in that it explains that USCIS will consider "all relevant factors" in determining whether a violation calls into question a petitioner's or successor in interest's intention and/or ability to comply with H-2 program requirements. The provision goes on to provide a non-exhaustive list of eight factors that may be considered in making the determination. Again, although this provision provides sufficient clarity and guidance to the regulated public and to USCIS adjudicators, USCIS may consider providing additional guidance on the uscis.gov website or in the USCIS Policy Manual.

Comment: Several commenters generally supported proposed 8 CFR 214.2(h)(10)(iv)(B) and provided suggestions on how to strengthen this provision. For example, an advocacy group expressed support for proposed 8 CFR 214.2(h)(10)(iv)(B), reasoning it would help curb abusive employers' exploitation of the program and level the playing field for "scrupulous" employers. However, the commenter suggested the Department strengthen 8 CFR 214.2(h)(10)(iv)(B)(3) to include housing-related violations, reasoning that H-2 workers are typically subject to "noncompliant, unsanitary, and unsafe" housing. Similarly, an advocacy group said that under 8 CFR 214.2(h)(10)(iv)(B), failure to provide safety training to H-2 workers should be grounds for denial, adding that the first 1 to 2 weeks of employment should be devoted to training that aligns with United States' labor laws for domestic workers. A research organization suggested 8 CFR 214.2(h)(10)(iv)(B)(3) be expanded to include "a number of other violations."

Response: DHS declines to make changes to 8 CFR 214.2(h)(10)(iv)(B)(3) based on these comments. DHS believes the wording of the provision at 8 CFR 214.2(h)(10)(iv)(B)(3), as finalized in this rule, is appropriately broad to allow USCIS to consider discretionary denial for a wide variety of administrative or judicial determinations, including those relating to housing, which are relevant to a petitioner's intention or ability to comply with H-2 program requirements. As the provision covers "any applicable employment-related laws or regulations," it is unnecessary to specifically list each category of violation covered.

For instance, with respect to the housing-related violations noted by one commenter, because H-2A employers are required to provide employee housing, the laws and regulations

governing the provision of such housing would constitute “applicable employment-related laws and regulations,” and a final determination that an H-2A employer had violated such laws or regulations in its provision of housing to workers could potentially call into question the petitioner’s intention or ability to comply with program requirements. In addition, while another commenter’s suggestion to institute specific training requirements for workers is outside of the scope of this rulemaking, to the extent that current or future laws or regulations prescribe specific training requirements applicable to H-2 workers, they would likewise be considered “applicable employment-related laws or regulations” for the purposes of this provision.

Comment: A research organization and a union suggested that USCIS create “a list of key labor, employment, wage and hour, civil rights, disability, anti-trafficking, and anti-discrimination laws” that if an employer violated, would establish evidence that they are unlikely to follow employment and immigration laws and thus, be prohibited from having a petition approved for an H-2 worker. The research organization added that DHS should make denial of petitions based on violations of these laws mandatory if the violations had occurred in the preceding 5 years. The commenters also suggested that a list of violations work best in tandem with a “front-end screening process” from DOL. As described by the commenters, this “front-end screening process” would require employers to first register with DOL for eligibility to use the program. DOL would then screen the employers’ records on compliance with labor and employment laws up front at the TLC stage. However, the commenters concluded that, even absent a new screening process at the DOL level, DHS should, at a minimum, build on 8 CFR 214.2(h)(10)(iv)(B) by creating a list of key violations, which could make significant progress in keeping lawbreaking employers out of the H-2 programs.

Response: DHS declines to create a specific list of additional legal violations or to make a violation on this list a specific ground for mandatory denial if the violation occurred within the preceding 5 years. By including a very broad scope for the types of violation determinations that may lead to discretionary denial provision at 214.2(h)(10)(iv)(B) generally and the catch-all provision at 214.2(h)(10)(iv)(B)(3) specifically, DHS recognizes that the violations

underlying these determinations can vary widely in nature and severity, and believes it is appropriate to maintain a discretionary analysis that will allow consideration on a case-by-case basis.

Comment: A union urged DHS to create a mechanism for public entities, such as labor unions and advocacy groups, to report employers that have committed violations or might be attempting administrative changes to avoid successor in interest consequences, considering the breadth and scope of H-2 employers and recruiters.

Response: DHS declines to create a separate mechanism for public entities to report suspected immigration benefit fraud and abuse, which would include employer violations and employers undertaking administrative changes solely to avoid successor in interest consequences. Instead, DHS encourages public entities to report such information through the existing ICE Tip Form or other tip forms, as appropriate.⁷⁵

Comment: While expressing support for the mandatory and discretionary denials for certain violations section, an advocacy group urged the Department to create mechanisms for former employees of barred petitioners to connect with alternative H-2 employers, such as a recruitment database. The commenter reasoned that certain H-2 “sending communities” have limited numbers of recruiters and employers, which causes workers to decide between an abusive H-2 job or no job at all. The commenter added that the exclusion of an abusive employer from the program might result in a loss of economic opportunities for workers who chose the job out of necessity.

Response: DHS appreciates the commenters’ concerns and suggestions but will not be adopting the suggestions as part of this final rule. While DHS appreciates the commenters’ concerns about the need to provide workers with alternative non-abusive employers, DHS does not match or otherwise facilitate recruitment between an H-2 worker and a prospective H-2 employer. Creating a recruitment database or other mechanism for matching workers with H-2 employers is outside the scope of this rule. However, DHS may continue to consider these suggestions outside of the regulatory process.

3. Compliance Reviews and Inspections

Comment: Some commenters, including a research organization and a few unions, expressed support for USCIS’ investigative authority to ensure employers’ compliance with the proposed rule. A couple of unions urged USCIS to use the proposed rule to ensure confidentiality in USCIS interviews and explicitly mandate that USCIS interviews with H-2 employees take place without the employer or their representative present. A union proposed modified language for the discussion of site visits at 8 CFR 214.2(h) to specify that “[i]nterviews with H-2B workers must be taken in confidence,” similar to DOL’s Davis-Bacon regulations on prevailing wage labor standards investigations. See 29 CFR 5.6(a)(3). This commenter concluded that, if an H-2 worker knows that an interview is taken in confidence and that its contents will not be reported back to the employer, the H-2 worker will be empowered to speak more freely about potential violations.

Response: The regulatory text in this rulemaking states that petitioners and employers must agree to allow USCIS to “interview [] the employer’s employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer’s representatives, as a condition for the approval of the petition.” New 8 CFR 214.2(h)(5)(vi)(A), (h)(6)(i)(F). As such, the regulatory text already states that employee interviews may be conducted without the employer or employer’s representative present. DHS declines to add regulatory text mandating that employee interviews take place without the employer or their representative present because of the operational and logistical issues it could present. Additionally, some employees may have a genuine wish to have an employer’s representative present and USCIS may grant that request.

DHS declines the suggested revision to the regulatory text to state that interviews of H-2 workers “must be taken in confidence.” DHS recognizes that workers providing information to USCIS officers during interviews can place the worker in a precarious position, and that assurances of confidentiality may encourage a worker to speak more freely. DHS anticipates that the expansion of the whistleblower protections in this rule will help counteract the potential negative consequences that workers may face when cooperating with USCIS officers in interviews. To the extent practicable, USCIS seeks to protect the privacy of

⁷⁵ The ICE Tip Form is available online at <https://www.ice.gov/webform/ice-tip-form> (last visited July 29, 2024). Anonymous tips may alternately be reported to ICE via the toll-free ICE Tip Line, (866) 347-2423.

workers when using information they have provided to support any adjudicative decision. However, USCIS must also adhere to 8 CFR 103.2(b)(16)(i) which states that for any decision based on derogatory information unknown to the petitioner, the petitioner will be advised of that fact and offered an opportunity to rebut the information. DHS also recognizes that sometimes workers may genuinely prefer to speak with their employer present. In that situation, USCIS may comply with the worker's preference and decline to remove the worker from the site to conduct the interview in confidence.

Comment: A couple of commenters, including a religious organization and a trade association, expressed support for USCIS' clarification of the scope and potential consequences for employers who fail to fully cooperate with USCIS with respect to on-site inspections. These commenters emphasized the importance of employers understanding what is required of them for on-site inspections and the consequences for noncompliance so that they avoid unnecessary penalties. A research organization recommended DHS repeal its October 27, 2021 policy memorandum, *Guidelines for Enforcement Actions in or Near Protected Areas*,⁷⁶ so that USCIS can broadly exercise the enforcement actions (including site inspections) proposed in the proposed rule, rather than being limited to certain areas or persons.

Response: DHS agrees with commenters that by providing clear requirements and expectations for inspections, verification, and compliance reviews, and adding transparency to the potential consequences of non-compliance, petitioners will have the information necessary to remain in compliance with the requirements of the H-2 program. Regarding the mentioned policy memorandum, USCIS does not anticipate that the requirements of that memorandum would interfere with the activities of USCIS officers conducting on-site inspections in a way that would limit their ability to interview pertinent individuals. Importantly, USCIS inspections, verifications, and compliance reviews are not enforcement actions, but rather are information gathering actions to ensure that entities remain in compliance with the terms and conditions of the H-2 petition that

was filed with USCIS. As noted in the proposed rule, the petitioner will be informed of and given the chance to respond to any information gathered from the site visit.

Comment: A professional association expressed support for the proposed rule's strengthening of USCIS activities such as audits and investigations, but opposed the provision that would allow government access to H-2A housing, calling this intrusive and burdensome. The professional association further stated that USCIS investigations should only include material and information collection related to H-2A program compliance.

Response: DHS appreciates the commenter's concern but will retain the language requiring H-2A petitioners and employers to allow access to sites where workers are or will be housed. This requirement is important to ensure USCIS has access to the workers themselves during the course of compliance review activities. As stated in the preamble of the NPRM, USCIS does not and will not conduct inspections regarding the standard of housing provided, however such inspections may, if in accordance with relevant law, be conducted by other Federal, State, or local agencies. 88 FR 65040, 65061 (Sept. 20, 2023).

Comment: Several individual commenters expressed concern about what standards USCIS would use to define noncooperation during on-site visits. Similarly, some commenters, including a business association, a professional association, and a couple of trade associations, expressed concern with the term "fully cooperate" used in the proposed rule at 88 FR 65040, 65061 (Sept. 20, 2023), writing that USCIS is unclear in explaining how it will decide what cooperation during site visits looks like.

Response: As discussed in the proposed rule, DHS's goal is to provide transparency to the compliance review process so that entities and individuals subject to those processes understand that USCIS' inability to verify pertinent facts, including where such inability is due to entities' or individuals' failure to fully cooperate, may result in denial or revocation of the petition. *Id.* With this rule, DHS is codifying its existing authority and clarifying the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections in response to these comments. *See* new 8 CFR

214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(2). In response to the commenters' request for clarification as to what cooperation during site visits is expected, DHS notes preliminarily that

the determination whether a person or entity is "fully cooperating" with a DHS inspection will depend on the facts of each case. In general, to "fully cooperate" in this context, entities would be expected to comply with the scope of the reviews and be responsive to investigators, including by: granting access to the premises, making a representative of the petitioner or employer available for questions, submitting or allowing review of pertinent records, providing access to workers and allowing interviews with such employees to take place in the absence of the employer or employer's representative and at a location mutually agreed to by the employee and USCIS officers, which may or may not be on the employer's property. Full cooperation also generally includes providing access to the sites where labor is performed and to worker housing, if applicable.

As described in the proposed rule, a petitioner or employer failing or refusing to fully cooperate "could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner's representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review HR records pertaining to the beneficiary(ies). Failure or refusal to fully cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the information requested within the time period specified, or did not respond to a written request for information within the time period specified." 88 FR 65040, 65061 (Sept. 20, 2023). Importantly, no denial or revocation for USCIS' inability to verify pertinent facts based on non-compliance would occur without the petitioner first being given notice of USCIS finding non-compliance and having a chance to rebut and present information on its own behalf in compliance with 8 CFR 103.2(b)(16).

Comment: Some commenters expressed opposition to the application of investigative authority to any documents or areas that another H-2 regulatory body already inspects and encouraged USCIS to coordinate with other agencies to avoid wasting Department or employer resources on duplicative reviews. Likewise, a joint submission and a professional association suggested USCIS may be overstepping its subject matter expertise and regulatory bounds when it comes to employment matters, noting specifically

⁷⁶ Dept. of Homeland Security, "Guidelines for Enforcement Actions in or Near Protected Areas" (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.

that DOL and State workforce agencies already exercise the same investigative authority that DHS seeks to codify. Similarly, while commenting on DHS's proposed codification of its authority for on-site inspections, a few commenters, including a professional association and trade associations, remarked that USCIS should ensure it is not overreaching or superseding the regulatory authority of other government entities.

Response: USCIS officers conduct verification and compliance reviews, including on-site verifications, to ensure compliance with the terms and conditions of the H-2 petition filed with USCIS. The focus of these reviews is on information that is needed by USCIS to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H-2 program. USCIS officers routinely coordinate with others in the Department and with other agencies to reduce duplicative investigations when possible. However, the occurrence of a review by another agency does not absolve the employer of its responsibility to fully cooperate with USCIS verification and compliance reviews, including on-site inspections. It remains the petitioner's burden to demonstrate eligibility for the benefit sought.⁷⁷

DHS recognizes that other agencies may exercise investigative authority pertaining to their respective mandates. However, DHS continues to exercise its own authority pursuant to INA sec. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, HSA sec. 451, 6 U.S.C. 271, and 8 CFR part 103, among other provisions of law,⁷⁸ under which USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. The existing authority to conduct inspections, verifications, and other compliance reviews is vital to the integrity of the immigration system as a whole and to the H-2A and H-2B programs specifically. In codifying its currently exercised authority, DHS will continue to review matters pertinent to H-2A and H-2B petition approval.

Although some issues, such as the duties of the offered job, may be applicable to both DHS authority and the authority of another agency, that overlap does not signify DHS "overstepping" its authority in reviewing information pertaining to that issue. To the extent that multiple agencies are involved in the administration of the H-2A and H-2B program, DHS and other agencies may each maintain independent authority to ensure that entities and individuals are abiding by the terms and conditions of the H-2A and H-2B programs.

a. Legal Authority for Compliance Reviews and Inspections

Comment: A research organization stated that the proposed on-site inspections by USCIS FDNS are illegal, asserting that there is no authority to authorize USCIS to conduct on-site inspections. The commenter stated that the HSA refers to USCIS' duties as solely immigration-related "[a]djudications," and Congress has never enacted any statute that overturns the prohibition on USCIS engaging in law enforcement, investigations, and intelligence gathering. The commenter went on to state that the HSA expressly prohibits any reorganization of agency functions by the Executive, and the NPRM provides no citation for FDNS's authority to conduct investigations and inspections. Further, the commenter said INA sec. 286(m) provides that Immigration Examinations Fee Account (IEFA) funds are earmarked "for expenses in providing immigration adjudication and naturalization services," and if USCIS insists on moving forward with FDNS inspections, it should clearly state that those inspections will not be paid for by IEFA funds. The commenter concluded that DHS should follow the HSA, transfer all investigations to ICE—which has express legal authority and capacity to carry out investigative and intelligence-gathering activities, and cease the unlawful diversion of IEFA funds to FDNS.

Response: DHS disagrees with the commenter that it lacks legal authority to conduct on-site inspections through USCIS FDNS. DHS also disagrees that DHS should transfer all investigations to ICE. Finally, DHS disagrees with the assertion that it is unlawfully diverting IEFA funds to FDNS. Specifically, this rulemaking codifies existing authorities exercised by USCIS FDNS in the Code of Federal Regulations, and does not

include any changes to the funding structure or sources of FDNS.⁷⁹

In 2004, USCIS established the FDNS in response to a congressional recommendation to establish an organization "responsible for developing, implementing, directing, and overseeing the joint USCIS-ICE anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits."⁸⁰ FDNS also oversees a strategy to promote a balanced operation that distinguishes USCIS' administrative and adjudicatory authority, responsibility, and jurisdiction from ICE's criminal investigative authority.

The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. The Secretary of Homeland Security is authorized to administer and enforce the immigration laws. INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The Secretary may confer this authority to any DHS employee, to the extent permitted by law. INA sec. 103(a)(4), 8 U.S.C. 1103(a)(4); HSA sec. 102(b)(1), 6 U.S.C. 112(b)(1); 8 CFR 2.1.⁸¹ Moreover, under 6 U.S.C. 112(a)(3), all functions of officers, employees, and organizational units of [DHS] are vested in the Secretary. The Secretary of Homeland Security delegated to USCIS the authority to administer the immigration laws, including the authority to investigate civil and criminal violations involving applications or determinations for benefits.⁸² Following

⁷⁹ As noted in the preamble of the USCIS fee rule, DHS interprets 8 U.S.C. 1356(v)(2)(B) as providing supplemental funding to cover activities related to fraud prevention and detection and not prescribing that only those funds may be used for that purpose, and FDNS is funded from both the IEFA and the Fraud Prevention and Detection Account. 89 FR 6194, 6247 (Jan. 31, 2024).

⁸⁰ See Conference Report to accompany H.R. 4567 [Report 108-774], "Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005," p. 74 (Oct. 9, 2004), <https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf>.

⁸¹ Pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Also, because INA sec. 103(a)(4) refers to "Service", i.e. Legacy INS, see also 8 CFR 1.2 which defines Service as "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears."

⁸² Delegation to the Bureau of Citizenship and Immigration Services, Department of Homeland

Continued

⁷⁷ See INA sec. 291, 8 U.S.C. 1361; see also USCIS, Policy Manual, Chapter 4—Burden and Standards of Proof ("The burden of proof to establish eligibility for an immigration benefit always falls solely on the benefit requestor. The burden of proof never shifts to USCIS."), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-4>.

⁷⁸ See, e.g., INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

the dissolution of the Immigration and Naturalization Service (INS) and the creation of DHS on March 1, 2003, authority to “administer the immigration laws” was delegated to USCIS.⁸³

USCIS was delegated the “authority to investigate alleged civil and criminal violations of the immigration laws, including but not limited to alleged fraud with respect to applications or determinations within the USCIS, and make recommendations for prosecutions, or other appropriate action when deemed advisable.”⁸⁴ USCIS also has the “authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357(a), (b), and (f), and under 235(d) of the INA, 8 U.S.C. 1225(d).”⁸⁵

USCIS and ICE were granted concurrent authority to investigate immigration benefit fraud.⁸⁶ Through written agreement, ICE agreed to take the lead on criminal and other enforcement investigations. USCIS agreed to focus on detecting and combating fraud associated with adjudicating applications and petitions.⁸⁷ The Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, granted the Secretary of Homeland Security the authority to administer and enforce provisions of the INA, as amended, INA sec. 101, 8 U.S.C. 1101 *et seq.* The Secretary, in Homeland Security Delegation No. 0150.1, delegated certain authorities to USCIS.

Security Delegation Number 0150.1, Issue Date: 06/05/2003. The Bureau of Citizenship and Immigration Services was the initial name for USCIS following the dissolution of the Immigration and Naturalization Service.

⁸³ See Delegation 0150.1(II)(H) (June 5, 2003).

⁸⁴ See Delegation 0150.1(II)(I) (June 5, 2003).

⁸⁵ See Delegation 0150.1(II)(S) (June 5, 2003).

⁸⁶ In Section (II)(I) of DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and in section 2(I) of DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, USCIS and ICE received concurrent authority to investigate fraud involving immigration benefits available under the INA. In their respective delegations, USCIS and ICE were further directed by the Secretary of Homeland Security to coordinate the concurrent responsibilities provided under these Delegations. A memorandum of agreement was undertaken to advance the coordination between USCIS and ICE, as authorized by these Delegations. The Secretary of Homeland Security has properly delegated authority to immigration officers, including immigration officers who work for FDNS.

⁸⁷ Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, September 25, 2008; see also Memorandum of Agreement between USCIS and ICE Regarding the Referral of Immigration Benefit Fraud and Public Safety Cases (Dec. 15, 2020).

FDNS’s activities fall squarely within this delegation.

Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines “immigration officer” to include a broad range of DHS employees including immigration agents, immigration inspector, immigration officer, immigration services officer, investigator, and investigative assistant. As duly appointed immigration officers, FDNS immigration officers may question noncitizens based on the authority delegated by the Secretary of Homeland Security. Furthermore, INA sec. 287(a)(1), 8 U.S.C. 1357(a)(1), provides any officer or employee of the Service with the authority to (pursuant to DHS regulations) without warrant “interrogate any alien or person believed to be an alien as to his right to be or remain in the United States.” See also 8 CFR 287.5. The regulation at 8 CFR 287.8(b) specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question individuals so long as they do not restrain the person they are questioning. The Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are “especially important pieces of evidence.”⁸⁸ These investigations and reports help ensure that adjudicative decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.

With respect to the assertions that DHS is unlawfully diverting funds to FDNS, DHS also disagrees with such assertions. USCIS’ funding authority for FDNS is discussed in detail in the Fee Final Rule where DHS addressed similar comments. 89 FR 6194, 6246–6248 (Jan. 31, 2024); 89 FR 20101 (Apr. 1, 2024).

4. Whistleblower Protection

a. Support for Whistleblower Protections

Comment: Many commenters expressed support for incorporating whistleblower protections in the proposed rule, with some commenters, including some unions, stating that workers would feel safer in reporting abuses or violations without fear of retaliation. A joint submission stated their support for expanding the activities covered under whistleblower protections.

⁸⁸ *Matter of P. Singh*, 27 I&N Dec. 598, 609 (BIA 2019) (“Detailed reports from on-site visits and field investigations are especially important pieces of evidence that may reveal the presence of fraud.”).

A couple of advocacy groups expressed strong support for the provision, particularly the inclusion of seeking legal services as a protected activity and for considering loss of H–2 status due to an employer’s retaliatory action an “extraordinary circumstance,” and urged DHS to finalize it as soon as possible. An advocacy group also expressed support for expanding the definition of protected activities, even if it would result in the language for H–2 differing from the H–1B whistleblower provision. An individual commenter expressed support for the implementation of H–2 whistleblower protection in alignment with protections for H–1B workers. The commenter reasoned that such protections would not only give nonimmigrants the ability to voice concerns about wrongdoing, malpractice, or fraud, but they would also hold industries accountable, creating a better environment for H–2 workers. Similarly, a union expressed that allowing H–2 workers the flexibility to call out employers’ program violations makes all workers safer.

Response: DHS appreciates the comments about the need for whistleblower protections for H–2 workers. DHS anticipates that these revisions will help H–2 workers feel safer in reporting violations, improving worker conditions for all employees at the location.

Comment: Discussing a series of court cases that emphasized “the crucial nature of provisions protecting workers against employer reprisals for filing claims and opposing employer violations” and expansively interpreted the types of conduct protected against retaliation, a joint submission expressed support for the proposed whistleblower provisions and DHS’s overall efforts to enhance worker protections as part of the broader changes alongside the DOL’s proposed changes to the H–2A program.⁸⁹ The commenters stated that “the total of such systemic change is especially essential” to protecting vulnerable H–2 workers, many of whom “are vulnerable to threats of violence or other forms of retaliation against their family members in their home country, as well as to recruiter threats to blacklist them from any future H–2 employment.”

Response: DHS agrees with the commenters that H–2 workers are vulnerable to retaliation and expects that this rule, along with existing DOL

⁸⁹ See “Improving Protections for Workers in Temporary Agricultural Employment in the United States,” 88 FR 63750 (Sept. 15, 2023). DOL subsequently published a corresponding final rule on April 29, 2024. 89 FR 33898.

regulations,⁹⁰ will encourage H–2 workers to report violations with less fear of retaliation.

Comment: While expressing support for whistleblower protections in the proposed rule, several commenters, including trade associations and a professional association, urged USCIS to better define terms such as “retaliatory action” and “nondocumentary documentation.” A couple of the trade association commenters added that employers require these definitions to implement training accordingly. A union recommended DHS include “charging of illegal recruitment fees” as an example of a labor dispute for which claims would be protected under the whistleblower protections, as well as ensuring that collective bargaining and other union activities warrant whistleblower protection.

Response: DHS appreciates the general support but declines to adopt the specific suggestions. The comments requesting that DHS define certain terms did not offer suggestions as to what those definitions should be. As explained in the proposed rule, to ensure flexibility, and to track the current approach for H–1B petitions at 8 CFR 214.2(h)(20), DHS did not propose to define “retaliatory action.” Nevertheless, DHS offered a non-exclusive list of examples, to include harassment, intimidation, threats, restraint, coercion, blacklisting, intimidating employees to return back wages found due (“kickbacks”), or discrimination, which could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity. In determining what constitutes “retaliatory action,” DHS will consider all relevant facts presented, including those vulnerabilities particular to H–2 workers. DHS also notes that it did not use the phrase “nondocumentary documentation.” Instead, DHS proposed requiring “credible documentary evidence . . . indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity.” In order to allow flexibility in the types of documentation that may be submitted, DHS did not propose specifying any particular form that a “claim” or the “credible documentary evidence” must take. DHS recognizes that credible evidence can take many forms, some of

which it might not be able to foresee, and anticipates that the flexible credible documentary evidence standard, without further restrictions, will balance the need for evidence with the special challenges vulnerable H–2 workers may face in collecting evidence.

Comment: A union suggested that the reasonableness of a claim of program violations should be considered from the H–2 worker’s perspective, similar to the decision in *Stericycle, Inc.*, in which the National Labor Relations Board explained that, in analyzing whether a work rule has a “reasonable tendency to chill employees from exercising their . . . rights,” it will “interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer”⁹¹ The commenter recommended DHS use similar language to revise 8 CFR 214.2(h)(10)(iv)(D)(2).

Response: DHS appreciates this suggestion. While DHS is not bound by NLRB’s decision in *Stericycle, Inc.* decision, DHS recognizes the importance of setting a standard that considers the perspective of an employee who is subject to an employer’s work rule and economically dependent on the employer. As discussed throughout the proposed rule and this final rule, H–2 workers are a vulnerable population at risk for retaliation against themselves and their family. Accordingly, new 8 CFR 214.2(h)(20) states that “USCIS will determine the reasonableness of any claim from the perspective of a reasonable person in the H–2A or H–2B worker’s position.” This will be similar to the language proposed and finalized for 8 CFR 214.2(h)(10)(iv)(D)(2), as recommended by the commenter.

Comment: A union expressing support for these protections urged DHS to ensure H–2 workers receive training—in a language they understand—on their rights just prior to their departure for the United States. A religious organization expressing support for the proposed whistleblower protections recommended that DHS provide the protections in 8 CFR 214.2(h)(2) to workers in a language they understand.

A union stated that DHS should work alongside other Federal agencies to improve access to and expedite requests for status protections during a whistleblower claim. A joint submission similarly remarked that other agencies with a similar purview, such as DOL, do not have enough time to investigate claims or ensure temporary immigration

relief for claimants. Accordingly, the commenter, along with an advocacy group, urged for the proposed policy to be adopted immediately on an interim basis until it is finalized.

An advocacy group cited multiple sources demonstrating the pervasiveness of blacklisting—a form of employer retaliatory action that can make it difficult for H–2 workers to find new positions—in the H–2 program, creating added fear that prevents H–2 workers from coming forward as whistleblowers. The group urged DHS to take further steps to specifically counter blacklisting, including (but not limited to) providing work authorization and parole to any worker who brings a credible report of blacklisting to a labor agency.

Response: DHS appreciates these comments and anticipates that this final rule will adequately address their concerns insofar as the issues are within DHS jurisdiction. DHS agrees that workers should understand their rights. Currently, DOS provides H–2 visa recipients with a Know Your Rights informational pamphlet, sometimes known as a Wilberforce pamphlet.⁹² The pamphlet explains that retaliation against workers reporting abuse is unlawful and provides information on programs available to victims of retaliation. The pamphlet is currently available in more than 50 languages, with new translations being added on a continual basis.

DHS also appreciates the interest in interagency efforts to reduce retaliation. DHS notes that DOL recently broadened 20 CFR 655.135(h) to explicitly protect certain activities workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation. 89 FR 33898, 33998–99 (Apr. 29, 2024). DHS anticipates that interagency cooperation is possible without additional revisions to this rule. While DHS agrees with the commenter that protections from retaliation are urgently needed, DHS is finalizing this rule rather than implementing this one aspect of the proposal on an interim basis.

DHS recognizes the harms caused by blacklisting and appreciates the commenters’ concerns about this issue. DHS explicitly stated in the preamble to the proposed rule that retaliatory actions include blacklisting and anticipates that the final rule, as drafted, will help address such actions by an employer. DHS will not, in this rule,

⁹⁰ See, e.g., 20 CFR 655.135 (H–2A); 29 CFR 501.4 (H–2A); 20 CFR 655.20(n) (H–2B); 29 CFR 503.16(n) (H–2B).

⁹¹ *Stericycle, Inc.*, 372 NLRB 113, 114 (NLRB Aug. 2, 2023).

⁹² The English language version of this pamphlet is available at DOS, “Know Your Rights; National Human Trafficking Hotline,” <https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf>.

implement further steps, such as providing work authorization and parole to any worker who brings a credible report of blacklisting to a labor agency. DHS did not propose to provide parole or work authorization in these circumstances, and the suggestions exceed the scope of this rulemaking. However, DHS notes that as a matter of prosecutorial discretion, it may defer removal action against individual noncitizens on a case-by-case basis, and that a noncitizen granted such deferred action may, per 8 CFR 274a.12(c)(33), apply for and obtain employment authorization for the period of deferred action if they establish “an economic necessity for employment.”⁹³ This process may, under appropriate circumstances, be applicable to workers who bring credible reports of blacklisting to a labor agency.

Comment: A religious organization supported the proposed whistleblower provision but recommended that DHS simplify, outline, and provide to workers an explanation of this process “so that the workers are able to submit complaints to DHS regarding retaliation.” The commenter also urged DHS to include in the whistleblower process the opportunity for certifications (I–918 Supplement B) or declarations (I–914 Supplement B) for U or T visa status.

Response: DHS appreciates the opportunity to clarify what might be a misunderstanding concerning the nature of the whistleblower provision at new 8 CFR 214.2(h)(20)(ii). This provision, as proposed and as finalized, does not create a new process in which an H–2 worker can submit a complaint regarding retaliation directly to DHS. Instead, this new provision allows a petitioner filing an H–2 petition requesting an extension of stay or change of status on behalf of a beneficiary to demonstrate that the beneficiary’s loss or failure to maintain H–2A or H–2B status was due to a retaliatory action from their employer. If DHS determines such documentary evidence to be credible, DHS may consider any loss or failure to maintain H–2 status by the beneficiary related to such retaliatory action as an “extraordinary circumstance” for purposes of 8 CFR 214.1(c)(4) and 8 CFR 248.1(b), and DHS may grant a discretionary extension of H–2 stay or a change of status to another nonimmigrant classification, as

applicable. This provision does not affect the existing processes or requirements for an H–2 beneficiary to apply for certifications for U or T nonimmigrant status.

b. Opposition to Whistleblower Protections

Comment: Multiple commenters, including a joint submission, a professional association, and a State Government, expressed concern that the whistleblower protections as written give H–2 workers too much power and may incentivize workers to make bad faith claims about employer violations. Two commenters expressed concern that the standard was too broad, with one recommending limiting whistleblower protections to “serious violations involving health and safety,” while another felt a formal report should be required evidence. Similarly, a State Government remarked that with the proposed whistleblower protections, DHS would eliminate employers’ protections.

A business association expressing opposition to the proposed whistleblower standards stated that H–2 workers are not as vulnerable as the proposed standards assume and DHS does not offer any specific evidence that these lowered standards would alleviate any vulnerability. A professional association questioned DHS’s authority to decide protected activities for whistleblowers.

A couple of commenters, including a joint submission and an association of State Governments, urged DHS to clarify how the whistleblower provision would be enforced or how claims would be investigated. The association of State Governments expressed concern that the change in protections may be costly to employers and that employers may not receive due process protections.

Response: DHS appreciates the commenters’ concerns about the broadness of the standard and the potential for bad faith claims of violations but declines to make changes in response to these comments. First, the “credible documentary evidence” standard should decrease any potential for frivolous or bad faith claims. Second, DHS does not anticipate that the new whistleblower protections would significantly incentivize beneficiaries to make false claims of retaliation. New 8 CFR 214.2(h)(20)(ii) does not create a new process for H–2 beneficiaries to directly notify DHS of a violation of potential violation of their rights. Instead, new 8 CFR 214.2(h)(20)(ii) will only apply when a petitioner files an H–2 petition requesting an extension of stay or

change of status on behalf of an H–2 beneficiary. An employer seeking to extend the stay of their own employee is unlikely to admit their own wrongdoing. Assuming a different employer was willing to advance a bad faith claim, DHS anticipates that the “credible documentary evidence” standard should decrease that risk.

Third, DHS emphasizes that these provisions are not intended to penalize employers. Instead, they are designed to better enable an employee who has a reasonable claim of retaliation to extend their stay or change status. A grant of the request for an extension of stay or change status for an H–2 worker under new 8 CFR 214.2(h)(20)(ii) based on a claim of retaliation by a specific employer will not, for example, trigger a discretionary or mandatory ground for denial of a petition filed by that employer. Only in cases where the claim leads to a separate proceeding that confirms an employer violation, with adequate notice and an opportunity to respond, would the employer face any adverse consequences. Because adjudications of the extension of stay or change of status requests are not punitive to a prior employer, DHS declines to elaborate further on how these extensions of stay or change of status requests will be adjudicated and does not believe that this provision raises due process concerns for employers. For the same reason, given that the adjudication of these requests does not, by itself, penalize an employer, DHS concludes there is no need to limit the types of whistleblower claims that can support an extension of stay or change of status request to formal reports or serious violations involving health and safety.

E. Worker Flexibilities

1. Grace Periods/Admission Periods

a. General Support for Revisions to Grace Periods

Comment: Some commenters, including an advocacy group, a business association, and a joint submission, generally supported the proposed changes to grace periods. A professional association supported the proposed worker flexibilities granting grace periods to H–2 workers, especially H–2B workers. An advocacy group said the proposals to grant workers greater flexibility in the form of grace periods and extended periods of admission are important steps towards realizing mobility between H–2 employers and alleviating the harms caused by the H–2 program’s structure. A business organization stated that its members welcomed the proposed grace periods as

⁹³ USCIS, “DHS Support of the Enforcement of Labor and Employment Laws,” <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws> (last updated Apr. 11, 2024).

the increased flexibility in these grace periods will help them meet their workforce needs. The commenter noted that the grace periods will help workers settle, which alleviates stress for both the employer and employee, and will help companies seeking to hire additional workers. Some commenters generally supported the proposed pre- and post-validity grace periods (further discussed below) without providing specific rationale.

Response: DHS appreciates these commenters' feedback on the benefits of the new grace periods, which will improve worker mobility and protections as well as benefit employers. DHS will finalize the grace periods without change from the NPRM.

b. Harmonization of H-2 Grace Periods

Comment: Multiple commenters, mostly trade associations and a business association, appreciated the harmonization of pre- and post-validity grace periods between the H-2A and H-2B programs, with commenters saying it would provide workers and employers with needed flexibilities to minimize challenges associated with transferring workers to a new contract. A joint submission said the proposed pre- and post-validity periods would be a desirable change that improves worker mobility and reduces the burden on both workers and employers.

A couple of trade associations said that aligning these periods among both programs would help reduce potential confusion in understanding the Department's "already overly complicated" regulatory structure governing the H-2A and H-2B programs. A joint submission similarly said the harmonization makes the two programs more efficient and provides uniformity in standards for affected employers and employees. An advocacy group said the alignment would improve certainty and predictability for H-2 workers and is a step towards improving H-2B workers' ability to seek legal support if needed. An advocacy group wrote that ensuring that pre- and post-employment admissions periods align for H-2A and H-2B workers would make it easier for advocates to inform workers about their rights and would improve certainty and predictability for workers. Some commenters, including several business associations, said the harmonization also allows sufficient time for successive petitions to be filed and timely processed by USCIS prior to the next contract start date.

Response: DHS appreciates the commenters' feedback on the benefits of harmonizing the length of the pre- and

post-validity grace periods for H-2A and H-2B workers and will finalize these grace periods without change.

Comment: Without elaborating, a religious organization invited DHS to consider expanding the grace period for H-2 beneficiaries to be consistent with the grace period afforded to H-1B workers, stating that many of the proposed changes incorporate other H-1B protections to the H-2 programs.

Response: The length of the new grace periods for H-2 workers finalized in this rule will be the same as, and in some cases longer than, the grace periods afforded to H-1B workers. Specifically, H-2A, H-2B, and H-1B workers will have a pre-validity grace period of up to 10 days. New 8 CFR 214.2(h)(5)(viii)(B); 8 CFR 214.2(h)(6)(vii); 8 CFR 214.1(l). H-2A and H-2B workers will have a post-validity grace period of up to 30 days, while H-1B workers have a post-validity grace period of up to 10 days. New 8 CFR 214.2(h)(5)(viii)(B); 8 CFR 214.2(h)(6)(vii); 8 CFR 214.1(l). H-2A, H-2B, and H-1B workers will have a grace period for cessation of employment of up to 60 days. 8 CFR 214.2(h)(13)(i)(C); 8 CFR 214.1(l). H-2A and H-2B workers will have a grace period of up to 60 days upon the revocation of the employer's petition, but H-1B workers have no such grace period. New 8 CFR 214.2(h)(11). These different grace periods take into consideration the special vulnerabilities of H-2 workers.

c. Post-Validity Grace Period of Up to 30 Days Following Expiration of the Petition

Comment: Some commenters specifically supported the proposed expansion of the grace period from 10 to 30 days following the expiration of the petition for H-2B workers, with most stating that it would likely alleviate some of the pressure employers feel due to the statutory cap when timing the filing of subsequent petitions against the expiration of a previous contract. The commenters added that the expansion would provide H-2B workers the time and flexibility to find continued subsequent employment without risk. A business association, examining the grace period in combination with the enhanced portability provisions, wrote that employers are confident that the ability of H-2 workers to find subsequent employment would inure direct benefits to their companies. The commenter said this would help H-2B employers avert cap-related issues, as these individuals have already been subject to the cap and would not be subject to the cap if they

transfer from one company to another in the same fiscal year.

A professional association similarly stated that, with the unpredictability of DOL processing times and the unavailability of additional visa numbers, this proposed grace period gives workers the opportunity and the time needed to find alternative H-2 employment from within the United States without having to potentially leave the United States and, if applicable, then subject themselves to the annual H-2B cap. The commenter also said that employers benefit, as this grace period will make it easier for them to transfer workers to their employ within the United States because the workers will remain in status for up to 30 days after the expiration of their program end date.

An advocacy group stated that, without this post-contract admission period, it would be "near impossible" for H-2 workers to take advantage of the proposed rule's portability provisions, as workers seeking to use these flexibilities may need time to look for another job, or the start date of the new job may not align precisely with the end date of their existing job. The commenter went on to state that a 30-day post-contract grace period would give workers returning to their countries of origin after the end of their H-2 contract period time to prepare for their departure. In addition, the commenter said the 30-day period would allow H-2 workers to address any violations of their rights by seeking legal assistance after they have finished employment, during regular business hours, and within the United States. A joint submission in support of the proposal stated that, where a worker seeks additional H-2 employment or where a worker seeks to pursue complaints relating to their employment, the current 10-day period of authorized presence is "grossly inadequate."

Response: As noted in the NPRM and by commenters, the extension of the post-validity grace period will benefit both H-2 workers and employers by facilitating the use of the new portability provision. It will also give workers more time to prepare for departure or applying for an extension of stay based on a subsequent offer of employment. As also noted by commenters, the extension of this grace period may also provide workers more time to address any violations of their rights and pursue complaints relating to their employment.

Comment: A research organization stated that this 30-day grace period should be lengthened to at least 60 days to ensure that workers do not find

themselves out of status when they cannot find an additional employer within such a short period.

Response: DHS declines to extend the length of the new post-validity grace period from up to 30 days to at least 60 days. Workers who complete their contracted employment should know in advance when their status ended and should have sufficient time to prepare for departure or make other arrangements within the 30-day grace period finalized in this rule, compared to H-2 workers who unexpectedly find themselves out of employment and would be eligible, under this final rule, for a longer grace period of up to 60 days.

Comment: A trade association stated that, with the change of work authorization starting at the filing of the extension with USCIS, “extending the grace period to 60 days after the authorized work period is not necessary.” The commenter said this extension may cause issues with workers who do not have access to housing or give “bad player” employers the opportunity to continue employment without the proper work authorization. The commenter said changing the policy that work can start when USCIS receives the petition would already increase the worker’s ability to find employment by several additional days and should give employees appropriate time to find new employment.

Response: Assuming this commenter is referring to the post-validity grace period at new 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A) providing for a grace period of up to 30 days (rather than 60 days) following the expiration of the H-2B petition, DHS declines to eliminate or shorten this grace period as proposed. As acknowledged by other commenters, the extension of the post-validity grace period to 30 days for all H-2 workers provides valuable benefits not only for H-2 workers, but also for H-2 employers by likely alleviating some of the pressure employers feel due to the statutory cap when timing the filing of subsequent petitions against the expiration of a previous contract.

d. Support for 60-Day Grace Period Following Cessation of Employment

Comment: Multiple commenters including a group of Federal elected officials, a union, and a professional association supported the proposal to provide a new 60-day grace period following cessation of H-2 employment if the worker was terminated, has resigned, or otherwise ceased employment prior to the end date of

their authorized validity period. Some of these commenters said this grace period is essential to allowing H-2 workers sufficient time to respond to the unexpected loss of employment by seeking new H-2 employment, exploring their legal options, or organizing their departure from the United States. A joint submission said that this new provision would improve worker mobility and reduce the administrative burden on workers and employers. A professional association stated that in situations usually outside of the worker’s control, the H-2 worker should be allowed to seek new employment. A union in support of this provision stated that, without time to search for and secure new employment, visa portability would not be practically accessible for H-2 workers. The aforementioned union and professional association, said the proposal is consistent with the benefits offered by other nonimmigrant classifications.

Multiple commenters, including a couple of unions, a joint submission, and an advocacy group, supported the proposed grace period because it would enhance worker autonomy, flexibility, and mobility to leave unfair, unsafe, or abusive employment conditions and apply for alternative employment without the risk of losing their visa. A group of Federal elected officials stated that guest workers have a well-founded fear of retaliation from employers that often prevents them from speaking out and advocating for better working conditions, and it is extremely challenging for workers to change employers, even when employers break the law. Likewise, an advocacy group said this grace period is especially critical when workers are terminated from employment in retaliation for exercising their rights and will lessen the power of bad-faith employers to leverage the immigration system as a tool of retaliation. The commenter stated that the proposed rule complements existing anti-retaliation provisions in DOL regulations governing the H-2 programs, and in Federal and State law. The commenter also welcomed DHS’s application of this flexibility to any termination rather than attempting to limit it to retaliatory firings, as determining whether a termination constitutes retaliation often requires a fact-intensive and time-consuming legal inquiry. The commenter went on to say that workers need the 60-day post-employment grace period to assess any potential violations of their rights and take legal action if necessary.

A couple of trade associations supported the specification that workers

would not accrue any period of unlawful presence solely based on cessation of employment. These commenters also agreed with the proposal that workers would not have to notify DHS or USCIS to take advantage of the new grace period. The commenters added that DHS should not consider employer notification to be conclusive evidence regarding a worker’s status or trigger the start date of the 60-day grace period, and that when an extension is filed the petitioner should provide information or evidence regarding the cessation of employment to demonstrate status maintenance.

Response: DHS appreciates the commenters’ support for this grace period, which is intended to improve worker flexibility, mobility, and protections. DHS confirms that this grace period will apply regardless of the reason for the H-2 worker’s termination (subject to the worker’s maximum period of stay). DHS further confirms that an employer’s notification under 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F) will not be considered conclusive evidence regarding a worker’s status.

e. Concerns With the 60-Day Grace Period Following Cessation of Employment

Comment: Multiple commenters, including several trade associations, expressed concern over the 60-day cessation of work grace period as proposed, stating that it could be abused if H-2 workers, in whom employers have invested considerable time and expense resources, immediately quit to spend 60 days, without risk, consequence, or penalty, to look for another H-2 job. Some of these commenters cited data indicating that most H-2 employers do not take advantage of their workforce, nor are they removed from the program, asserting that, while the 60-day grace period might be warranted if the Department revokes a bad-actor H-2 employer’s petition, it is not necessary or justified for the majority of H-2 employers. A trade association wrote that the uncertainty associated with this proposal would have a detrimental impact on labor-intensive American agriculture. Another trade association stated that their industry’s peak harvest generally lasts 60 to 90 days and that a worker unexpectedly leaving in the last 60 days of the contract would be devastating. Another commenter urged DHS “to be aware of perverse incentives” created by this new grace period and to consider how it “would affect worker behavior, and the economic cost of such impact on

employers should they experience turnover.”

Response: DHS will finalize the grace period for a cessation of employment at 8 CFR 214.2(h)(13)(i)(C) as proposed. Without this new grace period, an already financially vulnerable H–2 worker facing an abusive employment situation or hazardous working conditions must choose between remaining in a bad employment situation or facing the harsh consequences of losing wages, benefits, and legal status from their H–2 employment. As other commenters have noted, some H–2 employers leverage a potential loss of status to coerce workers into continued employment, creating a power imbalance that allows forced labor and trafficking to occur in the H–2 programs. Thus, this grace period of up to 60 days is an important step towards addressing the systemic power imbalance between H–2 workers and their employers by giving H–2 workers a more realistic option of leaving a bad employer.

DHS acknowledges that an H–2 employer, like any employer in a free labor market, risks losing valuable time, resources, and/or manpower when a worker leaves employment. However, the new grace period is not expected to provide a significant “perverse incentive” for H–2 workers to cease employment without good cause. DHS does not agree with the commenters that an H–2 worker who ceases employment does so without risk, consequence, or penalty. Whenever a H–2 worker ceases employment, they face several risks and consequences including the loss of wages and benefits that come from that employment, such as housing for H–2A workers and certain H–2B workers. And as other commenters have noted, the ability of H–2 workers to cease employment, especially when faced with a harmful work environment, will help improve equality of wages and working conditions with U.S. workers.

It is important to emphasize that the new grace period will not authorize a beneficiary to lawfully work in the United States, but only ensure that USCIS will not consider a beneficiary to have failed to maintain nonimmigrant status or to have accrued unlawful status “solely on the basis of a cessation of the employment.” New 8 CFR 214.2(h)(13)(i)(C). As stated in the NPRM, the limitation that the grace period will apply “solely on the basis of a cessation of employment” should mitigate the risk that some workers would try to use this grace period to engage in unauthorized employment or other unlawful behavior. 88 FR 65040, 65065 (Sept. 20, 2023). This aspect of

the grace period serves as an important disincentive for H–2 workers to abuse this provision. Considering the risks an H–2 worker incurs when leaving their employer, such as losing wages and other benefits, DHS disagrees that this grace period provides a “perverse incentive” for an H–2 worker to start and immediately quit employment unless there was good reason to do so. While DHS cannot completely eliminate all risk that an H–2 worker who might not be deserving would still benefit from the new grace period, for the reasons stated above, DHS maintains that such a situation would likely be rare and that the importance of protecting H–2 workers overall substantially outweighs the risk. *Id.*

f. Requested Changes to Proposed 60-Day Grace Period Following Cessation of Employment

Comment: Several commenters suggested that the proposed grace period following cessation of employment should only apply in certain circumstances, stating that workers can voluntarily quit for a number of reasons unrelated to an abusive or hazardous employment situation. For instance, a joint submission concluded that it would be appropriate to exclude beneficiaries terminated for cause from taking advantage of the 60-day grace period in order to protect subsequent employers from potentially dangerous or problematic behavior (for example, if workers were terminated for committing violent acts, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others). The commenter understood the basis for “casting a wide net” but said it is improbable that workers in an abusive or unsafe situation would nonetheless remain employed and also engage in behavior that would lead to their for-cause termination. The commenter said this is particularly the case in light of both DOL’s parallel rulemaking that would narrow the scope of permissible circumstances in which workers may be terminated for cause and DHS’s “very lenient” grace period proposal. A trade association said DHS should consider adding language defining a process by which employers and workers can document workplace claims and the efforts made to resolve the concern. This commenter stated that this provision is needed to provide a pathway for those working for H–2 employers that have taken advantage of their workforce, but added that a clearly defined process to utilize this type of grace period is needed to avoid unnecessary abuse of the provision. A few trade associations

stated that there should be an affirmative duty of the H–2 worker to attempt to resolve workplace claims or concerns with the employer prior to quitting since the employer has committed time and expense in exchange for the worker’s ability to enter and work in the United States, and that there should be less concern about reprisal if an H–2 worker ceases employment because they would have a 60-day grace period to seek other H–2 employment if they are unable to resolve the dispute with their sponsoring employer. Other trade associations expressed concern that providing a 60-day grace period after an employer has incurred the expense of bringing a worker to the United States could lead to workers arriving and quitting to spend 60 days searching for a higher paying H–2 job elsewhere, stating that there should be associated consequences for the worker who violates their contract instead of a “reward” by allowing the worker to stay in the United States to pursue another contract.

A business association urged DHS to consider options to ensure that workers do not take advantage of this grace period in a manner that harms employers and suggested an option of foreclosing an H–2 worker’s ability to avail themselves of the 60-day grace period within the first month of their entry into the U.S to help diminish the potential for mischief involving the 60-day grace period. Another commenter asked whether DHS should impose “a presumption of intent to defraud an employer if the H–2 worker arrives and leaves within a short period of time without trying to resolve any workplace dispute.”

Response: As proposed, the new grace period for cessation of employment will apply regardless of the reason for cessation. DHS declines to create a new discretionary process by which USCIS would determine whether to grant or deny a request for a grace period on a case-by-case basis, such as granting a grace period only when an H–2 worker can document that they made good faith efforts to resolve a workplace claim or that a workplace is hazardous, or denying a grace period when a beneficiary was terminated for cause (for example, if the beneficiary was terminated for committing a violent act, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others). The main reason why DHS did not propose—and now declines to adopt—a discretionary grace period similar to the one under 8 CFR 214.1(l)(2) is to provide more certainty to affected H–2

workers. As stated in the NPRM, giving more certainty of the length of the grace period could help alleviate some fears held by H-2 workers who are facing abusive employment situations, or otherwise wish to change jobs, but are reluctant to leave such employment due to uncertainty surrounding whether they would benefit from a grace period and how long the grace period would be. 88 FR 65040, 65064 (Sept. 20, 2023). Namely, “termination for cause” is both a law and fact-specific inquiry and workers may not have sufficient understanding of the concept to know with certainty where USCIS may land on such an inquiry in a subsequent adjudication, and therefore adding this limitation on the use of the grace period would likely create a chilling effect that would undermine the policy objective of this provision.

It would also be impracticable for USCIS to set up a separate process outside petition adjudication for approving grace periods on a case-by-case basis. USCIS would need to create a form for requesting grace periods, as well as a legal framework for determining whether a worker was terminated for cause and allow for the submission of evidence and rebuttal evidence. DHS believes that, even if DHS were inclined to adopt the commenter’s suggestion, the regulated public should have an opportunity to comment on any such framework and process, including on the feasibility of workers complying with such a process. More importantly, even if feasible, such an adjudication could take a considerable amount of time, potentially undermining the utility of the grace period for a terminated worker who most likely would not know the outcome of the adjudication until the end or close to the end of the grace period, which as explained above would likely lead to a chilling effect of workers even attempting to use the 60-day grace period. Regarding the commenter’s concern about the grace period possibly benefiting workers who were terminated for committing violent acts, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others, DHS believes that state and local judicial systems provide avenues to address such and similar serious criminal and civil infractions, and that limiting the use of the finite 60-day grace periods is therefore not necessary for that purpose. In addition, criminal charges may separately affect a worker’s ability to remain in the United States.

DHS declines to adopt the suggested alternative of foreclosing an H-2 worker’s ability to avail themselves of

the grace period of up to 60 days within the first month of their entry. Similarly, DHS declines to impose “a presumption of intent to defraud an employer” if the H-2 worker arrives and leaves within a short period of time without trying to resolve any workplace dispute. As previously explained, the limitation that the grace period would apply “solely on the basis of a cessation of employment” and the fact that the H-2 worker would be unable to work during this grace period absent any pending H-2 petition filed on their behalf should mitigate the risk that some workers would try to use this grace period for unlawful purposes. Again, while DHS cannot completely eliminate all risk that an H-2 worker who might not be deserving would still benefit from the new grace period, DHS maintains that such a situation would likely be rare and that the importance of protecting H-2 workers overall substantially outweighs the risk. 88 FR 65040, 65065 (Sept. 20, 2023).

Comment: Several commenters urged DHS to revise the length of the proposed grace period at 8 CFR 214.2(h)(13)(i)(C) to 30 days. A commenter stated that while 60 days is consistent with other nonimmigrant classifications, the H-2 programs are unique which warrants some differences, noting that H-2 programs impose substantial costs on employers compared to other nonimmigrant classifications. The commenter said a 30-day grace period for cessation of employment would reduce the likelihood of worker departure for “arbitrary or transient” reasons while accommodating workers who are in an unsafe or abusive employment relationship. The commenter also said a 30-day grace period for cessation would be congruent to the 30 days afforded to workers at the expiration of the petition validity, noting that it makes little sense for workers who successfully complete a period of employment to only have a 30-day grace period while affording workers terminated for cause an extra month. Lastly, the commenter said the unique low and unskilled nature of many H-2 occupations better lends itself to a shorter grace period as employers in labor-intensive industries are more likely than “white collar” employers to fill job positions quickly, whereas a 60-day grace period may be more appropriate for highly skilled visa classifications (for example, E-1, E-2, E-3, H-1B, L-1, O-1, and TN) that typically command higher pay and benefits, are subject to less frequent turnover, and are not associated with extensive employer cost obligations.

A couple of business associations similarly stated that the creation of a

new separate 60-day grace period adds unnecessary complexity and confusion regarding a beneficiary’s legal status and work authorization. The commenters recommended a standard 30-day grace period applicable in all situations for ensuring uniformity and simplicity in understanding and complying with the requirements.

Response: DHS declines to shorten the length of the proposed grace period at 8 CFR 214.2(h)(13)(i)(C) to 30 days. Thirty days likely would not allow sufficient time for a worker to respond to sudden or unexpected changes related to their employment, such as by searching for possible new employment or, if necessary, planning their departure from the United States. A longer period of up to 60 days would better allow affected H-2 workers to seek and secure new H-2 employment, assess any potential violations of their rights and explore legal actions, if necessary, and/or organize their departure from the United States. While DHS agrees that the H-2 program is unique in the sense that these programs impose some cost obligations (such as certain housing and subsistence costs) that not all employers in other nonimmigrant programs are responsible for, DHS does not agree that these differences warrant a shortening of the grace period to 30 days. Instead, because H-2 workers are a particularly vulnerable population, a 30-day grace period likely would not be sufficient for affected workers to respond to sudden or unexpected changes related to their employment. As other commenters have noted, H-2 guest workers are uniquely vulnerable given that they are temporary workers, rely on their employers for basic needs, often have a language barrier, and may live in isolated environments where their access to information and resources is limited, among other factors.

DHS acknowledges that this means an H-2 worker who successfully completes a period of employment will only have a 30-day grace period, while H-2 workers who cease employment before the end of their validity period will have a longer grace period by up to another month. However, this is reasonable as workers who cease employment before the end of their validity period may have such cessation of employment occur unexpectedly and thus would need more time to plan their next steps. Workers who successfully complete their period of employment would know the end date of their employment in advance and would have had more time to plan for their next steps.

g. 60-Day Grace Period Following Revocation of Approved H-2 Petition

Comment: Multiple commenters, including several trade associations, a joint submission, and a professional association, specifically supported the proposal to provide a new 60-day grace period following the revocation of an approved H-2 petition, with most citing a similar rationale as above relating to cessation of employment. Several of these commenters said that this grace period would provide protection and stability in circumstances beyond the petitioner's or worker's control. An advocacy group said H-2 workers do not control the petition or their employers' conduct and cannot prevent laws or violations that might lead to a revocation. For example, the commenter stated that both current and proposed rules call for petition revocation in the event of a determination that an H-2 petitioner or its agent has charged a recruitment fee or other prohibited fee. While supporting these consequences, the commenter said that H-2 workers who lose their jobs because of this would bear the brunt of their employer's violation. The commenter concluded that the proposed grace period would lessen the undue harm that a revoked H-2 petition causes workers.

A professional association agreed with proposed provision 8 CFR 214.2(h)(11)(iv) allowing H-2 beneficiaries to remain in lawful status for 60 days or the end of their H-2B petition, whichever is shorter.

Response: DHS agrees that this new grace period will lessen some of the harm to an H-2 worker who loses their job and H-2 status caused by a revoked H-2 petition.

h. Work Authorization During the 60-Day Grace Periods

Comment: Multiple commenters urged DHS to provide work authorization during the 60-day grace period, stating that not doing so would limit workers' ability to take advantage of the grace period and the flexibility this measure seeks to create. Specifically, several advocacy groups recommended that DHS automatically issue interim work authorization to H-2 workers. These commenters noted the financial situations of most H-2 workers, such as often living paycheck to paycheck, frequently arriving at their United States worksites already deeply indebted, and not having the savings to support the time needed to identify, apply to, and travel to new H-2 job opportunities. One of these commenters detailed a suggested process through which H-2 workers who experience an

early cessation of employment for any reason during an H-2 contract period, and who seek interim employment authorization, could directly notify DHS of this cessation of employment and receive a receipt at an address they would specify in their notice. Then, DHS could issue guidance (as it currently does for H-2A employers who are eligible to take advantage of the limited portability provisions) to potential employers of H-2 workers during the grace period stating that the employee's unexpired Form I-94 indicating their H-2 status, combined with the receipt of notification of early cessation of employment, would constitute sufficient proof the worker's employment authorization. DHS would then instruct employers to make any notation necessary on the I-9 to convey the limited 60-day period. The commenter said this process would be consistent with INA sec. 214(c)(1), as well as with DHS's broad authority to define the time periods and conditions of any nonimmigrant's admission to the United States under section 214(a)(1) of the INA. Another advocacy group supported this commenter's proposal. A couple of advocacy groups also stated that to the extent DHS has continued doubts about the appropriateness of providing interim employment authorization to all H-2 workers who experience an unexpected cessation of employment before the end of the contract period, DHS should at a minimum provide interim work authorization to workers who lose their employment due to the revocation of their employer's petition by no fault of the worker, as well as workers who are involved in an ongoing labor dispute with the H-2 employer that is the subject of an investigation by DOL or another relevant agency.

Response: As proposed and now finalized, none of the grace periods would independently authorize the beneficiary to work. As stated in the NPRM at 65065–65066, to the extent that such work authorization is permissible, there are also operational challenges and costs associated with providing work authorization documentation to H-2 workers who have ceased employment. While commenters provided suggestions that could have alleviated some operational challenges, other operational challenges would have remained. For example, setting up a process for beneficiaries to directly notify DHS of a cessation of employment and receive a receipt at an address would still require the agency to set up a new notification process for beneficiaries and mail out a physical

receipt notice, all of which takes time and resources which the agency would not recover without imposing a new fee.

DHS acknowledges that not providing work authorization upon cessation of employment makes it difficult for affected H-2 workers to support themselves, thus potentially limiting their ability, as a practical matter, to leave their current employment. DHS notes, however, that the new portability provisions may offer help to affected H-2 workers who wish to begin employment sooner if they find a new petitioning employer. In addition, as previously noted, other forms of relief such as deferred action may be possible depending on the circumstances.

Providing employment authorization to only some, but not all, H-2 workers also would not be feasible. As discussed above, it would not be operationally feasible for USCIS to “adjudicate” a grace period within the context of the H-2 petition process. Similarly, it is not operationally feasible for USCIS, using current processes, to determine who would be eligible for interim employment authorization within the limited timeframe of such a grace period; there is no current mechanism in which DHS could provide interim work authorization, or issue such proof of employment authorization, for only some H-2 workers, such as those whose employment was terminated “by no fault of their own.” In addition, as noted in the NPRM, DHS determined that the creation of a process whereby, upon cessation of employment, a worker would file, with fee, a request for work authorization for a limited period of 60 days and receive evidence of that work authorization before the 60-day period had elapsed, likely would not be an attractive option for the filer nor operationally feasible for the agency. 88 FR 65040, 65066 (Sept. 20, 2023). Finally, while DHS acknowledges the commenters' legitimate concern, the Department notes that not allowing for interim work authorization during the grace period is consistent with longstanding policy.⁹⁴

i. Requests To Extend the 60-Day Grace Periods

Comment: A couple of advocacy groups said DHS should allow at least

⁹⁴ See, e.g., “Modernizing H-2 Program Requirements, Oversight, and Worker Protections,” 88 FR 65040, 65065–65066 (Sept. 20, 2023) (“It has long been the policy of DHS that grace periods do not authorize employment.”); “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 81 FR 82398, 82439 (Nov. 18, 2016) (“Consistent with longstanding policy, DHS declines to authorize individuals to work during these grace periods.”).

a 90-day grace period for all H-2 workers who experience an unexpected end to their employment, with injured workers granted extensions beyond the initial 90-day period. An advocacy group expounded that H-2 workers need a longer grace period because of the acuteness and prevalence of abusive labor practices in the H-2 programs; their isolated living and working conditions; and their typically lower levels of income, education, and web access. In addition, the commenter said DHS should also provide for situations in which workers may need to remain in the United States for a longer period due to work-related injury or illness. The commenter stated that H-2 workers often are unable to take advantage of their workers' compensation benefits because they are forced to return to their home countries after a workplace injury or illness by retaliatory employers. The commenter noted that 60 days is insufficient for most workers to receive necessary treatment through workers' compensation because medical treatment and associated interactions can be time-consuming. Further, injured workers are unlikely to find new H-2 employment during a 60-day grace period, and therefore will be faced with the unfortunate choice between overstaying or returning home to forfeit medical care and benefits. The commenter suggested that DHS clarify that grace periods and the post-contract admission period may be extended for workers who need to remain in the United States to receive medical treatment related to an injury or illness covered by a workers' compensation claim. Relatedly, the commenter said DHS should also provide for a straightforward parole process for injured workers who have already departed the United States but need to return to seek medical care.

A couple of commenters, including an advocacy group and a research organization, recommended a 120-day grace period following loss of employment. One of these commenters provided similar rationale as above, stating that a 60-day grace period would often be too short for workers to seek care or find new employment, particularly given the geographic, social, and cultural isolation of H-2A workers. A research organization stated that, while it had previously urged that DHS should at least grant H-2 workers the same in-petition 60-day grace period as is granted to H-1B workers, given the "bureaucratic realities of the H-2 programs," 60 days is insufficiently short. The commenter cited data indicating that the median U.S. worker

took almost exactly 60 days to find a new job, but those workers could accept any job, not just seasonal jobs from employers willing to undergo the H-2 process. Additionally, the commenter said the H-1B petition DOL process takes only a week, while H-2 DOL processes take much longer. Citing data, the commenter stated that, assuming that an H-2B worker finds a new employer that is not already participating in the H-2B process, it will take over 100 days to complete the steps to join the program. Even in the case of the H-2A process, which takes about a month, the commenter said this month should be added to the median of 60 days it takes to find a new job to begin with.

Response: DHS declines to extend the grace period beyond 60 days. While commenters expressed legitimate concerns about why 60 days may not be sufficient (including TLC delays), DHS must balance these concerns with other concerns about potential abuse of the grace period if it were extended beyond 60 days. Also, the longer the grace period, the more concerns DHS would have with beneficiaries engaging in unlawful employment during the grace period.

DHS also declines to provide a longer grace period for only certain beneficiaries such as those who experienced an "unexpected" end to their employment or suffered a work-related injury or illness. As noted above, it would not be operationally feasible for USCIS to "adjudicate" a grace period within the context of the H-2 petition process using the current processes and mechanisms, or in a context separate from the H-2 petition process. Absent an adjudication, USCIS would not be able to provide a longer grace period only to certain H-2 beneficiaries. DHS again highlights that H-2 workers involved in labor disputes may request DHS to exercise prosecutorial discretion,⁹⁵ which may offer some relief for certain workers who were terminated for an unlawful reason or suffered a work-related injury or illness. Other avenues of relief, such as requesting a change of status to visitor status (B-2), may also be available to H-2 workers who need to receive medical treatment related to a workplace injury or illness.

⁹⁵ USCIS, "DHS Support of the Enforcement of Labor and Employment Laws," <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws> (last updated Apr. 11, 2024).

j. Grace Period at the End of 3-Year Period of Stay

Comment: Multiple trade associations expressed concern that H-2 workers who continue three successive contracts (that is, workers whose final contract within their 3-year authorization ends at the very end of that authorization period) would be left with no time to prepare to leave the country after their third contract expires. These commenters stated that DHS should consider providing an additional minimum grace period, such as 5 days, in those situations to ensure workers do not inadvertently overstay due to waiting for the employer-scheduled transportation or for delayed or canceled flights. The commenters said adding a minimum grace period would benefit H-2 workers and allow them to return to the United States without any unauthorized stay.

A research organization similarly stated that DHS should provide a grace period of at least 10 days at the end of the 3-year period of stay to avoid inadvertent periods where people lose status to give people time to line up their transportation home. The commenter said this would match the NPRM's proposed 10-day grace period to enter the country.

Response: By regulation, an H-2 worker's maximum period of stay is limited to 3 years. See 8 CFR 214.2(h)(5)(viii)(C); 8 CFR 214.2(h)(13)(iv)-(v). DHS did not propose to change the maximum period of stay for H-2 workers and will not provide an additional grace period beyond that 3-year limit in this final rule. Further, as new 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii) already provides a post-validity grace period of up to 30 days, it is unclear why the suggested additional 10-day grace period is necessary. It is the petitioner's burden to be aware of when their H-2 workers' status will end and arrange their return transportation accordingly.

k. Employer Obligations During Grace Periods

Comment: Several trade associations that were generally supportive of the proposed grace periods requested that DHS consider and provide clarity surrounding the obligations of parties during the grace periods, specifically whether an H-2 employer is required to provide housing and meals during those periods of time. These commenters opposed requiring a petitioner to provide housing and meals for a worker who is no longer employed, regardless of the circumstances of the end of

employment. The commenters also noted the impact of and asked DHS to clarify the situation when the worker quits mid-contract, and an employer may need to seek an emergency labor certification to hire new workers and have housing available for them. The commenters said DHS should evaluate and plan for how a worker who ceases to be employed has access to resources such as housing and food without placing those obligations on an employer following the abandonment, termination, revocation, or expiration of a petition period.

A research organization stated that DHS should clarify that all employer obligations toward the worker end when the worker exercises their rights to use the in-petition grace period, and DHS or the worker or both should be required to notify the employer that they have exercised the right to use the grace period. The commenter said employers should not be forced to provide housing, pay, food, and other benefits when a worker is no longer employed for them.

Response: H-2 employers must abide by applicable DOL regulations concerning their obligations to provide housing, pay, food, and other benefits when a worker's employment has terminated as described in DOL regulations.⁹⁶ DHS is not imposing any new obligations on an H-2 employer by virtue of providing these new grace periods or extending existing ones.

Comment: Several advocacy groups suggested that, in addition to granting H-2 workers work authorization during the grace period, DHS should also "clarify that otherwise eligible workers can qualify for unemployment benefits during the grace period."

Response: DHS declines to provide the requested clarification, as DHS does not adjudicate or otherwise regulate eligibility for unemployment benefits for H-2 nonimmigrants.

1. Restriction on Multiple Grace Periods During a Single Period of Admission

Comment: A few commenters including advocacy groups said that DHS should remove the restriction on multiple grace periods during a single period of admission, which would leave at-risk workers with no grace period in which they could leave a second abusive job. Specifically, the commenters said DHS should clarify H-2 workers' access to a 60-day (or 120-day) grace period in case of a second unforeseen cessation of employment. Commenters said workers need access to multiple grace periods during a single

period of admission if they have multiple employers due to the widespread nature of violations in H-2 industries, which DHS itself acknowledges. The commenters said workers who have previously changed employers would experience the same risks of labor abuse that are endemic to the H-2 program as workers who have not changed employers, and they should be able to access the same grace period.

Response: DHS believes the commenters' concerns may be based on a misunderstanding of the phrase "once during each authorized period of admission," as used in the NPRM and retained in this final rule at new 8 CFR 214.2(h)(13)(i)(C). DHS appreciates the opportunity to clarify this point.

As noted in the NPRM, the phrase "authorized period of admission" refers to the time period noted on a worker's I-94, which will normally have an end date 30 days after the end of the corresponding petition's validity period to account for the 30-day grace period at 8 CFR 214.2(h)(5)(viii)(B) or 8 CFR 214.2(h)(6)(vii). In the scenario described by the commenters, in which a worker is the beneficiary granted an extension of stay based on a petition by a new employer, the worker will have been granted a new "authorized period of admission" (and therefore, a new I-94) based on the approval of the new employer's petition.⁹⁷ Notably, 8 CFR 214.2(h)(13)(i)(C) allows a 60-day grace period for a cessation of employment "once during each authorized period of admission" (emphasis added). Accordingly, notwithstanding a worker's prior use of the 60-day grace period for cessation of employment in connection with a prior petition, such a worker would not be considered to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the new employment for 60 days or until the end of the new authorization period, whichever is shorter.

2. Transportation Costs for Revoked H-2 Petitions

Comment: A few commenters expressed support for the proposed provision requiring H-2A employers to pay for the beneficiary's reasonable costs of return transportation in the event of petition revocation. A professional association elaborated that

this provision is consistent with other nonimmigrant visa categories, including H-1B, O, and P, and that it ensures the worker has the means to return to their home country upon separation from employment. Another professional association remarked that this requirement would create uniformity between H-2A and H-2B and is fair and efficient. Conversely, a professional association and a trade association stated that the proposed provision is redundant with other existing regulations that are already in place.

A trade association and a few other commenters commented that they have no concerns regarding the proposed provision. A joint submission remarked that they have no objections to the proposed provision since the Department is making a conforming change and is not changing the underlying substantive requirements. The joint submission further commented that the proposed provision does not alter existing program obligations under applicable DOL regulations.

Response: DHS appreciates the support and confirmation that these revisions do not represent a change in an employer's obligation and conform with other nonimmigrant classifications. DHS is not making any additional revisions based on these comments.

3. Portability and Extension of Stay Petitions

a. Positive Impacts on Employers, Workers, Program Operability, and the Economy

Comment: A professional association stated that the proposed portability provisions were "sound" from both employers' and H-2B workers' perspectives. While expressing support for the proposal to allow workers to begin employment upon the filing of a nonfrivolous petition, a trade association stated that the proposal would provide employers with the ability to employ workers in a timely manner, and provide beneficiaries with expanded job opportunities. A joint submission and a trade association also expressed support for the portability provisions, reasoning that permitting workers to begin employment in the same classification upon receipt of the non-frivolous petition would help avoid gaps in employment and potential hardships to workers, and allow workers to capitalize on their presence in the United States to earn income rather than waiting for a petition to be finalized. The commenters also stated that the provisions would benefit employers because employers seeking to

⁹⁶ See generally, 20 CFR 655.20(j)(ii), 20 CFR 655.122(h)(2).

⁹⁷ When a Form I-129 petition with a request for extension is approved, the Form I-797 approval notice includes a Form I-94. The approval notice instructs the petitioner that the lower portion of the notice, including the Form I-94, should be provided to the beneficiary(ies).

employ transferred workers would have access to workers, and have already demonstrated that they have a temporary need for labor or services. Similarly, a trade association expressed support for the portability provisions, reasoning that current timelines frustrate both workers seeking employment and employers who need workers, but that the proposed provisions would allow workers to immediately help employers that are in need of assistance. A professional association expressed support for making permanent the portability provisions that were in place during the COVID-19 pandemic, reasoning it would allow employers to fully staff their workforce when the petition was valid rather than having the workers remain idle until petitions were approved.

A joint submission added that the provisions would positively impact the U.S. economy since workers pay taxes and purchase goods and services, which would be lost if workers faced employment gaps. An advocacy group expressed support for the portability provisions, reasoning it would give workers the flexibility they desire while benefiting U.S. regions with varied agriculture profiles.

A couple of advocacy groups expressed support for the proposed portability provisions on the grounds that they would curtail the coercive power employers have over H-2 workers. Discussing abuse faced by H-2 workers, the commenters said that some H-2 employers leverage a loss of status to coerce workers into continued employment, creating a power imbalance that allows forced labor and trafficking to proliferate in the H-2 programs. The commenter stated that permanent portability would help address trafficking, violations, and other abuses in the H-2 program. Similarly, a union and an advocacy group expressing support for the proposal stated that visa status is at the center of the power imbalance between employers and workers that enables exploitation within the H-2 program, and the portability provisions would help restore a balanced relationship between workers and employers. A group of Federal elected officials stated that workers' dependency on their employers to live and work in the United States creates a "well-founded fear of retaliation" that prevents workers from speaking out against abuse and advocating for better working conditions. The commenter stated that under DHS's current rules, it is "extremely" challenging for workers to change employers, even when the

employers break the law, which the proposed rule would ameliorate. A joint submission also stated that existing procedures fail to allow H-2 workers to pursue alternative employment free from employer control and retaliation.

A research organization expressed support for the portability provisions, reasoning that the ability to change employers was a basic freedom, that it was important for human and labor rights, and that it would empower workers. A couple of advocacy groups and a joint submission also expressed support for the proposal, reasoning that workers who face abusive conditions or are unjustly fired would have a greater chance of finding alternative employment. A religious organization stated the proposed provisions would provide stronger protections for workers to switch employers. A union expressed support for the portability provisions' goal to empower and prevent hardships to workers.

A trade association expressed support for the portability provisions, reasoning it would establish a consistent policy between H-2A and H-2B program regulations and help remove confusion in the complexity of the regulations governing the H-2 programs. A trade association expressed support for the portability provisions, reasoning it would establish a consistent policy between H-2A and H-2B program regulations and help remove confusion in the complexity of the regulations governing the H-2 programs.

Response: DHS agrees with the commenters about the intended benefits of portability, including empowering H-2 workers and providing H-2 employers with the ability to employ workers in a timely manner.

b. Negative Impacts on Employers and Program Operability

Comment: A few trade associations expressed support for the flexibility that the changes to the proposed extension of stay petition and E-Verify requirements created, but said that the language of the proposal was too broad when coupled with the other sections in the rule, such as the section on grace periods. The commenters expressed concern that workers would be encouraged to violate the terms of their contracts with employers. The commenters also discussed the "significant" financial investments employers make prior to hiring H-2 workers. A trade association added that in exchange for these investments, employers require a level of certainty that workers are to remain employed with them for the life of their contract. This commenter and another trade

association said that the proposed rule could cause economic harm to employers by allowing workers to abandon their employers and leave them in situations where they do not have enough workers to perform their harvest. A few trade associations recommended that in instances where a worker voluntarily abandons their job for reasons not related to a hazardous work environment, there should be consequences for workers who violate their contracts. A trade association recommended that DHS require that workers attempt to resolve workplace claims and concerns with employers before quitting a contract, and that it only provide workers the ability to port to a new contract when either the contract had been revoked, the employer is found to have violated the contract, the worker provides evidence of a hazardous workplace, or the worker completes their previous contract. A couple of trade associations also suggested that the Department could consider a requirement that a worker report to the Department that they are voluntarily abandoning employment as a mechanism to ensure the worker also meets their contractual obligations. The trade associations added that such a notification would serve as a consequence for a worker who violates their contract, and assist in tracking grace period timelines and lawful presence.

Similarly, a trade association added that while employees may voluntarily abandon employment for a variety of reasons, allowing workers to leave their primary employer for economic or social reasons would be detrimental to the program. The commenter urged the Department to develop "more rigid" language surrounding the conditions under which an employee may exercise the portability provisions in cases of voluntary abandonment. The commenter also suggested the Department develop a "review and qualifications system using a series of escalation and opportunities for corrective actions" to be enacted prior to permitting an employee to voluntarily abandon their primary employer. The commenter added that this system should be open to public comment prior to the Department moving forward with the portability provisions.

An attorney expressed opposition to the portability provisions, reasoning that the provisions would set up a bidding war to employ workers, where the initial employer is subject to "poaching" attempts by other employers who are able to pay higher wages and did not incur travel costs for the employee.

Response: DHS will not make changes to the portability provision. While DHS appreciates the commenters' concerns regarding the negative impacts on an employer when an H-2 employee ports to another employer, DHS does not agree that these concerns justify requiring an H-2 worker to stay with that employer for the life of their contract or imposing other limitations on an H-2 worker's ability to change employers. Nor does DHS agree that these concerns justify requiring workers to report to DHS when they leave employment as a mechanism to ensure that workers meet contractual obligations. As other commenters have noted, worker mobility is important to improving the ability of workers to leave an abusive employer without fearing retaliation. Worker portability helps to correct the power imbalance that has led to abusive employment practices within the H-2 programs as a result of a petitioning employer's control over the employee's legal status.

Implementing a "review and qualifications system using a series of escalation and opportunities for corrective actions" or another similar process prior to permitting an employee to port, as suggested by commenters, would be counter to the central aims of the portability policy. Such a mechanism would potentially require a lengthy, fact-intensive adjudication that would delay an H-2 worker from leaving an abusive or hazardous employment situation, undermining the benefit of the portability provision in the first place.

DHS declines to exclude from portability H-2 workers who voluntarily left their petitioning employer for economic or social reasons, as suggested by another commenter. Portability provides benefits even for workers not in an abusive employment situation. As other commenters have noted, the ability for H-2 workers to change workers for economic reasons may incentivize employers to offer better wages and working conditions in order to retain their H-2 workers, which in turn would raise labor standards for these workers as well as U.S. workers. Portability also benefits employers that have already demonstrated that they have a temporary need for workers to hire H-2 workers more quickly and avoid gaps in employment. For petitioners seeking workers under the cap-subject H-2B classification, this would also serve as an alternative for those who have not been able to find U.S. workers and have not been able to obtain H-2B workers subject to the statutory numerical limitations. 88 FR 65040, 65068 (Sept. 20, 2023). Although

portability could create instability or increase costs for some employers that lose or risk losing H-2 workers porting to another employer, this is not unlike the situation that any employer in the labor market may face or situations when an employer files an H-2 petition for another employer's workers in the same classification, but just has to wait until the petition is approved before such workers can start working. Further, some of these costs may be offset by the benefits and savings to employers of being able to have replacement workers start work more quickly to avoid loss of income due to lack of workers, and potentially averting some cap-related issues in the H-2B program.

c. Mixed Comments on Portability Provision

Comment: While suggesting an "at-will" visa that allows employees to move between employers without contractual commitments, an association of State Governments stated that the portability provisions in the proposed rule aim to create a similar dynamic. As such, the commenter expressed support for the portability provisions. The commenter reasoned that if the portability allowance permitted employees to immediately begin new employment, the changes to portability would allow employers to fill labor gaps, which is the purpose of an employer petitioning to receive H-2 employees in the first place. The commenter stated that this would impact the overall success of the program. However, they also noted that it could create instability and uncertainty for some employers, and expressed concern that the ability for employees to leave in the middle of a harvest could result in losses for employers. The commenter requested clarity on the "immediate" effectiveness of portability without consideration for the approval of the petition, except in cases of "blatant misuse or the program or abuse of an agricultural employee by the petitioner."

Response: Under new 8 CFR 214.2(h)(2)(i)(I), an eligible H-2 nonimmigrant on whose behalf a nonfrivolous H-2A or H-2B petition is filed requesting the same classification that the nonimmigrant noncitizen currently holds is authorized to start new employment upon the proper filing of the petition, or as of the requested start date, whichever is later. The eligible H-2 nonimmigrant does not need to wait until the approval of the portability petition to start working, and the H-2 nonimmigrant is authorized to work pursuant to the portability petition until the adjudication or withdrawal of

such petition. During the pendency of the petition, the H-2 nonimmigrant will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the portability petition, even if such petition is subsequently denied or withdrawn.

A portability petition must be properly filed and non-frivolous. While these standards are intended to prevent a petitioner that is misusing the program or abusing their workers from taking advantage of portability provisions, DHS recognizes that these determinations will not be made until USCIS has adjudicated the petition, meaning that an H-2 worker may have worked under the portability petition even if it is ultimately denied as frivolous. However, other provisions being finalized in this rule, such as the strengthened site visit provisions and the new mandatory or discretionary denial provisions, are intended to address the concern of "blatant misuse or the program or abuse of an agricultural employee by the petitioner" including the types of potential abuses noted by the commenters.

d. Portability and the H-2B Cap

Comment: A professional association said that the portability provisions would provide employers with "significant cap relief," reasoning that an H-2B worker could "seek employment, remain longer, and not count towards" toward the H-2B statutory cap. The commenter added this was a "win-win" for employers and employees. Similarly, a couple of trade associations and advocacy groups stated that the portability provisions appeared to be helpful in providing cap relief to a "vastly oversubscribed" H-2B program, but expressed concern that an employer could be left without a workforce if an employee moves to another employer that is "capped out."

Response: Under current practice, which DHS will not change in this final rule, workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment generally will not be subject to the cap.⁹⁸ Similarly, H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins generally will not be subject to the cap if the employer names them on the petition and

⁹⁸ USCIS, "Cap Count for H-2B Nonimmigrants," <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last updated Mar. 8, 2024).

indicates that they have already been counted.⁹⁹ It is therefore not clear what the commenter's concern is regarding an employer that "could be left without a workforce if an employee moves to another employer that is 'capped out'" because in that scenario, a petition filed by a porting employer seeking an extension of stay for a worker already in the United States in H-2B status generally would not be subject to the cap.

Comment: An advocacy group and a couple of unions stated that the Department must ensure H-2B petitions filed on behalf of transferring employees are subject to the statutory cap, reasoning that portability must not be implemented in a way that allows employers to work around the statutory H-2B cap. The commenters added that if the cap on petitions was already reached in a given fiscal year, the Department could count the positions against the cap in the following fiscal year. A union said that DHS could also deny petitioners if the cap had already been reached. Alternatively, another union suggested employers be instructed to only offer H-2B positions to transferring workers when there are still available positions under the current year's cap. The union further stated that regulatory flexibilities have been used to bypass the statutory cap in the past without increased accountability. Citing the INA's annual cap, the commenter added that if the provisions effectively created cap-exempt H-2B positions, it would result in a violation of congressional intent.

Similarly, while expressing support for the portability provisions, a research organization stated that they must not be implemented in a way that enables employers to circumvent the H-2B program cap. The commenter expressed concern that the NPRM did not consider the impact of the portability provisions on the growth and size of the program and that it did not put in place safeguards to ensure employers do not circumvent the H-2B cap. The commenter said that because the proposed portability provisions would allow employers to evade the statutory cap limit, the "true size" of the H-2B program would increase to three times the size of the total cap, which would be inconsistent with congressional intent. The commenter stated that as a result, the Department must subject workers who are continuing employment, either by transferring employers or extending their employment with the same employer, to the H-2B annual cap. The commenter

concluded that the simplest way to implement this requirement is to count an approved continuing petition against the annual cap for the following fiscal year. The advocacy group and a union added that keeping the program closer to the size that Congress originally intended would incentivize employers to improve pay and working opportunities, so employees do not leave for better opportunities.

Response: This rulemaking does not make any changes to DHS's longstanding method of counting the H-2B cap, and DHS will not make changes to its cap counting methodology. DHS will continue its longstanding practice of not counting against the statutory cap any petition seeking to extend the stay of an H-2B worker in the United States in H-2B status who has already been counted against the cap, which includes portability petitions. This longstanding practice is codified at 8 CFR 214.2(h)(8)(ii)(A) ("Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit") and is also articulated on USCIS' "Cap Count for H-2B Nonimmigrants" website.¹⁰⁰

DHS does not agree with the commenters that its cap counting methodology is inconsistent with congressional intent. Pursuant to INA sec. 214(g)(1), "[T]he total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year . . . under section 101(a)(15)(H)(ii)(b) of this Act may not exceed 66,000." An individual would be considered to have been "otherwise provided" H-2B nonimmigrant status upon admission into the United States without a visa or through change of status to H-2B while already in the United States. On the other hand, H-2B workers in the United States seeking an extension of H-2B stay, whether or not with the same employer, will not be counted against the cap because they have already been "otherwise provided" such H-2B status, either at the time of their admission to this country or in conjunction with their current H-2B grant of status. Further, since the beneficiaries of a porting petition requesting an extension of their H-2B stay are already in H-2B status, they are not changing their status from another nonimmigrant classification. Thus, H-2B workers seeking an extension of H-2B stay are not counted against the cap consistent with INA sec. 214(g)(1).

¹⁰⁰ USCIS, "Cap Count for H-2B Nonimmigrants," <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants> (last updated Mar. 8, 2024).

These longstanding H-2B cap procedures have been codified at 8 CFR 214.2(h)(8)(ii) for over two decades.¹⁰¹ This methodology has also been consistently and clearly documented in numerous reports that USCIS has submitted to Congress.¹⁰² The commenters did not acknowledge USCIS' longstanding cap counting methodology as codified in 8 CFR 214.2(h)(8)(ii) and, other than citing to INA sec. 214(g)(1)(B), did not cite to anything else to support their assertions that USCIS' cap counting methodology with respect to portability petitions and other petitions for extensions of status is inconsistent with congressional intent.

Comment: Several commenters generally supported the permanent portability provision but expressed concerns that an employer that paid transportation and filing fees could be left paying those significant costs and still be unable to find a replacement workforce. These commenters asked whether subsequent employers could be made to reimburse the costs paid by their previous employers.

Response: DHS will not adopt the suggestion to require a subsequent porting employer to reimburse the preceding employer its transportation and petition filing costs. Such a requirement could discourage the use of portability, or even discourage situations that are allowed by longstanding regulations, such as an H-2 nonimmigrant starting work for another employer once USCIS approves a petition that has been filed on their behalf. And while an H-2 employer that paid transportation and filing fees risks losing those costs if the worker leaves, this is not unlike the situation that any

¹⁰¹ See, e.g., 8 CFR 214.2 version as of January 1, 2002, <https://www.govinfo.gov/content/pkg/CFR-2002-title8-vol1/xml/CFR-2002-title8-vol1-sec214-2.xml>.

¹⁰² See, e.g., USCIS, "H-2B Usage and Recommendations, Fiscal Year 2016 Report to Congress" (July 22, 2016), <https://www.dhs.gov/sites/default/files/publications/U.S.%20Citizenship%20and%20Immigration%20Services%20-%20H-2B%20Usage%20and%20Recommendations.pdf>; USCIS, "Characteristics of H-2B Nonagricultural Temporary Workers: Fiscal Year 2022 Report to Congress Annual Submission" (Feb. 14, 2023), https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf ("Generally, a worker whose stay in H-2B status is extended will not be counted against the H-2B cap."); USCIS, "USCIS Report to Congress" (Mar. 20, 2006) <https://www.uscis.gov/sites/default/files/document/data/h-2b-fy2005-petitions-report.pdf> ("[A]liens who are currently in H-2B status and who seek to extend their stay or seek concurrent employment are not counted against the cap."); See also CRS Report R44306, "The H-2B Visa and the Statutory Cap" (July 13, 2022) (providing a history of the H-2B annual numerical limitations, including a history of special H-2B cap-related legislation throughout the years).

⁹⁹ *Id.*

employer in the labor market may face when a worker leaves and the employer loses costs already paid to hire that worker (for example, recruitment and training costs, relocation expenses, hiring bonuses).

e. Portability Within Same Classification

Comment: A joint submission, an advocacy group, and a trade association expressed support for the Department's proposal to extend portability to workers performing different jobs within the same classification, rather than limiting employment to the initial conditions of their authorization. Similarly, a professional association and a trade association expressed support that portability would be permanent and applied to new work in the same classification with the same or different employer, reasoning it would not limit workers' employment to the initial authorization, allowing the worker to have successive petitions and perform other jobs. A trade association and advocacy group reasoned that requiring beneficiaries to only work in the "exact same job" that they were initially approved for would be restrictive and undermine the provisions' goals.

Response: DHS appreciates these commenters' support for allowing H-2 workers to port to different jobs within the same classification.

Comment: An advocacy group suggested that the Department allow H-2 workers to switch between H-2A and H-2B program categories. The commenter noted that although transferring from H-2A status to H-2B status would cause administrative hurdles as the status change would require adherence to the H-2B cap, the commenter reasoned it would significantly improve H-2A worker mobility by allowing them to accept seasonal non-agriculture positions.

Response: While portability is intended to improve worker mobility, DHS will not adopt the suggestion to allow portability for H-2 workers to "switch between H-2A and H-2B program categories" and start working merely upon the filing of a portability petition. As proposed, new 8 CFR 214.2(h)(2)(i)(I) specifies that portability, or the ability to work while a petition remains pending, will only apply to new employment (with the same or different employer) in "the same classification that the nonimmigrant alien currently holds."

There is an important distinction between a change of status and an extension of stay. A worker in H-2A nonimmigrant status seeking to change to an H-2B employer (for example) would need to change their status, not

merely extend their stay. Unlike extensions of stay that fall under DHS regulations at 8 CFR 214.1, changes of status are governed by INA sec. 248, 8 U.S.C. 1258, which, unlike 8 CFR 214.1, specifically authorizes a nonimmigrant to change to any other nonimmigrant classification only if they are "continuing to maintain that status." It is not clear how a nonimmigrant worker seeking to change to another nonimmigrant classification will continue to maintain their current status as required by INA sec. 248 while their change of status petition is pending if they have ported to new employment based on the new petition requesting a different status. Further, porting between H-2A and H-2B nonimmigrant classifications may raise issues related to administration of the H-2B cap if an H-2A worker starts working while the petition seeking to change to H-2B nonimmigrant status, which is subject to numerical limitations under INA sec. 214(g)(1)(B) and (10), is accepted by USCIS and remains pending.

f. Employment Authorization While an Application for a Temporary Labor Certification Is Pending

Comment: Discussing the Department's proposal to consider beneficiaries who are employed in the United States while their petition is pending to be in a period of authorized stay, a joint submission stated that the proposal was necessary to maximize the portability provision and for it to be implemented and function properly. Similarly, a research organization expressed support for the NPRM's proposal to permit an H-2 worker to be employed while their petition is pending, reasoning that it would make it faster to change employers and complement the grace period proposal. However, the research organization suggested that USCIS should further authorize employment while a labor certification application is pending with the DOL. The commenter stated that given the high percentage of H-2 TLC approvals, it was "sensible" to allow workers to be employed pending the outcome of their "initial application," adding that it would decrease unlawful employment and make the portability provisions more "workable." The commenter further suggested that the Department exempt workers already in the United States from the labor certification process. The commenter reasoned that because they are already in the United States, they do not have to be "imported" and thus should not be subject to the H-2 labor certification statute, and that because they are transferring between employers, they do

not increase the total amount of labor market competition.

Response: DHS will not implement the suggestion to authorize employment while a labor certification application is pending with the DOL. Allowing portability to occur upon the filing of an application with a TLC would present integrity and operational issues due to the TLC being adjudicated by another agency. The mere filing of a TLC application does not guarantee that the labor market test with respect to the particular job in question has been satisfied nor does it ensure that the TLC application is non-frivolous and that DOL will approve it. In addition, allowing portability to occur upon the mere filing of an application with a TLC could incentivize frivolous TLC applications. DHS would not be able to determine if the TLC was frivolous, nor would DHS be able to codify a standard for whether a TLC filing is frivolous (or another similar requirement) through this rule, as such a regulation would necessarily have to be done by DOL and would be beyond the scope of this rule and DHS's expertise.

Allowing portability to occur upon the filing of an application with a TLC would also present integrity issues due to the potential for abuse or fraud inherent in allowing employment authorization without proper documentation. Because the TLC does not specifically name a worker, employers would face difficulties in satisfying the employment verification requirements of section 274A of the Act. Also, the mere filing of a TLC does not guarantee that the employer will actually file an H-2 petition based on that TLC. Without a signed and filed petition naming the porting worker accompanied by evidence of the certified TLC, DHS would be unable to identify the porting worker and verify their eligibility. Further, without a petition, DHS and DOL would not have evidence of the petitioner's agreement to employ the porting worker consistent with the requirements of the applicable H-2 program, including the employer's agreement to comply with all the obligations and assurances that serve to protect the porting worker (and U.S. workers). Thus, allowing portability to occur upon the filing of an application with a TLC could also undermine this rule's goal of improving worker protections.

g. Removal of E-Verify Requirement From H-2A Portability

Comment: Several commenters, including trade associations, advocacy groups, and a professional association, expressed support for removing the E-

Verify requirement from H-2A portability. A couple of advocacy groups reasoned that the E-Verify requirement had limited the number of H-2A jobs that qualified for the flexibility offered through permanent portability, with a few trade associations stating that its removal would open up the use of transfer petitions within the H-2A program. A joint submission stated that removing the E-Verify requirement from H-2A portability would provide many benefits, including improving worker flexibility and mobility, helping workers avoid gaps in employment and potential hardship and putting their U.S. presence to productive use rather than forcing them to sit on the sidelines unable to earn an income while the petition is pending. The submission also stated that this would benefit employers that have already demonstrated that they have a temporary labor need for such workers' labor or services (that is, by virtue of having an approved labor certification from DOL), and would benefit the U.S. economy overall, as such workers are earning, purchasing goods and services from local businesses, and paying taxes.

Response: DHS appreciates the commenters' support for the benefits of expanding H-2A portability beyond E-Verify participating employers.

Comment: A couple of commenters expressed support for removing the E-Verify requirement but expressed concern that the increased fee schedule in another DHS rulemaking, "USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," will "chill" the use of the proposal by increasing the cost of filing a named petition. The commenters expressed opposition to the fee increase, stating that it will hamper their ability to take advantage of in-country transfers. Similarly, a trade association expressed opposition to the fee increase, reasoning that the increased fee will negate the benefits of removing the E-Verify requirement.

Response: On January 31, 2024, DHS published a final rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 88 FR 6194, with an effective date of April 1, 2024. The final fee rule raised the Form I-129 filing fee for H-2A named beneficiaries from \$460 to \$1090 (or \$545 for small employers and nonprofits), and the Form I-129 filing fee for H-2B named beneficiaries from \$460 to \$1080 (or \$540 for small employers and nonprofits).¹⁰³ It also

raised the Form I-129 filing fee for H-2A unnamed beneficiaries from \$460 to \$530 (or \$460 for small employers and nonprofits), and from \$460 to \$580 for H-2B unnamed beneficiaries (or \$460 for small employers and nonprofits).¹⁰⁴ To the extent that the commenter is suggesting changes to the USCIS Fee Rule, those comments are outside the scope of this rulemaking. In addition, while H-2A and H-2B filers for named beneficiaries (excluding small employers and nonprofits) will pay significantly higher petition filing fees compared to H-2A and H-2B filers for unnamed beneficiaries, DHS is not persuaded that the increased filing fees will significantly negate the benefits of portability for employers. Employers will still benefit from portability in the form of the ability to employ workers earlier since portability petitions are for workers who are already in the United States in H-2 status and will not need to wait for petition approval and visa issuance. By obtaining H-2 workers faster, these employers may avoid financial hardships due to lack of workers to perform time-sensitive labor. Further, the porting employer will benefit by not paying for inbound transportation for the H-2 worker, since those costs will have already been paid by the preceding employer. The commenters did not account for these benefits, nor did they provide data to support the assertion that the increased filing fees will negate these benefits.

Comment: A research organization expressed opposition to DHS's proposal to remove the requirement that H-2A workers can only port to an employer who participates in good standing in E-Verify. The commenter said that the Department's initial goal to incentivize E-Verify's use and reduce unauthorized workers in the agricultural sector was still important. The commenter instead suggested DHS extend the requirement to all employers who petition for workers in the H-2 program, reasoning that E-Verify participation has "negligible costs and significant benefits to employers." The commenter added that E-Verify reduces the risk employers would hire unauthorized workers and provides them with a rebuttable presumption to section 274A of the INA if they do. The commenter also said that E-Verify participation reduces the likelihood that employers engage in misconduct, because employers who

filing-fees/frequently-asked-questions-on-the-uscis-fee-rule (last visited Apr. 11, 2024). These amounts represent the Form I-129 filing fees and do not include the additional asylum fee, if applicable.

¹⁰⁴ *Id.* These amounts represent the Form I-129 filing fees and do not include the additional asylum fee, if applicable.

misuse E-Verify are subject to "significant" criminal and civil liability.

Similarly, a joint submission from former DHS senior officials expressed opposition to the removal of the E-Verify requirement, reasoning that the NPRM was missing a justification for its removal. Referencing statistics associated with the "speed and accuracy" of the E-Verify program, the commenters stated that E-Verify is a "signature enforcement program" that deters undocumented immigration and serves as a "key indicator" that an employer is fairly dealing with its employees. The commenters said that the NPRM does not justify the proposal to remove the requirement and that it does not seek alternatives because the use of E-Verify is contrary to the goals of the Administration and is viewed as a barrier to legal immigration. While stating that there has been an increase in the number of noncitizens arriving at the U.S. border, the commenters expressed concern that "a tool with a proven track record of effectiveness" was being eliminated. The commenters added that the removal of the requirements "illustrates" the Administration's "contentment with illegal employment" in the United States, and concluded that the provision was arbitrary and capricious and that it should be struck from the final rule.

Response: DHS disagrees with the commenters. Permanently making portability available to all H-2 employers is expected to increase worker mobility and employer flexibility; it is not related to alleged "contentment with illegal employment" nor to the utility of E-Verify as a general enforcement tool. As stated in the NPRM, DHS remains committed to promoting the use of E-Verify to ensure a legal workforce. 88 FR 65040, 65067 (Sept. 20, 2023). However, DHS no longer believes it is appropriate to restrict the benefit of portability to H-2A workers seeking employment with E-Verify employers, particularly given the need to increase these workers' mobility and the various measures enhancing program integrity that are established in this rulemaking. For instance, other provisions being finalized in this rule will improve program integrity and deter harmful or illegal conduct by petitioners. These provisions include the strengthened site visit authority provisions at new 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F) and the mandatory and discretionary denial provisions at new 8 CFR 214.2(h)(10). These new provisions are targeted to address a petitioner's misbehavior within the H-2 programs, which a petitioner's E-Verify status may

¹⁰³ USCIS, "Frequently Asked Questions on the USCIS Fee Rule," <https://www.uscis.gov/forms/>

or may not reveal. As also noted in the NPRM, this provision is not anticipated to reduce E-Verify enrollment. This is because other incentives or even legal requirements exist for E-Verify participation outside of the H-2 programs.

Regarding the suggestion to expand the E-Verify requirement to all employers who petition for workers in the H-2 program (regardless of whether such employers are requesting the benefit of portability), such an expansion of the E-Verify program within the H-2 programs was not proposed in the NPRM and is beyond the scope of this rule. It would also be inconsistent with this rulemaking's goal of improving worker mobility, particularly as H-2B employers have never before been required to participate in E-Verify program in order to benefit from portability.

For all of the above reasons, DHS declines to make any changes to the proposed portability flexibility for the H-2A and H-2B programs that is permanently implemented in this final rule.

h. Additional Suggestions Related to Portability Provisions

Comment: A few advocacy groups and a union generally supported the portability provisions but noted that, while the portability and grace period provisions represent an improvement over the current status quo, they will not fully achieve their goals unless H-2 workers have better ways of obtaining accurate or real-time information about other available H-2 employment opportunities. These commenters suggested that the Department implement additional measures to ensure that H-2 workers are aware of existing employment opportunities. For example, the commenters suggested DHS:

- Work with DOL to improve the SeasonalJobs.dol.gov platform so that this website would provide accurate, real-time information about available job opportunities;
- Facilitate communication between workers and employers during the recruitment process, the pendency of the petition, and when porting between jobs, either through the enhancement of Seasonal Jobs or another platform, which would be an important step towards a just recruitment model through which workers would be able to connect directly with vetted, legitimate employers through a multilingual and accessible government database of verified job offers;

- Work with State workforce agencies' job services to H-2 workers seeking alternative employment;
- Consider the idea of allowing additional flexibility to match workers with other employers that are in need of staffing support;
- Create a process for H-2A workers in the United States to notify USCIS that they are seeking employment. These workers could be added to a database accessible by prospective H-2A employers for the duration of the worker's visa validity and grace period (although the list should not include any personal identifying information that may be used to retaliate or discriminate against workers, such as name, age, or gender). Such a process could also allow workers to rebut fraudulent abscondment or termination reports filed by their employers;
- Require employers who have not made job offers to domestic or prospective H-2 workers outside of the country to offer employment to an H-2 worker or prospective H-2 worker seeking new employment that qualifies for the position.

Response: DHS will not implement these suggestions in this final rule. While DHS appreciates the commenters' concerns about the need to provide workers with information about available job opportunities in order to improve the utility of the new portability provision, it is beyond DHS's purview to match or otherwise facilitate recruitment between an H-2 worker and a prospective H-2 employer. Working with DOL to enhance its SeasonalJobs.dol.gov platform or working with State workforce agencies is outside the scope of this DHS rule. However, DHS may continue to consider some of these suggestions and other ways to enhance worker mobility outside of the regulatory process.

Comment: Some commenters expressed concerns that true job portability would not be fully realized without a mechanism for H-2 workers to obtain information about a portability petition filed on their behalf. These commenters stated that, currently, an H-2 beneficiary's knowledge of their status depends entirely upon their employer's representations, and that existing procedures leave an H-2 worker vulnerable to unscrupulous employers and labor contractors who withhold or misrepresent petition status information. The commenters further stated that current procedures increase the worker's risk of labor exploitation, abuse, trafficking, blacklisting, or other forms of employer retaliation. These commenters made various recommendations on how DHS could

improve the benefits of portability by improving an H-2 worker's access to status information. These commenters recommended DHS:

- Directly notify H-2 workers of their continued lawful status and employment authorization status where an H-2 employer represents that it has filed an I-129 petition identifying them as a beneficiary;
- Provide I-129 petition and other immigration information to H-2 beneficiaries;
- Establish mechanisms for H-2 workers to independently confirm they are the beneficiaries of petitions and receive information about their immigration process;
- Communicate immigration status information through WhatsApp;
- Work with DOL to improve seasonal.jobs to provide H-2 workers with full and accurate information about the terms and conditions of offered H-2 employment and any agents authorized to recruit on behalf of the employer.

Response: DHS appreciates these comments. In the NPRM, DHS stated that it was seeking preliminary public input on ways to provide H-2 and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will seriously consider the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

4. Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa

a. General Support

Comment: A couple of trade associations expressed support for USCIS' elimination of the "dual intent" provision. Similarly, several trade associations and an advocacy group expressed support for the proposal to allow H-2 workers to have a "dual intent" of being both a noncitizen and an immigrant for purposes of obtaining a Green Card. A trade association expressed support for a "clearly defined path" for H-2 workers with a "dual intent" of obtaining a Green Card. Similarly, a business association expressed support for the provisions,

reasoning it would “form the beginning of a ‘dual intent’ regime.”

Numerous commenters, including advocacy groups, professional associations, and a research organization, expressed support for the proposed rule’s clarification that H–2 workers may take steps to become lawful permanent residents while maintaining lawful immigration status. A farming entity regarded proposed 8 CFR 214.2(h)(16)(ii) as “a significant and much-needed improvement to the current regulations governing H–2A workers” that recognizes the dynamic nature of immigration intents, aligns with broader policy goals, and promotes both flexibility and fairness in the H–2A program.

Other commenters expressed support for the proposed changes to H–2 workers’ ability to seek lawful permanent resident status on the basis that it would be beneficial for employers and H–2 workers. A trade association said that the proposed change would benefit workers who have followed H–2 program requirements and employers who want to offer promotions to those workers. A farming entity wrote that the proposed changes would provide a mechanism for improved stability in struggling rural communities and farms, which face challenges in securing full-time employees and working within the immigration system. Similarly, a trade association said that due to domestic labor shortages, employers’ options for permanent agricultural employees are limited. The commenter stated that the proposed rule’s clarification would allow employers to promote workers into permanent positions and expand opportunities for worker mobility. Similarly, a union said the changes would increase worker mobility and thus decrease the vulnerabilities faced by H–2 workers. A professional association stated that the proposed changes would allow for more worker flexibility and would help them obtain permanent residence. The commenter stated that while DHS would scrutinize the conversion of the employer’s job position from a seasonal need to a permanent need, this conversion would assist employers and workers with ongoing labor needs and stability. Another trade association said the proposed change would allow employers to sponsor employees who have an interest in moving to the United States year-round roles in their business.

A group of Federal elected officials said that the proposed rule would empower H–2 workers to seek permanent residence without fear that they would lose their H–2 program

status while they do so. Similarly, a couple of trade associations expressed support that H–2 beneficiaries who seek lawful permanent resident status through a petition related to the permanent labor certification program would not jeopardize their eligibility in the H–2 program in the interim. While expressing support for amending 8 CFR 214.2(h)(16)(ii) to incorporate elements of “dual intent,” a professional association said that the proposal reflected the reality that agricultural and nonagricultural employment could be temporary and permanent and that the employer’s need should not be “imputed” on a worker’s intention regarding employment or future permanent status. The commenter stated that because existing regulations allow approval of a permanent labor certification or filing an H–2 petition to be used as a reason to deny a worker’s extension of stay, the process deters employers and employees from taking steps toward permanent residence due to fear that future H–2 status could be denied based on the worker’s intent. The commenter added that the proposal does not undermine the integrity of the H–2 program because the requirement that employers demonstrate a temporary or seasonal need remains covered by 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

A few commenters, including a farming entity, an attorney, and an individual commenter, expressed support for the proposed provision based on the necessary contributions of H–2 workers to U.S. businesses and the economy. For example, the individual commenter and the attorney said that under current regulations, workers who support U.S. businesses and the U.S. economy are dissuaded from pursuing lawful permanent residence due to the risk of losing eligibility for H–2 status once the permanent labor certification is certified. A couple of commenters added that the potential loss of nonimmigrant status leaves workers with the “impossible” choice between pursuing the long-term goal of U.S. lawful permanent residence and sustaining the immediate need for seasonal income. Such concerns, the commenters concluded, drive potential full-time employees to Canada, harming U.S. businesses that rely on H–2 workers. An attorney and farming entity additionally reasoned that both nonimmigrants and businesses rely on the maintenance of seasonal positions, adding that workers fully intend to abide by the temporary nature of their placement while they wait “in line” to pursue permanent residence through the

employment-based (EB)-3 category and other worker categories. The farming entity wrote that the proposed provisions would enhance the ability of workers to contribute to the United States while respecting the integrity of the immigration system and would address the “overly restrictive” nature of regulations that penalize workers for pursuing a more stable future in the United States. Echoing the above remarks, an individual commenter also expressed support for Section IV.B.4. of the proposed rule (“Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa”) and urged DHS to maintain the proposed language in the final rule.

Response: DHS thanks these commenters and will finalize 8 CFR 214.2(h)(16)(ii) as proposed. As DHS explains further below, the proposal and the finalized regulation do not change the requirements that the H–2 petitioner’s need be temporary or seasonal in nature, that an H–2 beneficiary has a foreign residence that he/she has no intention of abandoning, or that the H–2 worker be in this country temporarily to perform labor or services. Rather, 8 CFR 214.2(h)(16)(ii) clarifies that taking certain steps in seeking lawful permanent residence, by itself, will not violate H–2 status.

b. Opposition on the Basis of Legal Authority

Comment: A couple of commenters, including a joint submission from former DHS senior officials and a research organization, opposed the proposed changes to clarify that an H–2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status. These commenters asserted that the proposal will transform the H–2A and H–2B programs into “dual intent” visa programs and claimed that the proposed change is *ultra vires*, as it is unlawful for agencies to act in violation of their own regulations or enabling statutory authority. The research organization said that both the H–2A and H–2B visa programs are “single intent” visa programs that do not allow beneficiaries to intend to take steps to adjust their status to that of a lawful permanent resident. The commenter asserted that, under the statute, H–2A and H–2B applicants must demonstrate that they are not coming to the United States to reside permanently, as immigrants, but will return home at the end of their authorized period of stay. The

commenter stated that proposed 8 CFR 214.2(h)(16)(i) is inconsistent with statute and must be withdrawn, asserting that if a noncitizen enters the United States on a “single intent” visa but nevertheless intends to apply for a Green Card during the workers’ time in the United States, this indicates that the noncitizen misrepresented their intention at the time they entered the United States. The commenter concluded that it is both *ultra vires* and inappropriate for the Executive Branch to actively encourage H–2A and H–2B workers to take steps towards adjustment of status in violation of the INA. Stating similar rationale, the joint submission from former DHS senior officials said the Department seeks to undermine unambiguous statutory language that the H–2 programs provide for temporary admission. The commenter said, pursuant to clear statutory construction, admission of an H–2 beneficiary cannot be granted when the beneficiary has an intent to abandon a foreign residence. The commenter indicated the proposed provision conflicts with the proposed regulation and violates the first prong of *Chevron*.¹⁰⁵ As further evidence of the asserted *ultra vires* nature of the proposal, the commenter said Congress specifically provided for dual intent of certain nonimmigrants but did not include H–2 classification. The commenter concluded that this proposed rule seeks to create a pathway for admission as a dual-intended H–2 beneficiary that is contrary to the law, asserting that DHS must withdraw these provisions from the proposed rule.

Response: New 8 CFR 214.2(h)(16)(ii) is consistent with the plain language of section 101(a)(15)(H)(ii)(a) of the INA. This provision does not exempt an H–2 worker from the statutory requirement that the worker have a residence in a foreign country which he or she has no intention of abandoning, nor from the requirement that the worker be coming temporarily to the United States to perform H–2 services or labor. This statutory provision includes the phrase “having a residence in a foreign country which he has no intention of abandoning.” Implicit in that phrase is discretion to determine, as a factual matter, whether the noncitizen meets

the definition for classification as an H–2A or H–2B nonimmigrant based, in part, on the noncitizen’s intent, since the statute does not address how such intent is to be ascertained; for example, by setting out facts or factors the Government is to consider.¹⁰⁶ Given that other sections of the INA delegate authority to the Secretary of Homeland Security to administer immigration laws, promulgate regulations regarding the same, and specifically authorize the Secretary to prescribe regulations for the admission of nonimmigrants,¹⁰⁷ DHS is well within its authority to establish which factors it will consider to ascertain the noncitizen’s intent, including whether any of those factors will *de facto* preclude the noncitizen from being classified as an H–2A or H–2B nonimmigrant. Therefore, final 8 CFR 214.2(h)(16)(ii) effectuates the authority Congress delegated to the Secretary to fill in details necessary to carry out the statutory scheme. As finalized, 8 CFR 214.2(h)(16)(ii) simply clarifies that certain H–2 worker’s actions seeking lawful permanent resident status will not, standing alone, be the basis for denying an H–2 benefit. This provision is, in fact, consistent with established binding precedent.¹⁰⁸ DHS is not persuaded that taking steps

¹⁰⁶ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes ‘expressly delegate’ to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’”) (cleaned up).

¹⁰⁷ As discussed in the Legal Authority section of this final rule’s preamble as well as in the proposed rule, under INA sec. 103(a) and (a)(3), 8 U.S.C. 1103(a) and (a)(3), the Secretary has explicit authority to administer and enforce the immigration and naturalization laws and establish regulations necessary to carry out that authority. Furthermore, under INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1), the Secretary has explicit authority to promulgate regulations prescribing the conditions for the admission of nonimmigrants, including explicitly “to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired . . . , such alien will depart from the United States.” In addition, INA sec. 214(c), 8 U.S.C. 1184(c), provides the Secretary with explicit authority to prescribe the form and content of a nonimmigrant visa petition, and to determine the eligibility for the H–2 nonimmigrant classifications.

¹⁰⁸ See *Matter of Hosseinpour*, 15 I&N Dec. 191 (BIA 1975) (noting that “a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status [citing cases]” and holding that “the filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status.”).

described in new 8 CFR 214.2(h)(16)(ii) to secure lawful permanent resident status necessarily demonstrates that the H–2 worker misrepresented their intent when entering the United States or that the H–2 worker does not intend to abide by the rules applicable to H–2A or H–2B temporary status. An unexpected opportunity can arise after admission.

The fact that DHS is amending 8 CFR 214.2(h)(16)(ii) to revise the language put into place by its 1990 regulations regarding the significance of the approval of a permanent labor certification and the filing of an immigrant petition or adjustment of status application with respect to the noncitizen’s H–2 status does not call into question DHS’s statutory authority to do so. As stated in the proposed rule, the current regulation conflates the beneficiary’s nonimmigrant intent with the nature of the employer’s need. 88 FR 65040, 65068 (Sept. 20, 2023). Further, while the agency in previous rulemaking stressed the importance of not allowing petitioners to circumvent the requirement to demonstrate a temporary need by petitioning for permanent status on behalf of the worker even in a different job, DHS continues to maintain, as it did in the NRPM, that such a prohibition is overly broad and that it is important to increase H–2 workers’ mobility to the extent legally possible, particularly given the vulnerability of H–2 workers to potential intimidation and threats made on the basis of their nonimmigrant status. 55 FR 2606, 2619 (Jan. 26, 1990).

Significantly, the provision does not create a “dual-intent” classification or otherwise encourage H–2 workers to seek lawful permanent resident status. It also does not create a new, direct pathway to lawful permanent residence deriving from H–2 status or otherwise contradict any statutory provisions applicable to the H–2A or H–2B classifications. Rather, it allows an H–2 worker to avail themselves of existing lawful pathways by clarifying that approval of a permanent labor certification, the filing of an immigrant petition for a noncitizen (family sponsored or employment-based), or an application by a noncitizen to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H–2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H–2 status. DHS is also slightly revising the provision, as proposed in the NRPM, to explicitly include those seeking benefits as an immediate relative or under the diversity visa program, as it was not DHS’s intention to exclude

¹⁰⁵ Subsequent to receiving this comment, the Supreme Court in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In its decision in *Loper Bright*, the Court recognized that in certain cases Congress has given agencies authority to exercise discretion, including by defining certain terms or promulgating rules to fill in details of a statutory scheme.

those benefits. *See* new 8 CFR 214.2(h)(16)(ii). DHS will consider these actions, together with all other facts presented, in determining whether the H-2 nonimmigrant is maintaining their H-2 status and whether the noncitizen has a residence in a foreign country which he or she has no intention of abandoning. For these reasons, DHS is finalizing this provision with slight revisions relating to immediate family and diversity visa programs described above.

c. Limited Impact of Proposed Provision

Comment: Some of the commenters who are in support of allowing H-2 workers to pursue lawful permanent residence specifically commented on DHS's data, stating that such data show that "the regulation will have a minimal impact due to the low number of workers who apply for permanent resident status" and that "the proposed rule would not expand the underlying eligibility of H-2 workers for lawful permanent resident status."

A research organization stated that few H-2 workers ever obtain lawful permanent resident status through the EB pathway. The commenter stated that Congress must address this issue, as there are insufficient pathways for workers in low-wage jobs and without advanced degrees to obtain lawful permanent resident status or become naturalized. Referencing statistics associated with employment-based lawful permanent residence, the commenter said that only 1 percent of total approved certifications by employers for employment-based lawful permanent residence were for H-2 workers. The commenter attributed this to DHS's interpretation of nonimmigrant intent, which the commenter stated has deterred employers who would otherwise apply to permanently hire H-2 workers.

Response: Congress has defined various employment-based immigrant classifications. This rule is not the place to address the applicability of those categories to H-2 workers. As noted in the proposed rule, this provision does not expand the underlying eligibility of H-2 workers for lawful permanent resident status and is consistent with longstanding precedent. *See Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975).

d. Temporary Need Requirement

Comment: A trade association expressed support for the proposed rule's clarification that an employer may petition for permanent status on behalf of an H-2 employee while still being able to demonstrate a temporary need.

Similarly, a joint submission expressing support for this proposed change stated that it would have no substantive impact on the current temporary need requirements of the H-2 programs and that it would improve the flexibility and mobility of individual beneficiaries. The commenter said that the current framework conflates the beneficiary's intent and the temporary or permanent nature of the employer's need. The commenter concluded that it was in the best interest of the United States and its businesses for the Department to not preclude H-2 status for beneficiaries that are at some point in the lawful permanent residence process and urged the Department to incorporate the provision in the final rule.

Response: DHS appreciates these comments and agrees that a more nuanced approach to actions in pursuit of lawful permanent residence is important for both H-2 workers and employers. As noted in the proposed rule, the requirements that an H-2A or H-2B petitioner must establish temporary need remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively. Removing the language of the prior regulation that mandates stringent consequences for an H-2 worker who takes certain action to obtain lawful permanent resident status creates flexibility for employers to promote H-2 workers.

e. Sponsoring of Lawful Permanent Resident Status by H-2 Employers

Comment: Several commenters, including several trade associations and a few advocacy groups, suggested the Department clarify whether employers can sponsor H-2 workers for permanent positions within their business even if they are the same or similar role that the employer is petitioning for. Some of the commenters reasoned that this was important because some positions are structured the same but while some employees are needed year-round, others are only needed for certain seasonal periods, as they have a reduced need for staff in the off-season. Several trade associations and an advocacy group added that this would allow employers to sponsor H-2 workers more frequently. An advocacy group added that this would provide clarity for workers and employers. Similarly, a business association stated that the proposed changes would provide welcome relief and certainty to H-2 workers and employers if immigrant visa petitions did not preclude workers from obtaining or maintaining H-2 status. However, the commenter also requested that the Department clarify

that the employer that files a permanent immigrant visa petition for an H-2 worker could also be that worker's employer on their H-2 visa.

Another trade association suggested that an additional clarification needed to be proposed for public comment that would allow employers to sponsor H-2 workers for permanent positions within their operation regardless of whether the position corresponds to the employment outlined in the H-2 petition.

Response: DHS appreciates the desire for greater clarity but is not proposing or making any change to how it views an employer's temporary need. As noted in the proposed rule, the requirements that an H-2A or H-2B petitioner must establish temporary and/or seasonal need, as applicable, remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

f. Other Feedback and Suggestions on the Impact of Seeking Lawful Permanent Resident Status

Comment: A union and a research organization expressed support for the proposed change, reasoning that it would increase the ability of H-2 workers to adjust their status to become lawful permanent residents. However, the commenters urged the Department to clarify that the change would apply to workers seeking permanent residence through both employment-based and family-based petitions.

Response: DHS appreciates the opportunity to clarify that the provision at 8 CFR 214.2(h)(16)(ii) does indeed apply to workers seeking permanent residence through both employment-based and family-based, as well as diversity visa, petitions. The provision at 8 CFR 214.2(h)(16)(ii), as revised in this final rule, clarifies that the fact that an individual has taken certain specified steps toward becoming a permanent resident will not by itself be a basis for denying an H-2 petition, a request to extend an H-2 petition, or an application for admission in, change of status to, or extension of stay in H-2 status, but will instead be considered together with all other facts presented in determining whether the individual is maintaining H-2 status and has a residence in a foreign country which he or she has no intention of abandoning. DHS is making minor revisions to the final rule to include all immigrant petitions, instead of just preference petitions, to avoid inadvertently omitting immediate relative petitions under INA sec. 204(a)(1)(I)(i) or diversity visa petitions filed with DOS. *See* new 8 CFR 214.2(h)(16)(ii). Among the steps covered in the revised provision is "the filing of an immigrant petition" on the

individual's behalf. The phrase "immigrant petition" in this context refers to any immigrant petition filed under INA secs. 204(a), 8 U.S.C. 1154(a), and 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i) ("Immediate Relatives"), 203(a), 8 U.S.C. 1153(a) ("Preference allocation for family-sponsored immigrants"), or INA sec. 203(b), 8 U.S.C. 1153(b) ("Preference allocation for employment-based immigrants"), as well as INA sec. 203(c), 8 U.S.C. 1153(c) ("Diversity immigrants"), and thus includes both family-based and employment-based petitions as well as the diversity visa program. Similarly, the provision covers the filing of an application to seek "lawful permanent residence or an immigrant visa" without specifying limitations as to the basis for the permanent residence application or the immigrant visa application.

Comment: While expressing support for the proposed change, a research organization stated in the interest of fairness to applicants in other programs, the change should not be limited to the H-2 program and should be codified generally. Similarly, an advocacy group suggested there be no barriers to legal migration and changes of status for H-2 workers.

In response to proposed 8 CFR 214.2(h)(16)(ii), a research organization requested that DHS provide an explanation as to why it decided to "partially address the barriers to citizenship by H-2A visa participation" rather than incentivizing citizenship. As an alternative to the proposed approach outlined in the NPRM, the organization suggested an approach to establish a clear pathway to citizenship, while incentivizing workers to return to their country of origin. Specifically, citing research, the organization suggested that new immigrants could work during an initial period under a provisional visa, during which they earn the benefit of permanent residence through "a continuous and productive working career" and through payment of taxes. The suggested approach would additionally entail a measure whereby workers would post a bond to an escrow account through their wages, and the bond would be forfeited if the worker becomes a resident.

Response: While DHS appreciates the comment, any new visa program or pathway to citizenship would require legislation. The suggestion about applying the language in new 8 CFR 214.2(h)(16) beyond the H-2 program is beyond the scope of this rule. The commenter's suggestion "that there be no barriers to legal migration and change of status for H-2 workers" is

unclear. However, DHS notes that it proposed numerous changes to improve the efficiency of the H-2 programs and to reduce barriers to use of those programs. For example, DHS proposed to remove the eligible countries lists and to simplify the regulatory provisions regarding the effect of a departure from the United States. These provisions are part of this final rule and are discussed below.

Comment: While expressing support for an immigration process that permits H-2 workers in good standing to apply for permanent residence or citizenship, an association of State Governments questioned whether this change would cause additional administrative burdens for employers and employees, and for the requirements for lawful permanent resident status. The commenter requested the Department clarify the details of this immigration process in the final rulemaking.

Response: DHS does not expect the provision at 8 CFR 214.2(h)(16)(ii) to result in any additional administrative burden for H-2 employers or employees. The provision at 8 CFR 214.2(h)(16)(ii) is not creating a new program for lawful permanent residence or citizenship and does not create any new obligation for H-2 employers or employees; it merely clarifies that, standing alone, the fact that an individual has taken certain steps to pursue permanent residence will not be considered a violation of H-2 status or show an intent to abandon a foreign residence. It is important to note that, for those employers who choose to file an immigrant petition on behalf of a current or former H-2 nonimmigrant—or those H-2 workers who choose to pursue permanent residence through another avenue (whether employment-based or family-sponsored, or on the basis of diversity)—the provision at 8 CFR 214.2(h)(16)(ii) does not change the existing immigration process or eligibility requirements. The provision also does not revise existing eligibility requirements or procedures for adjustment to lawful permanent resident status.

Comment: A business association referenced the consular review process that H-2 workers face when they leave the United States and return on another H-2 visa. The commenter stated that the "dual intent" regulations would help the individuals if they were reviewed by DHS, but that the regulations would not hold sway over consular officials under the State Department. The commenter suggested DHS work with the State Department to "harmonize their respective regulations and guidance documents" to avoid conflictual

applications of the two agencies' policies.

A professional association and a trade association expressed support for the Department's clarification but stated DHS's reasoning for the clarification, that an H-2 worker taking steps to become a permanent resident would not show an intent to abandon their foreign residence, appeared to be counterintuitive.

Response: DHS disagrees that the provision is counterintuitive. An H-2 worker may seek to eventually adjust status to that of a lawful permanent resident while maintaining a current intent to leave the United States at the end of their authorized period of stay and continuing to have a foreign residence that they have no current intention of abandoning. As the rule provides, the approval of a permanent labor certification, filing of a preference or other immigrant visa petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H-2 nonimmigrant is maintaining his or her H-2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning. See new 8 CFR 214.2(h)(16)(ii). Standing alone, such filing will not, however, be sufficient basis to conclude that the H-2 nonimmigrant has failed to maintain his or her H-2 status or has the intent to abandon the person's residence in a foreign country. As noted above, the provision is consistent with longstanding precedent, *Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975) ("[C]ourts have held that a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status.").

DHS agrees that coordination with DOS is important, and notes that the Foreign Affairs Manual (FAM) is not inconsistent with new 8 CFR 214.2(h)(16)(ii). The FAM, which constitutes guidance to DOS employees, is not binding on DHS and does not indicate that certain actions seeking lawful permanent resident status, standing alone, warrant denial of the visa.¹⁰⁹

¹⁰⁹ Currently, the FAM states, in pertinent part: "Unlike H-1B nonimmigrants, H-1B1, H-2, and H-3 nonimmigrants are subject to INA sec. 214(h). Under INA 101(a)(15)(H)(ii)-(iii), an applicant is not classifiable as an H-2A, H-2B, or H-3 nonimmigrant unless the applicant has a residence abroad and no intention to abandon that residence."

5. Removal of “Abscondment,” “Abscond,” and Its Other Variations, and Notification to DHS

a. Removal of “Abscondment,” “Abscond,” and Its Other Variations

Comment: A few commenters expressed support for DHS’s proposed technical change. Several commenters, including a few trade associations, an advocacy group, a joint submission, and a professional association, expressed that they have no concerns or objections to DHS’s proposal to remove the words “abscondment,” “abscond,” and its other variations from the H–2 regulations and replace the word “absconds” with the phrase “does not report for work for a period of 5 consecutive workdays without the consent of the employer.” A trade association stated that it was “agnostic” as to whether the Department should remove the terms “abscondment” and “abscond” from the regulations. A joint submission stated that it has no objections to the Department’s proposal to the extent that it does not substantively change any existing program obligations. The joint submission commented that it considers this a reasonable change to the regulatory text and supports the Department’s rulemaking on this front. The joint submission concurred with the Department that workers deserve to be treated fairly. They further commented that in their experience, though rare, workers do leave employment for legitimate reasons, and in isolation, the act of separating employment should not adversely affect that worker’s ability to secure subsequent employment if done through lawful processes. Similarly, a professional association stated that workers leave their employment for various reasons, the majority of which are entirely legitimate, including to undergo medical procedures, injury, pregnancy, emergencies back home, or to assume more advantageous employment elsewhere. The commenter remarked that it is critical to ensure that DHS uses appropriate and fair language when describing those workers who leave their employment for valid reasons since the negative connotation surrounding these words can negatively impact the workers’ ability to obtain future U.S. immigration benefits.

A professional association noted that some people have a negative connotation of the words “abscond” and “abscondment” and recognized that workers may have valid reasons for leaving their contracts. Two advocacy groups welcomed the Department’s removal of the words “abscondment,” “abscond,” and its other variations from the H–2 regulations as these words convey wrongdoing by the worker, without regard for the reality of their working and living conditions. The advocacy groups stated that there are many reasons why an H–2 worker may not report for work, including illness, injury, unsafe working conditions, and transportation issues. The commenters remarked that replacing these words is a positive step in the recognition of the imbalance of power between workers and employers since it is not uncommon for employers to use the threat of reporting abscondment to prevent workers from asserting their rights.

Response: DHS appreciates the support expressed by these commenters for removing terms “abscondment,” “abscond,” and its other variations from the H–2 regulations. These terms have negative connotations which suggest wrongdoing on the part of H–2 workers who may have a wholly valid reason to leave their employment prior to the end of a work contract. As explained in the supporting comments, in many instances, workers leave employment early for wholly valid reasons, such as safety concerns, medical issues, or emergencies that require their presence in their home countries. In finalizing the proposals to remove these terms, DHS reaffirms its recognition of the many legitimate reasons why workers may leave employment early.

b. Notification Requirements

Comment: A couple of advocacy groups urged the Department to reevaluate its decision to maintain the notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F). The advocacy groups stated that these requirements often function as another avenue of exploitation for abusive employers, who can rely on the threat of reporting a worker as having “absconded” to retaliate against workers seeking to leave. The commenters added that the coercive effect of the threat is intensified by the current policy that bars some absconded workers from the H–2A program for 5 years, and USCIS does not have the resources to verify the accuracy of these reports. The commenters asked that the Department amend this notification system or

include avenues for worker notification and opportunities for workers to respond. The commenters concluded that including workers in the process will minimize the chances that H–2 employment-related reports will be used to retaliate against workers who have exercised their rights or to coerce them into remaining in an abusive or exploitative working environment.

Response: DHS appreciates the commenters’ concerns regarding the potential for the H–2 notification requirements to be used by employers in a coercive or retaliatory manner. As demonstrated by the worker protection provisions finalized in this rule, the Department is strongly committed to addressing all forms of abuse in the H–2 programs, including coercive actions and threats of retaliation committed by employers. The Department has chosen not to substantially change or eliminate the notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), because these information collections continue to have value for both DHS and DOL. The Department reiterates, however, that it does not consider the information provided in an employer notification, alone, to be conclusive evidence indicating the worker is immediately out of status. As noted in the proposed rule, in subsequent petitions on the workers’ behalf, information or evidence may be requested regarding a worker’s date of cessation to demonstrate maintenance of status. This is one reason, in addition to operational limitations, DHS is not adopting the suggestion that affected workers be made aware of and provided an opportunity to respond to notifications submitted by their employers.

Comment: A trade association expressed its concerns about what it described as the burdens, “ineffective safeguards,” and unequal regulatory requirements placed on employers who avail themselves of the H–2 program, such as notification requirements when a beneficiary does not report for work. The commenter stated that employers must continue to satisfy notification requirements when a beneficiary does not report for work, which is yet another requirement for which employers must comply. While the notifications may permit an employer to file for a replacement worker, this is a marginal benefit, reasoned the commenter, noting that a harvesting season may be nearly over before a replacement worker can arrive. On the other hand, the commenter continued, failure to provide such notification could result in sanctions on the petitioner, including that DOL may find the employer liable

Thus, the fact that an H–2 or H–3 nonimmigrant has sought or plans to seek permanent residence may be considered evidence of the applicant’s intention to abandon foreign residence.” DOS, Foreign Affairs Manual 9 FAM 402.10–10(A) (emphasis added), https://fam.state.gov/FAM/09FAM/09FAM040210.html#M402_10_10_A.

to pay wages for up to three-quarters of the hours offered to a worker who abandoned the job. The commenter also suggests that “[H–2] regulating agencies show they are more concerned that employer submits an email than whether a beneficiary maintains their status.” The commenter added that “the Department must do better to ensure beneficiaries maintain status—either by completing job contracts or porting to another eligible job opportunity.”

Response: The commenter does not offer a clear supportive position on retention of petitioner notification requirements other than to suggest that it is important that employers notify DHS when workers have “abandoned” their jobs. The commenter also does not clearly oppose retention of these notification requirements or offer suggestions for revising the related regulatory provisions. Instead, the commenter appears to suggest that the current notification requirements are not “equitable,” as the burdens of complying with them fall heavily on petitioners yet these notification requirements only provide “marginal benefits” to petitioners. While DHS understands that the burdens of compliance fall on the petitioner, DHS believes these information collections continue to have value. For example, information that an H–2 worker is no longer working for a petitioner could be useful for public safety reasons and to maintain the integrity of the H–2 programs (or any other nonimmigrant visa programs) as well.

With regard to the commenter’s suggestion that “[H–2] regulating agencies show they are more concerned that employer submits an email than whether a beneficiary maintains their status,” DHS strongly disagrees with these unfounded assertions. The Department also declines to make any changes with respect to the comment’s statement that DHS must do even more to ensure beneficiaries maintain their status either by completing job contracts or porting to another eligible job opportunity. DHS is finalizing robust worker flexibility provisions in this rule, including expanded grace periods and access to portability, to help ensure H–2 beneficiaries can maintain status if situations arise where they need to find new employment.

F. Program Efficiencies and Reducing Barriers to Legal Migration

1. Eligible Countries Lists

a. Support for Eliminating Eligible Countries Lists

Comment: Multiple commenters expressed general support for the

Department’s removal of the H–2 eligible countries lists. While expressing their support, a professional association and a business association stated that the Department’s rationale for the removal—improving efficiency and removing burdens for the Department and employers—seems appropriate. Another professional association remarked that removing the lists provides another efficiency to the H–2 program. A joint submission concurred with the Department that the existing national interest waiver framework is burdensome, a waste of resources, and difficult to administer, while adding that it unfairly punishes foreign nationals for circumstances involving their home country’s government that are out of their control. The commenter agreed with the Department’s assessment that the costs of the eligible countries lists outweigh its benefits to U.S. geopolitical interests. A professional association applauded the proposed removal of the eligible countries lists, stating that it would reduce burdens on DHS, USCIS, and H–2 employers, while also enhancing the accessibility of the H–2 programs. A research organization welcomed the change to remove the eligible countries lists, stating that the INA provides no authority to impose a presumptive bar to entire nationalities from participating in these programs. The commenter stated that banning certain countries can cause overstay rates from those countries to increase, citing Haiti as an example. An individual commenter expressed general support for the regulations’ stance on reducing barriers to legal migration, and stated that the authorization of a select few countries/foreigners to work in the United States temporarily creates domestic labor shortages and diminishes opportunities for both foreign workers and U.S. industries.

An advocacy group remarked that the proposed provision would free up resources to be used on other pressing projects across DHS and the DOS, as well as reduce the burden on petitioners that seek to hire H–2 workers from ineligible countries. The commenter further stated that the provision would increase access to workers who are potentially available to businesses that utilize the H–2 programs.

Response: DHS appreciates the support from these commenters and agrees that eliminating the eligible countries lists reduces administrative burdens and avoids consequences for potentially blameless workers as a result of the actions of the countries they come from. DHS also appreciates the commenter’s referral to a blog post

discussing the increase in the Haitian overstay rate when at the time Haitian H–2A workers likely suspected that Haiti would be removed from the lists.¹¹⁰ The author of the blog post infers that one reason H–2A overstays rates are typically so low is that noncitizen workers can usually count on returning to H–2 work each year if they abide by the program’s requirements, therefore limiting the incentive to overstay their visa. The author believes that the perceived threat of a country’s nationals becoming ineligible for employment under the H–2 programs may lead to some individuals choosing to overstay rather than risk being unable to return to H–2 employment the following year, as he claims likely happened in the case of Haitian workers in 2016. While the assumptions in that blog post are speculative, it is, if true, an argument supporting the removal of the eligible countries lists.¹¹¹ DHS is retaining the removal of the eligible countries lists in this final rule.

Comment: While expressing support for the proposed rule and specifically its provisions related to reducing paperwork burden by allowing employers to request workers from multiple countries within the same petition, a professional association suggested that DHS explore additional streamlining measures for returning applicants who have favorable reviews from previous employers.

Response: DHS appreciates the general support. However, as the commenter did not provide specific suggestions for additional streamlining measures for certain returning applicants, DHS is not making any changes as a result of this comment.

b. Opposition to Elimination of Eligible Countries Lists

Comment: A couple of commenters, including a joint submission from former DHS senior officials and a research organization, expressed

¹¹⁰ Alex Nowrasteh, CATO Institute, “Haitian Guest Workers Overstayed their Visas Because the Government Cancelled the Program for Them” (Jan. 18, 2018), <https://www.cato.org/blog/haitian-guest-workers-overstayed-their-visas-because-government-cancelled-program-them>.

¹¹¹ DHS removed Haiti from the eligible countries list on January 18, 2018. See 83 FR 2646. It added Haiti back to the list on November 10, 2021, while noting that some factors, including nonimmigrant visa overstay and removal rates that precipitated Haiti’s removal from the H–2 programs in 2018 remain a concern. See “Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,” 86 FR 62559, 62562 (Nov. 10, 2021). Thus, as this example shows, the eligible countries list has not proven to be an especially effective tool in preventing nonimmigrant overstays and punishing recalcitrant countries.

opposition to the proposed provision. The joint submission from former DHS senior officials stated that the eligible countries lists are important tools in preventing nonimmigrant overstays. The commenter remarked that the concerns regarding time spent on adjudication of waiver requests and the compilation of data prior to the lists being generated do not form a basis to “jettison” the entire lists. The commenter stated that the data in the entry-exit report pinpoint which countries’ citizens are more routine abusers of nonimmigrant visas, information that should be used when evaluating which nationalities should be eligible recipients of the visas. While expressing the perceived importance of the lists to national security, public safety, and immigration enforcement, the commenter further remarked that removing one of the greatest punitive measures against a recalcitrant country would breed further non-cooperation. Additionally, the joint submission notes that it would not support the possible alternative to allow less frequent publication of the lists by providing that they remain in effect for up to 3 years instead of automatically expiring after 1 year, as it would be insufficient to combat the overstay rates and would still “allow free passes for recalcitrant countries” in years when no list is published. The commenter concluded that there was no attempt to find alternatives that would keep the lists in place, such as exempting returning workers from the lists in subsequent years.

A research organization strongly recommended that DHS maintain and strengthen the regulatory requirement that the Secretary designate countries whose nationals are eligible to participate in the H-2 programs. The commenter stated that it serves the interests of foreign workers and the U.S. government to bar participation from countries who fail to cooperate with U.S. laws and policies or abuse the visa programs. The commenter reasoned that limiting H-2 eligibility to nationals of countries who meet specific standards enables DHS to reduce risks of fraud and abuse in the H-2 programs and illegal immigration to the United States, all of which harm the integrity of the immigration system and labor conditions in the United States generally. The commenter cited the removal of the Philippines and the Dominican Republic from the list of eligible countries in 2019 as an example of the potential harms that continued inclusion could pose to the H-2 programs. The research organization disagreed with DHS that program

reforms made under this proposed rulemaking will be sufficient to guard against harms such as illegal immigration and human trafficking. The commenter requested that DHS publicize the information it considered regarding agency resource allocation for making program eligibility determinations.

The research organization recommended the following additional requirements for country eligibility:

- DHS should determine that a country’s inclusion in the visa programs would not negatively affect U.S. law enforcement and security interests;
- Participating countries should make similar forms of temporary work visas available to U.S. citizens; and
- Participating countries should enter into agreements with the United States to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

Response: DHS shares the commenters’ concerns about recalcitrant countries but does not anticipate that retaining the eligible countries lists would significantly reduce overstays or encourage countries to cooperate with the United States on immigration matters. DHS reviewed the Congressional Research Service report¹¹² shared by one commenter. That report addresses INA sec. 243(d) visa sanctions in general,¹¹³ rather than focusing on the eligible countries list within the context of the H-2 programs.¹¹⁴ Most significantly, the report concludes that there are several alternatives to visa sanctions, and that both DHS and DOS “reported success in achieving cooperation without resorting to visa sanctions, resulting in countries being removed from the recalcitrant or [at risk of non-compliance (ARON)] lists.”

DHS notes that other provisions in the rule address labor trafficking, including worker portability, whistleblower protections, and mandatory and

discretionary denials for employers with certain violations. In addition, DOL recently finalized a rule that increases oversight of the program, including protections for advocacy and labor organizing, worker protections, and enhancing transparency from employers. 89 FR 33898 (Apr. 29, 2024).

DHS appreciates the suggested alternative to exempt returning employees from the lists in subsequent year to address the DHS’s concerns with the lists; however, DHS disagrees that this suggestion would address all of those concerns. As noted in the proposed rule, eliminating the lists frees up DHS resources which currently are devoted to developing and publishing the lists in the **Federal Register**, and collaborating between several DHS components and agencies as well as DOS. DHS would also still incur the burden of adjudicating waiver requests, as are currently allowed, for nationals of countries not on the lists who are not returning workers. Similarly, employers would still incur the extra burdens of preparing a petition that requests a national from a country not on the lists who is not a returning worker.¹¹⁵ While exempting returning workers could reduce some of the burdens, those that remain are not outweighed by the benefits of retaining the lists when, as discussed above, alternative visa sanctions and diplomatic efforts have been shown to be effective in encouraging cooperation with U.S. immigration laws by other countries.

As DHS declines to retain the eligible countries lists for the reasons discussed above, it also declines to add the new factors the commenter suggested for when DHS is deciding on which countries to include on the lists.

Regarding the request that DHS publicize the information it considered regarding agency’s resource allocation for making program eligibility determinations, the NPRM already described the burdens associated with adjudicating waiver requests as well as the significant collaboration needed between several DHS components and agencies and DOS to come to these yearly eligibility determinations. 88 FR 65040, 65069–70, 65089–90 (Sept. 20, 2023). For example, the NPRM stated that it takes “months of work to gather recommendations and information from

¹¹² Jill H. Wilson, Congressional Research Service, “Immigration: ‘Recalcitrant’ Countries and Use of Visa Sanctions to Encourage Cooperation with Alien Removals,” (July 10, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11025>.

¹¹³ Section 243(d) of the INA, 8 U.S.C. 1253(d), provides for the Department of State’s discontinuation of the granting of immigrant visas and/or nonimmigrant visas to citizens, subjects, nationals, and residents of a specified country upon DHS notification that such country denies or unreasonably delays in accepting repatriation requests.

¹¹⁴ For example, the report discusses sanctions applied to tourist and business visas for certain government officials while vaguely referencing sanctions on a “broader set of visa categories and applicants.”

¹¹⁵ See 8 CFR 214.2(h)(2)(ii) (petitions for workers from designated countries and undersigned countries “should be filed separately”); see also USCIS, “Form I-129 Instructions for Petition for a Nonimmigrant Worker” (recommending that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

offices across ICE, U.S. Customs and Border Protection (CBP), and USCIS, compile statistics and cooperate closely with DOS.” 88 FR 65040, 65089. DHS is unable to provide more specific data beyond the information already provided in the NPRM, as it is not possible to quantify all the time and resources involved in these types of robust agency collaborations and the unique foreign policy considerations required for each analysis.

c. Mixed Feedback on Elimination of Eligible Countries Lists

Comment: A foreign government expressed mixed views on the removal of the eligible countries lists. The commenter expressed that the rationale for removing the list has merit, considering that the limited data available indicated that during FY 2022, the majority of countries currently on the lists did not participate in the H-2 programs. However, the commenter remarked that the elimination of the list may lead to workers from countries with high populations and rates of unemployment flooding the H-2 programs, which would serve as a disadvantage to smaller states that are already in the program. The commenter recommended the implementation of a mechanism to protect the participation of smaller countries, such as a quota system that provides for a minimum level of participation by countries meeting specific criteria.

Response: DHS appreciates the commenter’s support for removing the eligible countries lists and concerns with the impact of doing so on smaller countries. DHS does not anticipate that elimination of the lists will result in the adverse impacts mentioned, however, as elimination of the country lists is country-neutral, and it is speculative that smaller countries would be adversely affected by the elimination of the lists.

2. Eliminating the “Interrupted Stay” Calculation, Reducing the Period of Absence for Resetting the 3-Year Stay Clock

a. General Support for the Provisions

Comment: Commenters expressed support for the proposed changes for a variety of reasons. Several commenters, including a business association, a professional association, and a joint submission expressed support for DHS simplifying the interrupted stay calculation and shortening the period of absence that will reset H-2 workers’ 3-year limit of stay. A professional association said that shortening the period of absence to 60 days is a

welcome change because H-2 workers satisfy a significant economic need for the United States, and therefore it is important to remove unnecessary hurdles to their contributions. A few commenters, including professional, business, and trade associations, expressed support for simplifying the interrupted stay calculation due to the current calculations being confusing for employers and workers. While expressing their support, a few trade organizations noted that this change would simplify the process of determining an H-2 worker’s remaining length of stay. Additionally, a business association said that simplifying the interrupted stay calculation and shortening the period of absence that would reset the 3-year limit of stay should work well when H-2 workers leave the United States via an airport. A joint submission wrote that the proposed changes would improve certainty and predictability for H-2 workers and are a “step towards improving H-2B workers’ ability to seek legal support if needed.”

While describing DHS’s proposed changes to the interrupted stay provisions and the 3-year clock, a joint submission concurred with DHS’s justification for this change, writing that the existing standards are confusing, burdensome, and difficult to implement. The commenters provided an example of how named petitions to extend a beneficiary’s stay require significant documentation, which the commenters said creates administrative work and lengthens the adjudication timeline. This joint submission also noted that reducing the time to reset the 3-year limit of stay to 60 days would not only accomplish the Department’s policy objectives and reduce the burden on workers and employers but also foster interagency harmony, as this would bring DHS’s standards in line with the DOL’s “10-month rule” for evaluating temporary need. The commenters further stated that many H-2A employers utilize the full 10-month period of need, which can result in cases where workers reach their 3-year limit and are ineligible for an extension of stay in H-2A status. The commenters wrote that the proposed change would make it easier for employers with longer periods of need to extend their H-2A workers’ stay as necessary. Similarly, a trade association wrote that for workers who return to their home countries every year, this change would align DHS’s requirements with the maximum possible season of 10 months and clarify the dates for when workers can return to the United States. A professional

association also expressed support for the proposed change to the interrupted stay calculation, as it would create uniformity between the two H-2 programs and increase efficiency and opportunity for workers.

Response: DHS appreciates the commenters’ support for these changes. DHS agrees that these changes will simplify the process for determining an individual’s remaining available time in H-2 status and will reduce confusion for employers. DHS also anticipates that the change will simplify USCIS adjudications, resulting in fewer requests for evidence and greater efficiency in adjudicating H-2 petitions.

b. Opposition to the Provisions

Comment: An advocacy group expressed opposition to the proposed changes. The commenters reasoned that if a worker left the United States, reducing the time to reset the 3-year limit of stay to 60 days would neither pause the period of stay clock nor extend the time a worker could work in H-2 status upon returning. The advocacy group wrote that this could harm workers and prevent them from seeing their families and taking care of them, when necessary, thereby potentially harming the workers’ health.

While a professional association noted that current regulations regarding the 3-year limit and interrupted stay calculation are complicated for employers and workers to understand, the commenter stated that eliminating the interrupted stay calculation was not the correct solution. Instead, the commenter suggested allowing employees to maintain the ability to return to the United States if they had “spent less time in H-2 status given potential ‘interrupted status.’”

Response: DHS does not agree that this provision will harm workers. Under current regulations, a period of absence from the United States will interrupt the stay of H-2 workers only in the following circumstances:

- If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days.
- If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months.

Under the final rule, USCIS no longer recognizes certain absences as an “interrupted stay” for purposes of pausing the calculation of the 3-year limit of stay. Specifically, H-2 workers who have an accumulated stay of less than 18 months and have an absence from the United States of 45 to 59 days will no longer have their period of stay

“interrupted.” DHS recognizes that this subset of H-2 workers may not benefit from these changes, but as it relates to the H-2 program as a whole, the change to simplify the calculations and shorten the time to “reset” the clock will benefit H-2 workers and employers and help improve program efficiency overall. Further, this subset population of H-2 workers may still benefit from the reduced period for resetting their H-2 clock if they extend their stay outside of the United States for at least 60 days. Rather than “interrupting” the stay, an absence for the designated period of at least 60 days would in all cases “reset” the H-2 clock (instead of, per current regulations, just “pausing” the H-2 clock), and thus, allowing for an additional 3 years in the United States in H-2 status upon the worker’s readmission. Moreover, this change does not in any way prevent an H-2 worker from making short trips outside the United States and returning to the United States in H-2 status. Therefore, the basis of the commenters’ concerns about “harm to the family and health of the worker” and “leaving in the ability for employees to return to the United States” is unclear.

To the extent that these commenters are suggesting that any period of absence should interrupt the H-2 period of stay, similar to the current “recapture” provision for H-1B beneficiaries codified at 8 CFR 214.2(h)(13)(iii)(C), DHS explained in the NPRM that it considered and rejected this alternative. As explained in the NPRM, DHS determined that implementing a provision similar to the H-1B “recapture” provision would be only a minimally less confusing calculation for petitioners and H-2 workers, as well as for USCIS adjudicators. DHS believes a single, consistent standard under which an uninterrupted absence of at least 60 days would reset the 3-year limitation represents the best way to reduce confusion, resulting in fewer RFEs and greater efficiency in adjudicating H-2 petitions. Therefore, DHS declines to adopt the commenters’ suggestions and is finalizing the provision without change.

c. Other Feedback and Recommendations Regarding the Interrupted Stay Provisions

Comment: While expressing support for simplifying the interrupted stay calculation, a union suggested the period of absence to reset H-2 workers’ 3-year limit of stay remain at 90 days. The commenter reasoned that H-2 programs are temporary, and therefore a 90-day period of absence aligns better

with the purpose of the program. The commenter added that program reform must advance both U.S. and migrant workers’ interests, and that creating rules employers could misuse as year-round labor solutions would not be an acceptable outcome.

Response: DHS maintains that a 60-day period of absence is sufficient to ensure that an H-2 worker’s stay is temporary in nature, while at the same time affording employers and workers the flexibility to fill an employer’s temporary needs. Further, the commenter did not specifically explain why a 90-day period of absence would better align with the purpose of the program as opposed to 60 days.¹¹⁶ DHS therefore declines to make any changes based on this comment. DHS maintains that a 60-day period of absence is sufficient to ensure that an H-2 worker’s stay is temporary in nature, while at the same time affording employers and workers the flexibility to fill employers’ temporary needs.

Comment: In the context of expressing support for the interrupted stay provisions, several business associations suggested that the Department implement a method for tracking land border crossings, which are not currently tracked, reasoning that this could prevent issues when H-2 workers who cross the border with Mexico return to the United States. A few business associations recommended incorporating this tracking method into the CBP One application so that workers could log their exit when leaving the

United States for Mexico. Another business association expressed concern with the Department’s ability to enforce the current and proposed requirements, reasoning that the Department does not currently have a way to track land border crossings and thus, a way of tracking the H-2A workers that cross the land border with Mexico. Like other commenters, the business association suggested including a function in the CBP One application to allow H-2A workers to log their location when returning to Mexico.

A business association provided a recommendation regarding the use of the CBP One application to track land border crossings. The commenter suggested that the Department build out the application’s capabilities so that H-2 workers are responsible for recording their exit from the United States. Alternatively, the commenter suggested a two-step process where an employer first records the end of an H-2 worker’s employment, and the employee then logs their official exit on the CBP One application when they leave the country.

Response: DHS notes that the burden of proof to establish eligibility for an immigration benefit is on the petitioner or applicant.¹¹⁷ In the NPRM and final rule, DHS has provided a non-exhaustive list of evidence that may be provided to document relevant absences from the United States, including arrival and departure records, copies of tax returns, and records of employment abroad. While DHS appreciates the commenters’ suggestions, DHS did not propose a method for tracking land border crossings or any changes or additions to the CBP One application in the NPRM. Because DHS did not propose any changes with respect to tracking land border crossings or the CBP One application, these comments are outside the scope of this rulemaking. Therefore, DHS declines to adopt these suggestions as part of this final rule. The Department continues to make improvements to the accuracy and reliability of the entry/exit system, and may consider these suggestions as it does so.

G. Severability

Comment: A professional association and a business association expressed support for the Department’s proposal for the regulations to be severable. Another professional association remarked that it has no objection to including severability in the rule proposal.

¹¹⁶ As noted in the NPRM, DHS did not provide specific policy reasons for setting the period of absence at “3 months” in prior regulations, noting only that it was reducing that period from 6 months “in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H-2A program.” *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, 88 FR 65040, 65072 (Sept. 20, 2023); *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 8230, 8235 (Feb. 13, 2008) (proposing the reduction to 3 months); *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 76891, 76904 (Dec. 18, 2008) (adopting the proposed reduction in waiting time without change and agreeing with comments stating that 3 months would “enhance the workability of the H-2A program for employers while not offending the fundamental temporary nature of employment under the H-2A program”); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 49109, 49111 (Aug. 20, 2008) (proposing to reduce the required absence period to 3 months to “reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamental temporary nature of employment under the H-2B program”); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 78104 (Dec. 19, 2008) (adopting the proposed reduction in waiting time without change).

¹¹⁷ See, e.g., INA sec. 291, 8 U.S.C. 1361; 8 CFR 103.2(b)(1), 214.1(a)(3).

Response: DHS appreciates these comments and is finalizing the severability provision with minor clarifying edits. DHS intends for the provisions of this rule to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule will remain in effect as to any other person or circumstance. While, as discussed in the NPRM and in this preamble, the various provisions of this rule, taken together, will provide maximum benefit with respect to strengthening program integrity, increasing worker flexibility, and improving program efficiency, none of the provisions are interdependent and unable to operate separately. In the severability clause contained in this final rule, DHS has identified the second level paragraphs (for example, (h)(6)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.2 that are not being impacted by this final rule.

H. Input on Future Actions/Proposals for Beneficiary Notification

Comment: Multiple commenters suggested that the Department implement an electronic notification system of beneficiary and employer statuses, while also recommending that the Department implement an electronic filing process. A business association suggested using a system like DOL's Foreign Labor Application Gateway (FLAG) system, which would reduce cost and time burdens for employers and DHS. A trade association remarked that electronic filing is a necessary efficiency, and it would be a "disservice" to employers and beneficiaries to not implement electronic filing for H-2A petitions. A couple of trade associations, an advocacy group, and a business association recommended that the Department implement an electronic notification system through the technology the Department currently possesses, while also proposing to make the entire filing process electronic to reduce cost and time burdens to employers and the Department. The commenters added that it is inconceivable that employers must still file their petitions on paper, given they will be transcribed and entered into the Department's electronic system. A trade association stated that the paper petitions currently used are costly, time consuming, and inefficient, especially

given that the Department already stores a large amount of information electronically.

A couple of commenters, including a professional association and a business association remarked that moving USCIS systems into the digital age as quickly as possible would be welcomed by H-2A workers, employers, and the Department itself.

A professional association stated that using email with digitized notices and enhancing website capabilities with real-time information would be the most effective, efficient, and affordable method of communication between beneficiaries, petitioners, and DHS. Another professional association recommended that the Department add an email section to Attachment-1 of Form I-129, which would allow USCIS to email the beneficiary that someone applied to amend their status. The commenter stated that at times, this may result in more work for employers, agents, and associations, but it would be an efficiency that would benefit the worker.

A joint submission concurred with DHS's reasoning on providing notifications directly to beneficiaries, but cautioned the Department not to implement a process that requires significant information collection or disclosure on the part of the employer. The commenter added that it would advocate against any process that makes the contact information of beneficiaries, such as email address, a mandatory field on petition forms. The commenter concluded that failure to provide beneficiary contact information should not serve as a basis for petition rejection or denial.

Another joint submission concurred with DHS that more notice and transparency is beneficial, and limiting notifications to the petitioning employer may restrict the beneficiary's options to transfer to subsequent employment or extend or change their status. The commenter expressed opposition to any changes to the Form I-129 that would dramatically increase the transaction cost associated with a named petition, such as the inclusion of multiple new fields or additional pages. The commenter recommended adding an optional email address field to Attachment-1 and using this information to copy the beneficiary on any notifications. The commenter concluded that a copy of notifications could be mailed to beneficiaries if an email address is not available since the Attachment-1 already requires U.S. and foreign addresses.

Response: DHS appreciates these comments. In the NPRM, DHS stated

that it was seeking preliminary public input on ways to provide H-2 and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. As indicated in the NPRM, the feedback was being sought to inform a potential future action, and DHS did not propose a particular approach in the NPRM. Therefore, DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will take into serious consideration the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

I. Other Comments Related to the Rule or H-2 Programs/Requirements

1. Alternatives and Other General Comments on the Proposed Rule

Comment: Some commenters provided broad recommendations to improve H-2 worker conditions while supporting USCIS for its efforts to protect H-2 workers' rights. For example, an advocacy group stated that in the longer term, additional changes would be needed to shift the balance of power in the employer-worker relationship in favor of workers' rights. A couple of individual commenters provided additional suggestions, requesting that the proposed rule establish safe and clean housing for workers and their families, a minimum wage for workers, access to healthy food, medical care, English language learning opportunities, and education for both adult workers and their children. An individual commenter stated, without elaboration, that H-2 workers should be well compensated for their labor, must have adequate rest periods and opportunities to organize for fair wages, and should have their living conditions and safety monitored.

Response: DHS appreciates the broad support for efforts to protect H-2 workers' rights. However, while DHS appreciates these holistic analyses of the H-2 programs, DHS declines to make any changes in response to these comments as they do not address specific elements outlined in this rulemaking or suggest specific changes. Further, issues involving housing standards, access to housing, H-2 wages, access to healthy foods, and rest periods, generally are better addressed by local, State, and Federal labor agencies such as DOL and are outside

the scope of this rule. Similarly, other concerns with the need for medical care, English language learning opportunities, and education for both adult workers and their children, are outside the scope of this rule.

Comment: An individual commenter requested that any employers who abuse H-2 workers face swift prosecution.

Response: DHS is committed to protecting all workers from exploitation and abuse. However, though it is not entirely clear what the commenter was referring to, DHS notes that the term “prosecution” generally relates to criminal proceedings.¹¹⁸ As this rulemaking does not directly involve criminal proceedings, the comment is beyond the scope of this rulemaking.

Comment: A research organization requested that USCIS prioritize the selection of H-2B petitions in industries with the greatest need for workers in order to curtail fraud and abuse in the program.

Response: DHS appreciates the comment but is not making any changes in response to this comment because the comment is beyond the scope of this rulemaking. In any event, it is also unclear how an industry-based H-2B prioritization scheme would curtail fraud and abuse in the program.

2. Implementation

Comment: An advocacy group recommended developing a “multi-pronged communications strategy to ensure that workers are aware of the changes related to worker flexibility and program integrity once implemented” including clearly communicating all implemented changes related to aligning admissions periods and grace periods to H-2 workers, ensuring workers are aware they may stay in the United States for 60 days following unexpected termination of H-2 employment and for 30 days following the validity period of their H-2 contract. The commenter also requested that DHS partner with worker leaders, organizers, and trusted community organizations to communicate the changes in the proposed rule as well as workers’ rights in the United States more broadly.

Response: DHS has worked diligently to develop a communications strategy in preparation for this final rule. After the publication of this final rule, DHS will announce various stakeholder events it intends to hold, which will be open to the public, to raise awareness of the final rule.

Comment: An individual commenter encouraged USCIS to improve the

clarity and readability of the regulatory text through the use of plain language, active voice, bullet points, lists, examples, and illustrations. The commenter suggested, for example, that USCIS replace terms such as “petitioner,” “beneficiary,” “certifying officer,” or “administrative law judge” with simpler terms, such as “employer,” “worker,” “DHS official,” or “judge.” The commenter concluded that these adjustments would enhance the ability of employers and workers to understand and comply with program regulations.

Response: DHS/USCIS is dedicated to improving its communications with the public. We support the Plain Writing Act of 2010 and have an internal plain language program.¹¹⁹ We strive to use plain language where it is possible to do so; however, often times it is necessary to use precise terms such as “petitioner” and “beneficiary” because these are the words that appear in related and corresponding regulatory text and have established meaning, and using alternate words would introduce ambiguity or confusion.

3. Employer/Petitioner Requirements, Processes, and Fees

Comment: A professional association expressed support for the provision in the proposed rule that would allow for the substitution of H-2A beneficiaries after admission and urged the Department to extend it to H-2B beneficiaries. The commenter said that not extending the provision to H-2B employers would place them on a different footing than H-2A employers and hinders H-2B employers who were looking for foreign labor assistance because they could not find domestic labor.

Response: The provision at 8 CFR 214.2(h)(5)(ix) that allows substitution of H-2A beneficiaries after admission is an existing provision to which DHS did not propose substantive changes. Rather, DHS proposed minor revisions to the provision to remove and replace the negatively charged terms “abscond” and “absconded” with more neutral terms. 88 FR 65040, 65068 (Sept. 20, 2023). Therefore, the commenter’s suggestion is out of scope of this rulemaking.

4. Validity Period and 3-Year Maximum Period of Stay

Comment: A research organization suggested that the Department extend the 3-year maximum stay provision to 6 years, stating that easing the maximum

stay provision would increase the availability of H-2 workers, reduce agency and employer burdens, and improve the bargaining power of workers. The commenter elaborated that the current limit imposes “unnecessary burdens” on agencies by requiring them to vet a new group of workers to replace those subject to the 3-year limit, which would expose the country to “avoidable security risks.” The commenter further elaborated that the current 3-year limit imposes burdens on employers, as employers are harmed by turnover caused by workers leaving the country during their jobs and are potentially blocked from rehiring returning workers whom they have already trained on their operations. The commenter also noted that workers nearing the end of their stay would not be able to change employers, thus giving their employers “excessive leverage in setting wages and working conditions.” The commenter added that the current maximum limit on stay exacerbates the shortage of H-2B workers because H-2B hires who are already in the United States are exempt from the H-2B cap, and that extending the maximum stay provision to 6 years would lead to a lower portion of the H-2 workforce receiving extensions. The commenter also added that the NPRM’s grace periods proposal may radically increase the percentage of workers who reach their 3-year limit. Finally, the commenter stated that the NPRM’s proposal to limit H-2 workers to a maximum of 3 years with H-2 status unless they have departed the United States for an uninterrupted period of 60 days has no basis in law. Referencing the regulatory history associated with the 3-year limit, and the statutory history of the 6-year limit applicable to the H-1B classification maximum period of admission, the commenter concluded that there is “statutory ground” for extending the provision to 6 years. Specifically, the commenter indicated that Congress had defined “coming temporarily” in the H-1B context as up to 6 years.

Response: DHS declines to extend the 3-year maximum period of stay provision to 6 years. First, the NPRM did not propose to substantively change the 3-year maximum period of stay, but rather, proposed to eliminate the “interrupted stay” calculation and reduce the period of absence to restart the 3-year maximum period of stay clock. Second, it is not necessary to change this longstanding regulatory standard which, as the commenter stated has existed since 1964,¹²⁰ was

¹¹⁸ *Prosecution* definition, Black’s Law Dictionary (11th ed., 2019).

¹¹⁹ USCIS, “About Us: USCIS Plain Language,” <https://www.uscis.gov/about-us/uscis-plain-language> (last viewed May 6, 2024).

¹²⁰ 29 FR 11956, 11958 (Aug. 21, 1964). As promulgated in that rulemaking, 8 CFR 214.2(h)(3),

again referenced in the 1987 final rule, and is intended to ensure that a person's stay in H-2 status is in fact temporary, as required under section 101(a)(15)(H)(ii)(a) of the INA.¹²¹ DHS further disagrees with the commenter that because Congress defined what "coming temporarily" means for purposes of the H-1B program, this provision should be applied in the H-2 context or provide support for similar treatment of H-2s. There is no requirement that the maximum period of stay for the H-2 classification be the same as that for the H-1B classification.

The new provisions being finalized in this rule, including the provisions to reduce the period of absence required to reset the worker's maximum period of stay and provide portability flexibility permanently, will alleviate many of the commenter's concerns about rehiring returning workers, pressures on employers due to the H-2B cap, and improving the bargaining power of workers. DHS does not agree with the commenter's concerns about agency burdens. The maximum validity period on an H-2 petition remains unchanged; each H-2 petition may only be approved for a validity period not to exceed 1 year (except for an H-2B petition approved for a one-time occurrence under 8 CFR 214.2(h)(6)(ii)(B)(1)). An employer seeking to employ an H-2 worker beyond the end of the petition validity period would still have to file another H-2 petition requesting an extension of stay for that worker. USCIS would still need to adjudicate each extension petition, at which time USCIS would screen the beneficiary for continued eligibility, and thus keeping the 3-year limit would not lead to "avoidable security risks" as suggested by the commenter.

J. Statutory and Regulatory Requirements

1. Administrative Procedure Act (APA)

Comment: Numerous commenters, including multiple trade associations, a joint submission from numerous industry associations, State Government agencies, and Federal elected officials, expressed general disappointment with the lack of extension or requested a 30-

or 60-day extension to the comment period for the proposed rule. Many commenters reasoned that they and their members or constituents are limited in their ability to review and provide meaningful feedback on the proposed changes, as the comment period aligns with peak harvesting season or peak seasonal business needs. Additionally, multiple commenters reasoned that the comment period overlaps with multiple recent administrative actions—including public comment opportunities with the DOL and the USDA, and other agencies—that impact the same stakeholders and that require input during or around the same period. The commenters concluded that an extension would be necessary for the regulated community to analyze the full impact of the proposed changes, submit comments based on a comprehensive review of the rule, and meaningfully participate in the rulemaking process. A trade association expressed concern that because the proposed regulation does not acknowledge the existing legal investigative and enforcement structure for H-2 employment conditions, that the public cannot properly evaluate or comment on the proposal.

Response: As DHS noted in a November 3, 2023, letter that it posted to the rule's electronic docket (USCIS–2023–0012) for public viewing, DHS takes seriously the requirements under the Administrative Procedure Act to provide an opportunity for members of the public to participate in the rulemaking process by submitting data, views, or arguments on the proposed agency action. In that letter, DHS stated that it decided not to extend the comment period beyond 60 days, that is, past November 20, 2023, the last day of the comment period, noting that a 60-day comment period is generally considered sufficient for the public to provide input in response to proposed rulemaking actions. DHS has provided 60 days for public comment for other comprehensive rulemakings like this one in the past, and that duration has routinely been sufficient as evidenced by the volume and substance of public comments received. The letter emphasized that DHS believes the 60-day comment period for the 2023 H-2 NPRM provides sufficient time and a reasonable opportunity for the public to comment. DHS noted too that USCIS had engaged stakeholder groups over the past several years and incorporated comments and suggestions from these engagements into the 2023 H-2 NPRM.

As stated above, some commenters raised specific concerns with the comment period because it aligned with

peak harvesting season or certain peak seasonal business needs, and because it overlapped with public comment opportunities for administrative actions by other agencies that could impact the same stakeholders. While the noted circumstances may have rendered the 60-day comment period a busier time for certain stakeholders, DHS believes it was sufficient to afford the public a meaningful opportunity to participate in the rulemaking process. Indeed, neither of these circumstances appears to have limited the public's ability to meaningfully engage in the notice and comment period. DHS notes that nearly two thousand commenters—including many stakeholders impacted by the harvest season and other agencies' administrative actions—submitted substantive comments during the 60-day comment period.

Comment: Several commenters, including an advocacy group, a professional association, and a business association, expressed appreciation for the opportunity to meaningfully comment on the proposed rulemaking. A joint submission from a union and numerous advocacy organizations urged USCIS to expedite finalization of the rule immediately following the standard 60-day comment period.

Response: DHS appreciates these commenters' support and the significant response and feedback it received on the published H-2 NPRM. Given the importance of the issues addressed herein, DHS has worked diligently to timely finalize the rule after carefully reviewing public comments and making appropriate changes based on public feedback.

Comment: A few commenters, including an advocacy group, a trade association, and a business association, urged USCIS to engage stakeholders more generously, such as through providing more details for comment, publishing another notice to the **Federal Register** with more detail, or other direct communication with stakeholders. One of these commenters indicated that the NPRM lacked sufficient explanation of the prohibited fees and denial provisions needed to properly apprise stakeholders of what is to be expected of them under this proposed rule. A State Government agency recommended USCIS offer forums for recruiters or hirers of foreign workers to express concerns earlier in the rulemaking process.

Response: DHS appreciates the suggestions from these commenters but disagrees that the NPRM lacked specificity necessary to apprise stakeholders of how the various proposal would operate or what would

the header for which read, "Admission and extension," stated "An alien defined in section 101(a)(15)(H)(ii) of the Act shall not be granted an extension which would result in an unbroken stay in the United States of more than 3 years." It is notable that while this regulation generally applied to all H classifications, the 3-year limit was specifically applied only to H-2s.

¹²¹ "Nonimmigrant Classes," 52 FR 20554, 20555 (June 1, 1987) (interim final rule codifying the 3-year limit noting that "[t]here has traditionally been a three year limit on an H-2 alien's uninterrupted stay").

be required of the public to comply. Nonetheless, as discussed in the section addressing, for example, prohibited fees, DHS has further refined these provisions to address requests for further clarification received from commenters, and has made other responsive edits to the regulation in response to public comments. The number and quality of public comments received on the NPRM further demonstrate that most commenters both understood the proposals and were able to provide salient feedback on those proposals. Therefore, DHS believes that the opportunity for notice and comment has been sufficient. In addition, following publication of the final rule, DHS will consider ways to effectively engage the regulated community on its new H-2 provisions and provide further guidance, if needed, to assist program participants with compliance.

Comment: A joint submission from former DHS senior officials stated that the proposed rulemaking violates the APA as it is “both arbitrary and capricious” and because USCIS must consider alternative options.

Response: DHS disagrees that the proposed changes in the NPRM, which are finalized in this rule, are arbitrary, capricious, and fail to consider alternatives. The NPRM and this final rule provide a reasonable basis for each of the changes proposed and made. To the extent possible and available, DHS has cited studies and data in support of the proposed changes and has used available data to assess the impact of the proposals, and where applicable, regulatory alternatives. In addition, where possible, DHS generated and considered specific alternative approaches to the changes made and explained why it was not proposing such alternatives. For example, DHS explained that rather than eliminating the eligible country list as proposed, it considered keeping the list in place until it is replaced by a new list and extending the timeframe for review from every 1 year to every 2 years. It then explained the shortcomings of this alternative as reasons for not proposing it. 88 FR 65040, 65070 (Sept. 20, 2023). In addition, as an alternative to the complicated calculations needed to determine an interrupted stay under the current H-2 framework, DHS considered adopting an interrupted stay provision similar to the current “recapture” provision for H-1B beneficiaries. Ultimately, DHS chose not to match the H-1B provision because it believes the H-1B provision to “recapture time” would be only a minimally less confusing calculation for petitioners and H-2 workers, as well as

for USCIS adjudicators. 88 FR 65040, 65072. In addition, in the Initial Regulatory Flexibility Analysis in the NPRM, DHS discussed alternatives to the proposed regulation.¹²²

Finally, in this final rule, DHS has considered and addressed alternatives proposed by commenters. For example, in this final rule DHS explains why it is not adopting the alternatives commenters proposed to the elimination of the exception to the prohibition on charging workers fees. As explained more fully in the responses to comments relating to prohibited fees, the prohibited fee provisions in this final rule are intended to complement DOL rules. DHS also explained how inconsistency between DHS’s and DOL’s H-2 rules may cause confusion and could discourage law-abiding employers from using the H-2 program to address labor shortages. As discussed elsewhere in this preamble, this final rule further clarifies the employer obligations related to prohibited fees to ensure that employers understand what is expected of them and are not discouraged from using the H-2 program to fill their legitimate temporary need for workers.

2. Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)

a. Impacts on Nonimmigrants/Workers or Their Representatives

Comment: An advocacy group responded to the request for comment on “the prevalence, population, and cost of prohibited fees and their impacts on H-2 workers.” The advocacy group stated that despite regulations prohibiting the requesting or receiving of payments or recruitment fees from workers in exchange for activity related to H-2A employment, workers are still vulnerable to fraud. The commenter provided an example of H-2A workers being asked to pay recruitment fees of between \$3,000 and \$4,000 per person as a condition for their employment. The commenter also referenced other federal court cases and reports of recruiters or employers charging prohibited fees, and referred to statistics suggesting the average payment issued by workers is \$590 per person.¹²³ The

¹²² 88 FR 65040, 65098, subsection f, (Sept. 20, 2023). (“Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities.”).

¹²³ As examples of the reports of prohibited fees, the commenter cited *Ulloa v. Fancy Farms, Inc.*, 762 Fed. Appx. 859 (2019 U.S. App.), *Palma Ulloa v. Fancy Farms, Inc.*, 274 F. Supp. 3d 1287 (2017 U.S. Dist.), and ICE, “3 Indicted in Immigration Fraud Scheme That Exploited Immigrant Farm Workers By Charging Prohibited Fees For Visas, Living Expenses” (May 17, 2018), <https://www.ice.gov/news/releases/3-indicted-immigration-fraud-scheme-exploited-immigrant-farm-workers-charging>. As support for the statistics suggesting an average prohibited fee payment of \$590, the commenter cited to Centro de los Derechos del Migrante, “Recruitment Revealed” (2018), https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

advocacy group added that predatory actions such as charging workers prohibited fees can contribute to human trafficking, because H-2A workers often arrive to the United States in debt from unreimbursed costs and fees, putting them at greater risk of trafficking.

Response: DHS appreciates the commenters’ input regarding the average amount of prohibited fees H-2 workers are being asked to pay. While DHS cannot independently verify the provided statistics, the input is nevertheless valuable as generally demonstrating the prevalence of the practice of charging prohibited fees despite current regulations that prohibit them. This final rule attempts to mitigate, to the extent possible, the harm to H-2 workers resulting from the imposition or threat of prohibited fees by those engaged in the practices described by the commenters.

b. Impacts on Employers/Petitioners or Their Representatives

Comment: An attorney remarked that while 88 FR 65040, 65045, n. 1 (Sept. 20, 2023) states that “USCIS does not expect any additional costs to H-2B employers as, generally, they do not have to provide housing for workers,” amusement industry employers have had to bear additional costs related to housing provision since 2016. The commenter then stated that USCIS has not conducted a cost-benefit analysis on this matter.

Response: DHS acknowledges that, while there is no statutory requirement for H-2B employers to provide housing, there are regulatory prohibitions against deductions from wages for the cost of housing by an H-2B employer when it is provided primarily for the benefit or convenience of the employer, such as in the context of an employer with a need for a mobile workforce. See 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015). This rule’s regulatory impact analysis of costs and benefits is being revised to acknowledge that certain H-2B employers in this limited scenario may face additional costs such as for housing, but because DHS does not have data on the population of H-2B employers that this provision would affect at this granular of a level, monetized impacts cannot be estimated.

news/releases/3-indicted-immigration-fraud-scheme-exploited-immigrant-farm-workers-charging. As support for the statistics suggesting an average prohibited fee payment of \$590, the commenter cited to Centro de los Derechos del Migrante, “Recruitment Revealed” (2018), https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

Comment: An association of State Governments expressed concern that the proposed rule could cause administrative delays to the H-2B program and higher costs for agricultural employers. In particular, the association suggested that a shortage of labor exacerbated by the proposed rule could cause producers to turn to producing less labor-intensive agricultural products or turn the costs of restructuring their businesses onto consumers.

Response: It is speculative that this rule will exacerbate labor shortages and cause higher costs for agricultural employers and consumers. It is also speculative that this rule will cause administrative delays to the H-2B program. Insofar as the rule codifies new requirements for petitioners and new protections for workers, it does so in furtherance of program integrity.

c. Impacts on Small Entities (Regulatory Flexibility Act, Initial Regulatory Flexibility Analysis (IRFA))

Comment: An association of State Governments expressed concern that the proposed rule would adversely impact small agricultural employers who may lack resources needed to understand the regulatory requirements of the H-2B program. The commenter urged USCIS to specifically contact small entities to describe the proposed changes. A trade association remarked that small employers who rely on agents for recruiting workers and unintentionally violate the proposed stricter standards for prohibited fees could be disproportionately harmed, and some small growers could be put out of business.

Response: DHS appreciates the comment but declines to contact all possibly affected small businesses. DHS emphasizes that all regulatory requirements and procedures will be explained and analyzed through multiple channels (the promulgation of this rule as evidenced by publication after consideration of comments received during the notice and comment period, relevant form instructions, and established communication materials such as the “Small Entity Compliance Guide”). Additionally, DHS believes that marginal burdens being placed on small entities in order to ensure that they comply with program requirements and worker protections is justified by the benefits of increased program integrity (as discussed above in the preamble).

d. Impacts on the Economy, U.S. Citizens/Taxpayers/Consumers

Comment: A research organization expressed concern that USCIS does not provide an impact assessment of the proposed permanent and expanded portability in the NPRM, stating that this prevents the public from comprehending the impact of the proposed rule on the U.S. labor market.

Response: The comment that the NPRM did not provide an impact assessment of the proposed permanent and expanded portability is inaccurate. In the NPRM, DHS provided a detailed explanation of the expected impact of the portability provision. 88 FR 65040, 65044, 65084–65089 (Sept. 20, 2023). Additionally, in this final rule DHS is has provided additional data showing the number of approved H-2B petitions and beneficiaries extending stay with and without a change in employer pursuant to the commenter’s request (see Table 2 and Table 3, respectively).

Comment: A joint submission of former DHS senior officials stated that the economic analysis in the NPRM does not consider administrative costs of the proposed rule on U.S. workers, namely that the average wage for H-2B workers is lower than the national mean wage in several job categories. The joint submission remarked that this could make H-2B employees more favorable to employers than U.S. citizens.

Response: DHS appreciates the comment but disagrees with the commenters’ conclusions regarding H-2B wages and making H-2B workers more favorable to employers than U.S. citizens. A certified TLC issued by the DOL is a necessary condition for the approval of a Form I-129 petition for H-2B workers. The TLC certifies that the employer has already attested and demonstrated that a qualified U.S. worker was not available to fill the petitioning H-2B employer’s job opportunity and that the H-2B worker’s employment in said job will not adversely affect the wages and working conditions of similarly employed workers in the United States. See INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(iii)(A), and (h)(6)(v).

K. Out of Scope

DHS received numerous comments that were unrelated to the proposed revisions in the NPRM. Many of these comments would require Congressional action or additional regulatory action by DHS that was not proposed in the NPRM. Other comments suggested revisions within the purview of DOL or other Federal, State, or local agencies.

Although DHS has summarized the comments it received below (and in some cases, noted them above), DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. Comments from the public outside the scope of this rulemaking concerned the following issues:

- Comments specifically regarding DOL’s rulemaking for H-2A workers, or comments specifically directed to DOL asking them to undertake certain actions;
- Suggestions related to H-2 wages, such as increasing H-2 wages or that farm workers should receive 8 hours of pay for a 4-hour workday;
- Comments to improve or expand the functionality of DOL’s website, SeasonalJobs.dol.gov, or another similar resource to facilitate H-2 workers seeking new jobs;
- Comments asking DHS to engage in interagency efforts with DOJ, the Equal Employment Opportunity Commission, and the Department of Housing and Urban Development, in addressing discriminatory recruitment, labor trafficking, retaliation, and substandard housing;
- Comments to improve DOS’s visa process;
- A suggestion that DOL allow certifications of H-2A and H-2B recurring jobs for up to 3 years, which would allow DHS to approve these workers’ status for up to 3 years;
- A suggestion that DHS reduce the number of petitions an employer needs to make for a given season, including increasing the number of beneficiaries allowed per petition from 25 workers to at least 35 workers;
- Comments advocating for domestic solutions to the aging services staffing crisis, including a guest worker program for eldercare healthcare providers;
- Comments about increasing filing fees for H-2 petitions;
- Suggesting that “employers without violations in the previous 5 years should be able to receive a 3-year labor certification rather than a single-year certification;”
- A request that DHS consider permitting for-profit, non-attorney agents who are not eligible to file a Form G-28, Notice of Entry of Appearance, to communicate with USCIS on behalf of employers if authorized to do so, and allow partial accreditation for this purpose;
- Comments about the annual statutory cap for H-2B visas;
- Comments about the exclusion of certain occupations from the H-2B program;

- General concerns with unauthorized immigration and its negative impacts on the United States;
- A request to close the U.S. southern border and force individuals who entered without authorization to work;
- A request to adjust fees based on the size or type of the employer, allocate visas based on employer and worker needs, and expand the list of eligible occupations based on market demand or worker availability;
- Requests to create a pathway to citizenship;
- Requests to create a clear path to “legal permanent residency” in the United States for H–2 workers;
- Suggestion to create a renewable seasonal visa;
- Comments about deferred action or parole;
- Comments about an ICE policy memorandum relating to enforcement actions in or near protected areas;
- Requests to authorize work employment for spouses of H–2 workers;
- Suggestions to make year-round work easier, including allocating a certain number of year-round temporary visas and increasing the 2-week maximum period for emergent circumstances for H–2A workers;
- Suggestions to create a way for H–2 workers to self-petition for their visas and connect directly with certified employers through a multilingual, government-hosted database of available jobs.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review) and E.O. 14094 (Modernizing Regulatory

Review) direct agencies to assess the costs and benefits of available regulatory alternatives. If a regulation is necessary, these Executive Orders direct that, to the extent permitted by law, agencies ensure that the benefits of a regulation justify its costs and select the regulatory approach that maximizes net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It explicitly draws attention to “equity, human dignity, fairness, and distributive impacts,” values that are difficult or impossible to quantify. All of these considerations are relevant in this rulemaking.

The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094, however it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this regulation.

1. Summary of Major Provisions of the Regulatory Action

As discussed in the preamble, DHS is amending its regulations affecting temporary agricultural and temporary nonagricultural workers within the H–2 programs, and their employers. The final rule seeks to better ensure the integrity of the H–2 programs, enhance protection for workers, and clarify requirements and consequences of actions incongruent with the intent of H–2 employment. The provisions of this final rule subject to this regulatory analysis are grouped into four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H–2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates.

2. Summary of Costs and Benefits of the Final Rule

This final rule will impose new direct costs on petitioners in the form of opportunity costs of time to complete and file H–2 petitions and time spent to familiarize themselves with the rule. The quantifiable costs of this rule that will impact petitioners consistently and directly are the increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule’s portability provision. Over the 10-

year period of analysis, DHS estimates the total costs of the final rule will be approximately \$16,905,113 to \$22,607,100 (undiscounted). DHS estimates the annualized costs of this final rule will range from \$1,825,104 to \$2,438,679 at a 3-percent discount rate and \$2,014,389 to \$2,686,606 at a 7-percent discount rate. In addition, DHS expects the rule will result in transfers from consumers to a limited number of H–2A and H–2B workers who may choose to supply additional labor (consumers pay for the goods made available by the marginal labor provided). The total annualized transfer amounts are estimated to be \$2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of \$337,122 (\$168,561 from these workers + \$168,561 from employers). Fees paid for Form I–129 and premium processing as a result of the final rule’s portability provision constitute a transfer of \$884,180 from petitioners of porting workers to USCIS (3- and 7-percent annualized equivalent).

Certain petitioners may also incur other costs that are difficult to quantify. For example, certain petitioners may incur additional opportunity costs of time should they be selected for a compliance review or a site visit. Other petitioners may face stricter consequences for charging prohibited fees, and/or may opt to transport and house H–2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. In general, petitioners that are found to be noncompliant with the provisions of the rule or other existing authorities (for example, H–2 program violators subject to mandatory and discretionary grounds for denial) may incur costs related to lost sales, productivity, or profits as well as additional opportunity costs of time spent attempting to comply with the rule. Moreover, USCIS may incur increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue RFEs or NOIDs, and for related computer system updates.

The benefits of this final rule will be diverse, though most are difficult to quantify. The final rule extends portability to H–2 workers lawfully present in the United States who are seeking to extend their stay regardless of a porting petitioner’s E-Verify standing, allowing for greater consistency across portability regulations and other nonimmigrant worker categories. Beneficiaries will also benefit from the

extended grace periods, the permanent ability to port, the clarification that employers who employ porting workers must continue to abide by all H-2 requirements regarding worker benefits and protections, and the elimination of the interrupted stay provisions and

instead reducing the period of absence out of the country to reset the 3-year maximum period of stay. The Federal Government will also enjoy benefits, mainly through bolstering existing program integrity activities and providing a greater ability for USCIS to

deny or revoke petitions for issues related to program compliance. Table 4 provides a more detailed summary of the final provisions and their impacts.

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Table 4: Summary of Provisions and Impacts

Provision	Purpose of Provision	Expected Impact of the Provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)	DHS is adding stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS' authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Costs: - Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. - Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. Benefits: - USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities will be improved through increased cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H-2 workers.
8 CFR 214.2(h)(20)	DHS is providing H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers.	Costs: Employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefits: Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H-2 programs while also offering protection to such workers (therefore potentially improving overall working conditions for both U.S. and noncitizen workers), but the extent to which this would occur is unknown.
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C),	DHS is significantly revising the provisions relating to prohibited fees to strengthen the existing	Costs: Enhanced consequences for petitioners who charge prohibited fees could lead to increased

8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D)	prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bases for denial for some H-2 petitions.	financial losses and extended ineligibility from participating in H-2 programs. Benefits: • Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H-2 beneficiaries. • More effective application of provisions regarding prohibited fees benefits domestic workers, compliant petitioners, and H-2 beneficiaries.
8 CFR 214.2(h)(10)(iv)	DHS is instituting certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. • Expanding the grounds for denial could lead to increased financial losses and extended ineligibility from participating in H-2 programs for affected petitioners. Benefits: • Expected to increase compliance with H-2 program requirements, thereby increasing protection of H-2 workers directly and indirectly benefiting domestic workers and compliant petitioners.
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E)	Eliminate the lists of countries eligible to participate in the H-2 programs.	Costs*: • None expected. Benefits: • Employers and the Federal Government will benefit from the simplification of Form I-129 adjudications by eliminating the “national interest” portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H-2 programs. • Free up agency resources currently devoted to developing and publishing the eligible country lists in the <i>Federal Register</i> every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A)	Change grace periods such that they will be the same for both H-2A and H-2B Programs. Create a 60-day grace period following any H-2A or H-2B	Costs**: • H-2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.

8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C)	revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Benefits: - Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. - Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarify responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: - None expected since H-2A petitioning employers are already generally liable for the return transportation costs of H-2A workers. Benefits: - Beneficiaries will benefit in the event that clarified employer responsibility decreases the incidence of workers having to pay their own return travel costs in the event of a petition revocation.
8 CFR 214.2(h)(16)(i)	Clarify that H-2 workers may take certain steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	Costs: - None expected. Benefits: - DHS expects this to enable some H-2 workers who have otherwise been dissuaded to take certain steps towards becoming a lawful permanent residence with the ability to do so without concern over becoming ineligible for H-2 status based solely on taking these steps.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B)	Eliminate the “interrupted stay” calculation and instead reduces the period of absence to reset an individual’s 3-year period of stay.	Costs: - Workers in active H-2 status considering making trips abroad for periods of fewer than 60 days but more than 45 days, may be disincentivized to make such trips. Benefits: - Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. - May reduce the number of RFEs related to 3-year periods of stay. Transfers: - As a result of a small number of H-2 workers at the 3-year maximum stay responding to the shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of \$2,918,958 in additional earnings from consumers to H-2 workers and \$337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21)	Make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.	Costs: The total estimated annual opportunity cost of time to file Form I-129 by human resource specialists is approximately \$42,186. The total estimated annual opportunity cost of time to file

		Form I-129 and Form G-28 will range from approximately \$93,628 if filed by in-house lawyers to approximately \$161,434 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I-907 if it is filed with Form I-129 is \$4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I-907 will range from approximately \$9,006 if filed by an in-house lawyer to approximately \$15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from \$144,636 to \$216,633, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form. Benefits: • Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity will aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H-2 worker with an employer that is not complying with H-2 program requirements will have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of \$884,180 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(3)	DHS is clarifying that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.	Costs: • None expected. Benefits: • Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.
Cumulative Impacts of Proposed Regulatory Changes		

DHS is making changes to the Form I-129, to effectuate the proposed regulatory changes.	Costs: • The time burden to complete and file Form I-129, H Classification Supplement, will increase by 0.23 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer will be \$11.72 for an HR specialist, \$26.26 for an in-house lawyer, and \$45.28 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this final rule ranges from \$571,700 to \$755,946.
Petitioners and/or their representatives will familiarize themselves with the rule.	Costs: • Petitioners and/or their representatives will need to read and understand the final rule at an estimated opportunity cost of time that ranges from \$9,741,753 to \$12,881,310, incurred during the first year of the analysis.
Source: USCIS analysis. Notes: * DHS notes that there were comments advising of possibly adverse costs from the removal of the eligible countries list, notably that the list provides an important incentive for other countries to cooperate with the United States, such as by accepting repatriation of their nationals who are subject to a final order of removal. DHS disagrees with those comments, as discussed above in the preamble. ** DHS does not expect any significant additional costs to H-2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H-2A workers. See INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H-2B workers, although there are regulatory prohibitions against deductions from wages for the cost of housing by an H-2B employer when it is provided primarily for the benefit or convenience of the employer. See 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).	

OMB A-4 Accounting Statement (\$ Millions, FY 2022) Time Period: FY 2024 through FY 2033				
Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation
BENEFITS				
Monetized Benefits	N/A	N/A	N/A	Regulatory Impact Analysis ("RIA")
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	Strengthened protections for workers who expose program or labor law violations, and for workers benefitting from increased grace periods; improvements to program integrity from reduced incentives for employers to collect prohibited fees and increased incentives to comply with program requirements; and increased access to workers potentially available to businesses that utilize the H-2 programs.	RIA		

	Elimination of the eligible countries lists will reduce burdens upon DHS, USCIS, and H-2 employers. DHS will focus these resources on continuing to identify human trafficking and other forms of noncompliance with the H-2 visa programs.			
COSTS (\$ in Millions)				
Annualized monetized costs (7%)	\$2.13	\$1.83	\$2.44	RIA
Annualized monetized costs (3%)	\$2.35	\$2.01	\$2.69	
Annualized quantified, but unmonetized, costs	Increased cooperation with existing USCIS site visits that average 1.7 hours in duration. Whereas 12 percent of petitioners underestimated compliance burdens, additional costs to comply with existing program requirements may occur.	RIA		
Qualitative (unquantified) costs	Certain employers may incur costs (including, but not limited to, lost sales, productivity, or profits and additional opportunity costs of time) for failing to comply with investigative or adjudicative actions undertaken due to the rule.	RIA		
TRANSFERS (\$ in Millions)				
Annualized monetized transfers: From consumers to limited number of workers supplying more labor	(3% and 7%) \$2.92	N/A	N/A	RIA
Annualized monetized transfers: From limited number of H-2 workers to taxes	(3% and 7%) \$0.17	N/A	N/A	RIA
Annualized monetized transfers: From limited number of H-2 employers to taxes	(3% and 7%) \$0.17	N/A	N/A	RIA
Annualized monetized transfers: Fees from petitioners to USCIS	(3% and 7%) \$0.88	N/A	N/A	RIA
Miscellaneous Analyses/Category	Effects	Source Citation		
Effects on State, local, or Tribal governments	None	RIA		
Effects on small businesses	None	RIA		

Effects on wages	None	None
Effects on growth	None	None

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Furthermore, a limited number of changes have been made to the final rule relative to the NPRM. First, the final rule has been updated to reflect the publication of the USCIS Fee Rule.¹²⁴ Second, the final rule has been updated to reflect the publication of the most recent H-2B Supplemental Cap Temporary Final Rule.¹²⁵ Both updates affected the final rule's costs and transfers due to changes to the analytical baseline depicting the world absent the impacts of this rule rather than policy changes from the NPRM. Additionally, some small methodological changes were made to the calculation for the number of marginal Form I-129 filings due to the rule's portability provision.

3. Summary of Comments Related to the Regulatory Impact Analysis and Associated Responses

DHS requested comments from the public on several topics discussed in the NPRM. Several of those comments discussed issues related to the regulatory impact analysis and the economic impacts of the rule. These comments, and their responses, are discussed at length in the preamble but, in the interest of transparency, are also discussed here.

a. Impacts on the Economy, U.S. Citizens/Taxpayers/Consumers

Comment: A research organization expressed concern that USCIS does not provide an impact assessment of the proposed permanent and expanded portability in the NPRM and that, in failing to do so, USCIS prevents the public from comprehending the impact of the proposed rule on the U.S. labor market.

Response: The comment that the NPRM did not provide an impact assessment of the proposed permanent and expanded portability is inaccurate. In the NPRM, DHS provided a detailed explanation of the expected impact of the portability provision. 88 FR 65044, 65084–65089 (Sept. 20, 2023).

¹²⁴ See “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Final Rule,” 89 FR 6194 (31 Jan. 2024).

¹²⁵ See “Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers; Temporary Final Rule,” 88 FR 80394 (17 Nov. 2023).

Additionally, in this final rule DHS has provided additional historical data showing the number of approved H-2B petitions and beneficiaries extending stay with and without a change in employer (*see* Table 2 and Table 3, respectively) pursuant to the commenter's request.

Comment: A joint submission of former DHS senior officials stated that the economic analysis in the NPRM does not consider administrative costs of the proposed rule on U.S. workers, namely that the average wage for H-2B workers is lower than the national mean wage in several job categories. The joint submission remarked that this could make H-2B employees more favorable to employers than U.S. citizens and therefore could have negative impacts on the domestic labor force.

Response: DHS appreciates the comment but disagrees with the commenter's conclusions regarding H-2B wages and making H-2B workers more attractive relative to the domestic labor force. A certified TLC is a necessary condition for the approval for a Form I-129 for H-2B workers and, as such, any prospective H-2B employer has legally attested that they have already attempted to hire domestic labor and that any H-2B beneficiaries will not adversely impact wages and working conditions of similar workers already in the United States.¹²⁶

Comment: A research organization expressed concern that the NPRM does not discuss important aspects of the H-2B program, including extensions of stay, and therefore does not properly address the “true” size of the program. The commenter discussed concerns regarding publicly available data and that the program has grown beyond its statutorily mandated parameters.

Response: DHS appreciates the comment but notes that much of the comment's substance focuses on aspects of the H-2 program that would not be affected by the rule and therefore should not be considered as an impact of the rule. DHS provided an in-depth analysis regarding the annual impacts of the final rule's portability provision.

Furthermore, DHS also provided additional data in this final rule to address the commenter's concerns regarding extensions of stay (*see* Table 2 and Table 3). In summary, the

¹²⁶ See 20 CFR 655.1(a); *see also* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A) and (ii), (h)(6)(iii)(A), and (h)(6)(v).

Department did not receive comments related to the RIA or the rule's economic impacts that necessitated changing the population calculation methodology or analytical content of the RIA present in the NPRM.

4. Background and Purpose of the Rule

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program (collectively “H-2 programs”). Through this final rule, DHS seeks to strengthen worker protections and the integrity of the H-2 programs, provide greater flexibility for H-2A and H-2B workers, and improve program efficiency and reduce barriers to legal migration.

The H-2A temporary agricultural nonimmigrant classification allows U.S. employers unable to find sufficient able, willing, qualified, and available U.S. workers to bring foreign nationals to the United States to fill seasonal and temporary agricultural jobs. To qualify as seasonal, employment must be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. To qualify as temporary, the employer's need to fill the position will, except in extraordinary circumstances, last no longer than 1 year.

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary nature, which may be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.¹²⁷ For an H-2A or H-2B nonimmigrant worker to be admitted into the United States under one of these nonimmigrant classifications, the hiring employer is required to: (1) obtain a TLC from DOL (or, in the case of H-2B employment on Guam, from the Governor of Guam); and (2) file Form I-129, Petition for a Nonimmigrant Worker, with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS

¹²⁷ See 8 CFR 214.2(h)(6)(ii).

review during adjudication of Form I–129.¹²⁸

For the H–2B program there is a statutory cap of 66,000 visas allocated per fiscal year, with up to 33,000 allocated in each half of a fiscal year, for the number of nonimmigrants who may be granted H–2B nonimmigrant status.^{129 130} Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.¹³¹

5. Population

The final rule will impact petitioners (employers) that file Form I–129 seeking to bring foreign nationals (beneficiaries or workers) to the United States to fill

temporary agricultural and nonagricultural jobs through the H–2A and H–2B visa programs, respectively. This rule also will have additional impacts on employers and workers presently in the United States under the H–2A and H–2B programs by permanently providing “portability” to all H–2A and H–2B workers. Portability, for purposes of this proposed rule, is the ability to begin new qualifying employment upon the filing of a nonfrivolous petition rather than upon petition approval. Workers may transfer, or “port,” to a qualifying new job offer that is in the same nonimmigrant classification that the worker currently holds. Porting, as described in this final rule, does not include transferring from one H-visa classification to another such as, for example, transferring from a H–

2A nonimmigrant status to an H–2B nonimmigrant status, or vice versa. The new job offer may be through the same employer that filed the petition or a different employer after an H–2B petition is filed. This provision will apply to all H–2A and H–2B workers on a permanent basis, whereas currently portability applies to only certain H–2A workers and on a time-limited basis to all H–2B workers.¹³² Portability allows H–2A and H–2B workers to continue to earn wages and gaining employers to continue obtaining necessary workers. Table 5 and Table 6 present the total populations this final rule would impact. For provisions impacting a subset of these populations, the analysis provides separate population totals, when possible, for more specific analysis.

Table 5: Total H-2A Petitions Received Using Form I-129 for Total Beneficiaries with Total Approved H-2A Petitions and Beneficiaries, FY 2013 through FY 2022.				
Fiscal Year	Total Petitions Received	Total Number of Beneficiaries	Total Petitions Approved	Total Beneficiaries Approved
2013	7,332	105,095	7,280	104,487
2014	8,226	123,328	8,189	122,816
2015	9,158	157,622	9,077	155,683
2016	10,248	178,249	9,989	172,661
2017	11,602	218,372	11,504	216,000
2018	13,444	262,630	13,315	258,360
2019	15,509	287,606	15,356	282,133
2020	17,012	306,746	16,776	300,834
2021	20,323	353,650	19,853	339,419
2022	24,370	415,229	23,704	396,255
Total	137,224	2,408,527	135,043	2,348,648
10-Year Average	13,722	240,853	13,504	234,865
Source: USCIS Office of Policy and Strategy -- C3, Electronic Immigration System (ELIS) USCIS Data System as of Oct. 18, 2022.				

As shown in Table 5, the number of Form I–129 H–2A petitions increased from 7,332 in FY 2013 to 24,370 in FY 2022 while approved petitions increased from 7,280 in FY 2013 to 23,704 in FY 2022.¹³³ The number of beneficiaries also increased over this

period from 105,095 to 415,229 with approved beneficiaries increasing from 104,487 to 396,255. Note that petitioners can petition for multiple beneficiaries on one petition, hence the much larger number of beneficiaries compared to petitions received and approved. On

average, 13,722 H–2A petitions were received for an average 240,853 beneficiaries and 13,504 H–2A petitions

¹²⁸ Revised effective January 18, 2009 (73 FR 78104).
¹²⁹ See INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).
¹³⁰ In addition to the statutorily available 66,000 H–2B visas per fiscal year, DHS and DOL have also generally provided supplemental visas when granted that authority by Congress. See, e.g., 88 FR 80394.

¹³¹ A TLC approved by DOL must accompany an H–2B petition. The employment start date stated on the petition generally must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).
¹³² See “Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,” 87 FR

76816 (Dec. 15, 2022) (providing temporary H–2B portability to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2024).
¹³³ DHS notes that the number of filed H–2A petitions has grown by a compound average growth rate of approximately 12.76 percent between FY2013 and FY2022. DHS acknowledges that potential costs may be underestimated in this analysis if historical growth rates continue.

were approved for an annual average of 234,865 beneficiaries.

Table 6: Total H-2B Petitions Received Using Form I-129 for Total Beneficiaries with Total Approved H-2B Petitions and Beneficiaries, FY 2013 through FY 2022.				
Fiscal Year	Total Petitions Received	Total Number of Beneficiaries	Total Petitions Approved	Total Beneficiaries Approved¹³⁴
2013	4,720	81,220	4,546	78,532
2014	5,314	91,150	5,132	87,859
2015	5,412	93,160	5,165	90,031
2016	6,527	114,181	5,946	105,213
2017	6,112	110,794	5,860	105,839
2018	6,148	113,850	5,941	108,380
2019	7,461	128,122	7,337	125,773
2020	5,422	95,826	5,269	93,345
2021	9,160	160,790	8,937	156,528
2022	12,392	185,700	12,153	182,037
Total	68,668	1,174,793	66,286	1,133,537
10-Year Average	6,867	117,479	6,629	113,354
Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921				

Table 6 shows that the number of Form I-129 H-2B petitions and number of beneficiaries increased from FY 2013 through FY 2019, declined in FY 2020 due to labor market conditions during COVID-19, and then increased again in FY 2021 and FY 2022.¹³⁵ As previously discussed, the total number of H-2B visas is constrained in recent fiscal years by statutory numerical limits, or “caps,” with some exceptions, on the total number of noncitizens who may be issued an initial H-2B visa or otherwise granted H-2B status during each fiscal year.¹³⁶ Whereas the exact statutory limits (including any supplemental limits) on H-2B visas are unknown for FY 2025 and beyond, the receipts and approvals seen in FY 2022 are assumed

to be a reasonable estimate of future H-2B petitions and beneficiaries.

As these tables show, U.S. employers and foreign temporary workers have been increasingly interested in the H-2A and H-2B programs from FY 2013 to FY 2022 as evidenced by an increasing number of petitions filed for an increasing number of beneficiaries. However, the H-2B program remains constrained by the statutory cap of 66,000 visas allocated per fiscal year, provided for under INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), though Congress, through time-limited legislation, has allowed, to date, supplemental allocations beyond that 66,000 visa cap.¹³⁷ The supplements allocate additional visas for nonimmigrants who may be granted H-

2B nonimmigrant status in each half of a fiscal year.¹³⁸

6. Cost-Benefit Analysis

The provisions of this final rule subject to this regulatory analysis are grouped into the following four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H-2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates. Each subsection that follows explains the proposed provision, its population if available, and its potential impacts.

a. Integrity and Worker Protections

To improve the integrity of the H-2 programs, the final rule will: (1) provide clearer requirements for USCIS compliance reviews and inspections; (2)

¹³⁴ This number includes workers who are exempt from the H-2B cap and those who were approved under any applicable temporary supplemental cap. This number reflects the number of H-2B workers who are in petitions that have been approved by DHS (including ones that have not yet been issued an H-2B visa or otherwise acquired H-2B status).

¹³⁵ Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap in FY 2020, the Secretary did not exercise that authority. See 86 FR 28202 (May 25, 2021).

¹³⁶ On November 17, 2023, DHS made available to employers an additional 64,716 H-2B temporary nonagricultural worker visas for fiscal year 2024. See 88 FR 80394.

¹³⁷ See section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115-31; section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141; section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116-6; section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116-94; section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117-43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117-70, Further Continuing Appropriations Act, 2022; section 204

of Division O of the Consolidated Appropriations Act, 2022, Public Law 117-103, and section 101(6) of Division A of Public Law 117-180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, and section 303 of Division O, Consolidated Appropriations Act, 2023, Public Law 117-328; Public Law 118-15, Continuing Appropriations Act, 2024 and Other Extensions Act, Division A, sections 101(6) and 106 (extending into 2024 DHS funding and other authorities, including the authority to issue supplemental H-2B visas that was provided under title III of Division O of Pub. L. 117-328, through November 17, 2023).

¹³⁸ See INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

provide H-2A and H-2B workers with “whistleblower protections;” (3) include provisions relating to prohibited fees; and (4) institute certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition. We address each of these provisions in turn below.

(1) USCIS Compliance Reviews and Inspections

The final rule includes provisions that codify USCIS’ authority to conduct compliance reviews and inspections within the H-2A and H-2B programs, clarify the scope of such reviews and inspections, and specify the consequences of a refusal or failure to fully cooperate with such compliance reviews and inspections. While no inspection that the USCIS FDNS conducts is mandatory, if an inspection is conducted, this provision will make the successful completion of an inspection required for a petition’s approval.¹³⁹ Inspections can include site visits, telephone interviews, or correspondence (both electronic and mail).¹⁴⁰ This regulatory change will apply to both pre- and post-adjudication petitions, which will codify USCIS’ ability to either deny or revoke petitions accordingly. This final rule will provide USCIS with a greater ability to obtain compliance from petitioners and employers. Outside of this final rulemaking, USCIS is planning to conduct future site visits for both H-2A and H-2B work sites, some of which are expected to occur in later fiscal years.

Data on H-2 program inspections are limited and generally consist of site visits. USCIS has conducted only 189 H-2A program site visits associated with fraud investigations since calendar year 2004. With respect to H-2B program inspections, USCIS conducted a limited pilot program in FY 2018 and FY 2019 in which USCIS conducted site visits and inspections at 364 (randomly selected) H-2B employment sites.¹⁴¹ Of the site visits USCIS conducted, USCIS officers were unable to make contact with employers or workers over 12 percent of the time (45 instances).¹⁴² On

average, each site visit took 1.7 hours.¹⁴³ Of the limited number of site visits USCIS has conducted thus far, non-cooperation exists in at least some cases. Cooperation is crucial to USCIS’ ability to verify information about employers and workers, and the overall conditions of employment.

This final rule will provide a clear disincentive for petitioners who do not cooperate with compliance reviews and inspections while giving USCIS a greater ability to access and confirm information about employers and workers as well as identify fraud. Employers who may be selected to participate in such inspections may incur costs related to the opportunity cost of time to provide information to USCIS instead of performing other work. As discussed above, FDNS data on previous H-2B site visits show that the average site visit takes 1.7 hours. DHS believes that, due to the rule’s provisions clarifying the consequences of a refusal or failure to fully cooperate with compliance reviews and inspections, the rate of “inconclusive” site visits will be negligible. As such, each site visit that warrants a conclusive finding under the rule that would have warranted an “inconclusive” finding under the baseline scenario would therefore cause a 1.7-hour time burden to accrue to the respective petitioner due to the petitioner having to expend time cooperating that they would not have under the baseline.

DHS cannot quantify these costs, however, because the relevant hourly opportunity cost of time is highly specific to the affected petitioner and, as such, any average would likely not be informative. However, DHS expects the benefit of participation in the H-2 program would outweigh these costs. Additionally, employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses.

DHS does not expect this provision to result in additional costs to the Federal Government because it will not require additional resources or time to perform compliance reviews and inspections and, at the same time, USCIS is not seeking to establish a particular number of compliance reviews and inspections to complete annually or increase the number of compliance reviews and inspections or the number of H-2 program site visits. A benefit is that USCIS will have regulations to clearly

refer to its existing authority to deny or revoke a petition if unable to verify information related to the petition. Additionally, existing USCIS program integrity activities will be made more effective by additional cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H-2 workers.

(2) Whistleblower Protections

This final rule provides H-2A and H-2B workers with “whistleblower protections” comparable to the protections currently offered to H-1B workers.¹⁴⁴ For example, if an H-1B worker: (1) is a beneficiary of a petition seeking to extend their H-1B status or change their nonimmigrant status; (2) indicates that they faced retaliatory action from their employer because they reported a labor condition application violation; and (3) lost or failed to maintain their H-1B status related to such violation, USCIS may consider this situation to be an instance of “extraordinary circumstances” as defined by sections 8 CFR 214.1(c)(4) and 248.1(b). In addition, H-1B workers normally are not eligible to extend or change their status if they have lost or failed to maintain their H-1B status. However, if they can demonstrate “extraordinary circumstances,” USCIS may use its discretion to excuse this loss or failure to maintain H-1B status on a case-by-case basis.

DHS does not currently have specific data related to whistleblower protections for the H-1B program nor does it have data on other similar types of reports on worker issues from the H-2 populations.¹⁴⁵ Therefore, it is possible that whistleblower protections may afford H-2 workers the ability to expose issues that harm beneficiaries or are not congruent with the intent of H-2 employment. This impact could, potentially, improve working conditions but the extent to which H-2 workers would cooperate in program integrity activities as a direct result of prohibitions on specified employer

¹³⁹ For more information on site visits, see USCIS, “Administrative Site Visit and Verification Program” (Sept. 9, 2019), <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program>.

¹⁴⁰ The expected time burden to comply with audits conducted by DHS and OFLC is 12 hours. The number in hours for audits was provided by USCIS, Service Center Operations. See 87 FR 76816 (Dec. 15, 2022).

¹⁴¹ The H-2B petitions were randomly selected so they do not represent a population that data led USCIS to believe were more vulnerable to fraud or abuse.

¹⁴² Site visits can be categorized as “inconclusive” for a variety of reasons including,

but not limited to, noncooperation or a lack of personnel (petitioner, beneficiary, or other relevant personnel) present at the respective site.

¹⁴³ Data from USCIS FDNS, Reports and Analysis Branch.

¹⁴⁴ See USCIS, “Combating Fraud and Abuse in the H-1B Visa Program” (Feb. 9, 2021), <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program>.

¹⁴⁵ WHD prohibits retaliation and publishes fact sheets and other resources online. See, e.g., WHD, “Retaliation,” <https://www.dol.gov/agencies/whd/retaliation> (last visited Jun. 17, 2024); WHD, “Fact Sheet #77D: Retaliation Prohibited under the H-2A Temporary Visa Program” (Apr. 2012), <https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation>; WHD, “Fact Sheet #78H: Retaliation Prohibited under the H-2B Temporary Visa Program,” <https://www.dol.gov/agencies/whd/fact-sheets/78h-h2b-retaliation-prohibited> (last visited Jun. 17, 2024).

retaliations is unknown. It is also possible that employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers.

(3) Prohibited Fees

The final rule includes provisions relating to prohibited fees that strengthen the existing prohibitions on, and consequences for, charging certain fees to H-2A and H-2B workers, including new grounds for denial for some H-2 petitions. The economic impacts of these changes are difficult to assess because USCIS currently does not have the means to track or identify petitions associated with the payment of prohibited fees. Prohibited fees are paid by a worker and include, but are not limited to, withholding or deducting workers' wages; directly or indirectly paying a recruiter, employer, agent, or anyone else in the recruitment chain agent; or paying for other work-related expenses the employer is required by statute or regulation to cover.

USCIS generally has no direct interaction with beneficiaries, so it currently depends in significant part on findings by DOS consulates to determine if prohibited fees have been paid, usually in relation to applicant interviews or investigations. For example, the DOS Office of Fraud Prevention, in collaboration with several consulates in Mexico, confirmed they do not have data on the average number of prohibited fees charged nor the amount paid.¹⁴⁶ A consulate in Mexico shared that during visa interviews beneficiaries may disclose the payment of prohibited fees, but typically these admissions are for fees paid to previous facilitators or employers from returning applicants who are going to work for a new employer.¹⁴⁷ This is likely due to disincentives to admitting to the payment of fees for current petitions for fear of losing the proffered job opportunity in the United States.¹⁴⁸ DOS assumes it only receives reports from a small fraction of the workers who

pay prohibited fees because they still are able to obtain work and make more money in the United States than they would in Mexico regardless of whether they pay fees or not leading some workers to choose not to report the prohibited fees.¹⁴⁹ Further, DOS also noted that workers usually only report paying prohibited fees when fees are increased, when they do not have the money to pay the fee in a current year, or they are excluded from being listed on a petition.

Moreover, DOS noted that prohibited fees are commonplace and pervasive in the H-2 program, but that this issue largely goes unreported.¹⁵⁰ Consular employees noted, in their experience, that fees ordinarily range from \$800 to \$1,000 for a beneficiary to be included on a petition but that non-monetary transfers may also occur.¹⁵¹

Data on the prevalence of prohibited fees are very limited. However, according to one non-profit organization that conducted a survey, about 58 percent of H-2 workers reported paying a prohibited fee.¹⁵² Since data on the prevalence of prohibited fees are very limited, we use the 58 percent estimate as a primary estimate of beneficiaries that may be subject to some form of prohibited fee. Using this estimated percentage, we can multiply by the total number of FY 2022 beneficiaries to consider the potential population impacted by prohibited fees.¹⁵³ If we assume 58 percent of beneficiaries pay an average fee of \$900,¹⁵⁴ we estimate that prohibited fees (including those incurred both within and outside of the United States) may have cost H-2A workers around \$216.7 million and H-2B workers around \$96.9 million in FY 2022.¹⁵⁵ If prohibited fees are a prevalent problem on such an economically significant scale, it may not be reasonable to assume that this

rule would stop all fees paid by H-2 workers. However, for beneficiaries who currently pay prohibited fees or could pay them in the future, this final rule provision seeks to minimize the occurrence and burden of prohibited fees on H-2 beneficiaries.

It is difficult to estimate the specific impacts that this regulatory change will have, but DHS expects that enhanced consequences for petitioners would act as a deterrent to charge or collect prohibited fees from H-2 workers. In addition, the harsher consequences for employers charging prohibited fees could, in conjunction with whistleblower protections that are to be implemented with this rule, reduce disincentives for workers to report that prohibited fees had been charged. However, DHS is not able to estimate whether and to what extent those disincentives are expected to be reduced. Consequently, under this final rule, there will be additional unquantifiable and non-monetizable reductions in indenture and harms from other more serious abuses such as those discussed in section III, Background. Furthermore, the more effective and consistent application of provisions regarding prohibited fees will benefit domestic workers, compliant petitioners, and H-2 beneficiaries by reducing the ability of noncompliant firms to abuse the H-2 programs.

(4) Mandatory and Discretionary Grounds for Denial

As another integrity measure and deterrent for petitioners that have been found to have committed labor law violations or abused the H-2 programs, DHS will institute certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition. The impacts of these provisions are targeted at H-2 petitioners that have committed serious violations or have otherwise not complied with H-2 program requirements.

To understand the baseline, DHS has data on current DOL debarments.¹⁵⁶ DHS relies on debarment data shared by DOL to determine the eligibility of certain H-2 petitions. As of December 19, 2022, there were 76 active debarments for both the H-2A and H-2B programs. Historically, from FY 2013 through FY 2022, USCIS has tracked a total of 326 recorded debarments for a company, individual, or agent as provided by DOL. USCIS regularly performs additional research to confirm

¹⁴⁶ Information from email discussions. See DOS Emails Re_Prohibited fees (H-2) (Sept. 19, 2022).

¹⁴⁷ *Id.*

¹⁴⁸ Workers have a disincentive to report prohibited fees since regulations stipulate that a visa should be denied to those admitting to paying these fees.

¹⁴⁹ Information from email discussions. See DOS Emails Re_Prohibited fees (H-2) (Sept. 19, 2022).

¹⁵⁰ *Id.*

¹⁵¹ In addition to the non-exhaustive list of prohibited fees, there are also other types of non-fee payments, including favors, meals, or even the transfer of livestock.

¹⁵² See Centro de los Derechos del Migrante, "Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change," https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf (last accessed Mar. 31, 2023).

¹⁵³ FY 2022 Total H-2A beneficiaries 415,229×0.58=240,833 (rounded); FY 2022 Total H-2B beneficiaries 185,700×0.58=107,706 (rounded).

¹⁵⁴ We take an average of the range provided by the consular office in Mexico: (\$800+\$1000)/2=\$900.

¹⁵⁵ Calculations: Half of FY 2022 H-2A beneficiaries 240,833×\$900 fee = \$216.7 million (rounded); Half of FY 2022 H-2B beneficiaries 107,706×\$900 fee=\$96.9 million (rounded).

¹⁵⁶ Please note that impacts from this provision are based on debarment data from DOL. DHS cannot accurately estimate the impact of other mandatory and discretionary denials due to a lack of data, as explained in this section.

debarment and petitioner information to assist in adjudications. For the period of debarment, a petition covered by the debarment cannot be approved where the debarred organization—or its successor-in-interest in some limited circumstances, whether or not having the same name as that listed—is the petitioner or employer.

Costs under this provision of the final rule will be borne by such petitioners or their successor in interest through denials that preclude participation in the H-2 program during the debarment period which can range between 1 to 5 years. More petitioners may face financial losses as a result of these new grounds for denial because they may lose access to labor for extended periods. While DHS expects program participants to comply with program requirements, however, those who do not could experience significant impacts due to this final rule such as experiencing too few workers, loss of revenue, and possibly going out of business.

DHS also notes that the final rule encompasses more than debarments as grounds for mandatory or discretionary denials, including but not limited to USCIS findings of fraud or willful misrepresentation, violation(s) under section 274(a) of the Act, the revocation of an approved TLC, and final revocations by USCIS on the basis of a variety of prohibited behaviors. However, DHS does not have data on the total population of employers that these mandatory and discretionary denial provisions would affect at this granular of a level, or what the impact of potential economic losses could be given the heterogeneity of H-2 employers and the specific fact-patterns in each instance where new mandatory or discretionary grounds for denial could apply.¹⁵⁷ Monetized impacts therefore cannot be estimated. Although monetized impacts cannot be estimated, DHS expects these provisions to provide various benefits. For instance, DHS expects that the final rule will hold certain petitioners more accountable for

violations, including certain findings of labor law and other violations, and will result in fewer instances of worker exploitation and safer working environments for beneficiaries. As is the case with other program integrity provisions of the final rule, DHS believes that these provisions benefit H-2 workers directly and benefit domestic workers and compliant petitioners indirectly by reducing the ability of noncompliant firms to abuse the H-2 programs.

The Federal Government may experience costs associated with implementing these provisions. Specifically, USCIS adjudicators may require additional time associated with reviewing petitioner information relating to debarment by DOL (in the case of H-2A and H-2B debarments) and GDOL (in the case of H-2B debarments), and other determinations of past violations more closely (as they will now be able to consider past noncompliance in the current adjudications), issuing an RFE or NOID, and, if the violation determination is covered under the discretionary bar provision, including when debarment has concluded, conducting the discretionary analysis for relevant petitions. Additionally, the expansion of grounds for denial based on debarment as well as the need to improve the way debarments are tracked in current USCIS systems would require additional inter-agency coordination and information sharing.

b. Worker Flexibilities

This final rule provides greater flexibility to H-2A and H-2B workers by implementing grace periods, clarifying the responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation, clarifying expressly that H-2 workers may take steps toward becoming a permanent resident of the United States while still maintaining lawful nonimmigrant status, and expanding job portability. We address each of the provisions regarding these worker flexibilities in turn below.

(1) Grace Periods

DHS will provide increased flexibility for H-2 workers by extending grace periods. Workers will not experience an increase in work time due to these extended grace periods because these grace periods do not authorize employment. More specifically, this rule will provide the same 10-day grace period prior to a petition's validity period that H-2B nonimmigrants currently receive to H-2A

nonimmigrants, resulting in the extension of the initial grace period of an approved H-2A petition from 1 week to 10 days. The updated initial grace period will also apply to their dependents in the H-4 visa classification. DHS does not have data on how early H-2 workers arrive in the United States prior to a petition's validity period. As a result, we do not know how many H-2B workers currently or historically arrive up to 10 days prior to their employment start date, nor do we know how many H-2A workers currently or historically arrive a full week (7 days) early. Further, the portion of the H-2A populations that may benefit from this provision is unknown. Extending the grace period prior to a petition's validity period for H-2A workers by 3 days may result in additional costs to employers, such as for housing.¹⁵⁸ However, since H-2A employers pay for and normally arrange transportation to the worksite, DHS assumes employers will weigh the costs of providing additional days of housing to H-2A workers against the benefit of providing their employees with additional time to prepare for the start of work. For example, it may be beneficial for an employer to provide workers additional time to adjust to a new time zone or climate. DHS will also extend the grace period following the expiration of their petition from 10 days to 30 days for H-2B nonimmigrants, subject to the 3-year maximum limitation of stay. DHS does not have data on the length of time H-2A or H-2B workers typically spend in the United States following the validity period of a petition because departures from the United States are not always tracked. Unlike the general practice regarding entries, departures are not always tracked and do not typically require an encounter with U.S. Customs and Border Protection, so it is difficult to determine when nonimmigrants leave the United States. Furthermore, DHS notes that while there is no statutory requirement for H-2B employers to provide housing, there are regulatory prohibitions against deductions from wages for the cost of housing by an H-2B employer when it is provided primarily for the benefit or convenience of the employer. See 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015). DHS acknowledges that H-2B employers who are subject to this provision may face additional costs if they opt to keep

¹⁵⁷ For example, DHS possesses limited data from DOL on H-2B violators with violation findings in FY 2020 through FY 2023 as a result of the H-2B TFRs from FY 2022 through FY 2024. DOL Wage and Hour Division publishes enforcement data on several worker programs at <https://enforcedata.dol.gov/homePage.php>. This data alone cannot reliably predict how many of these employers might be subject to a discretionary denial under this rule, because DHS will apply multiple factors to consider whether to approve or deny a petition, as noted above. Furthermore, these data cannot be relied upon here to determine the possible population of violators because the parameters of the violations are more limited than the violations that could be covered under the new discretionary provision.

¹⁵⁸ H-2A workers must be provided housing. See WHD, "H-2A: Temporary Agricultural Employment of Foreign Workers," <https://www.dol.gov/agencies/whd/agriculture/h2a> (last visited Jun. 17, 2024).

workers in the United States for a longer period due to the extended post-validity grace period. DHS does not have data on the population of employers that this provision would affect at this granular level, however, so monetized impacts cannot be estimated. Therefore, the population that may be affected by this provision is unknown due to a lack of available data. Lack of data notwithstanding, DHS does not expect any significant additional costs to accrue to employers as this final rule will extend only the H-2B grace period and, except for the limited scenario described above, H-2B employers are not required to provide housing for their workers during the time of employment or during the grace period. The extended grace period for H-2B workers will benefit the workers by providing additional time to prepare for departure or seek alternative work arrangements such as applying for an extension of stay based on a subsequent offer of employment or porting to a new employer. Additionally, this provision will align the grace periods for H-2A and H-2B workers so that they both are afforded 10 days prior to the approved validity period and 30 days following

the expiration of an H-2 petition, thereby reducing confusion for potential employers and better ensuring consistency in granting workers the grace periods.

DHS will also provide a new 60-day grace period following a cessation of H-2 employment or until the end of the authorized period of admission, whichever is shorter. DHS does not have data on H-2 employment cessations and, therefore, the impact of this provision on the portion of the H-2A and H-2B populations is unknown. However, this provision will likely offer H-2 workers time to respond to sudden or unexpected changes related to their employment, regardless of the reason for employment cessation. The time could be used to seek new employment, prepare for departure from the United States, or seek a change of status to a different nonimmigrant classification.

(2) Transportation Costs for Revoked H-2 Petitions

This final rule adds language clarifying that upon revocation of an H-2A or H-2B petition, the petitioning employer will be liable for the H-2 beneficiary's reasonable costs of return

transportation to their last place of foreign residence abroad. Under 20 CFR 655.20(j)(1)(ii) and 20 CFR 655.122(h)(2), as well as prior 8 CFR 214.2(h)(6)(i)(C) and existing 8 CFR 214.2(h)(6)(vi)(E), petitioning employers are already generally liable for the return transportation costs of H-2 workers, so this final change will not result in any additional costs to employers.

(3) Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or Immigrant Visa

This final rule clarifies that H-2 workers may take certain steps toward becoming lawful permanent residents of the United States while still maintaining lawful nonimmigrant status. The population impacted by this provision can be seen in Table 7. Historical receipts data for Form I-485 (Application to Register Permanent Residence or Adjust Status) show a 5-year total of 9,748 receipts from applicants with H-2A and H-2B status. The annual average is 1,950 receipts.

Table 7: Form I-485 Receipts from Applicants with H-2A and H-2B Status, FY 2018 through FY 2022

Fiscal Year	Receipts	Approved	Denied	Admin Close/Withdraw
2018	1,294	240	22	2
2019	1,698	1,032	81	2
2020	2,491	1,366	87	1
2021	2,701	2,411	97	2
2022	1,564	1,832	138	6
Total	9,748	6,881	425	13
5-Year Average	1,950	1,376	85	3

Source: USCIS Office of Policy and Strategy -- C3, ELIS USCIS Data System as of Nov. 4, 2022.

DHS does not have information on how many H-2 workers have been deemed to have violated their H-2 status or abandoned their foreign residence. However, DHS expects this could enable some H-2 workers who have otherwise been dissuaded to pursue certain steps toward lawful permanent residence with the ability to do so without concern over becoming ineligible for H-2 status. This final rule will not expand the underlying eligibility of H-2 workers for lawful permanent resident status.

(4) Portability

This final rule permanently provides portability for eligible H-2A and H-2B nonimmigrants. The population affected by this provision are nonimmigrants in H-2A and H-2B status who are present in the United States on whose behalf a nonfrivolous H-2 petition for new employment has been filed, with a request to amend or extend the H-2A or H-2B nonimmigrant's stay in the same classification they currently hold, before their period of stay expires and who have not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment. Codifying this provision

in regulation for H-2 nonimmigrants will provide stability and job flexibility to the beneficiaries of approved H-2 visa petitions. This portability provision facilitates the ability of individuals to move to more favorable employment situations and/or extend employment in the United States without being tied to one position with one employer. Additionally, the final rule clarifies that H-2 employers must comply with all H-2 program requirements and responsibilities (such as worker protections) in the event that a petition for a porting worker is withdrawn or denied.

Previously, portability was available on a permanent basis to H-2A workers, but it was limited to E-Verify employers.¹⁵⁹ E-Verify is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I-9) against records available to DHS and the Social Security Administration.¹⁶⁰ DHS does not charge a fee for employers to participate in E-Verify and create cases to confirm the identity and employment eligibility of newly hired employees. Under this final rule, employers petitioning for a porting H-2A worker will no longer need to be enrolled in E-Verify, but will remain subject to all program requirements based on the approved TLC and the filing of the H-2 petition.

Although there is no fee to use E-Verify, this requirement could result in savings to newly enrolling employers. Employers that newly enroll in E-Verify to hire H-2 workers incur startup enrollment or program initiation costs as well as additional opportunity costs of time for users to participate in webinars and learn about and incorporate any new features and system updates that E-Verify may have every year. DHS assumes that most employers that are currently participating in E-Verify will not realize cost savings of these expenses since they previously incurred enrollment costs and will continue to participate in webinars and incorporate any new E-Verify features and system changes regardless of this final rule.¹⁶¹ Additionally, DHS expects that only those employers who enroll for the

explicit purpose of petitioning on behalf of a porting employee will realize a cost savings for verifying the identity and work authorization of all their newly hired employees, including any new H-2A workers as a result of this final rule. For employers currently enrolled in E-Verify that choose to hire an H-2A worker, the final rule will not result in a cost savings to such employers since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding (MOU).¹⁶² Therefore, with or without the final rule, an employer already enrolled in E-Verify that chooses to hire a porting H-2A worker will continue to incur the opportunity cost of time to confirm the employment authorization of any newly hired employees.

Participating in E-Verify and remaining in good standing requires employers to enroll in the program online,¹⁶³ electronically sign the associated MOU with DHS that sets the terms and conditions for participation and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.¹⁶⁴ If an employer violates the terms of this agreement, it can be grounds for immediate termination from E-Verify.¹⁶⁵ Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in E-Verify designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with E-Verify. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign

the MOU, take a new user training, and review the user guides.¹⁶⁶ Once enrolled in E-Verify, DHS estimates the time burden is 1 hour to users who may participate in voluntary webinars and learn about and incorporate new features and system updates to E-Verify annually.¹⁶⁷ This may be an overestimate in some cases as webinars are not mandatory, but we recognize that some recurring burden to users exists to remain in good standing with E-Verify.

Cost savings due to this provision relate only to the opportunity costs of time to petitioners associated with the time an employer will save by not newly enrolling or participating in E-Verify. In this analysis, DHS uses an hourly compensation rate for estimating the opportunity cost of time for an HR specialist. DHS uses this occupation as a proxy for those who might prepare and complete the Form I-9, Employment Eligibility Verification, and create the E-Verify case for an employer. DHS notes that not all employers may have an HR specialist, but rather some equivalent occupation may prepare and complete the Form I-9 and create the E-Verify case.

According to Bureau of Labor Statistics (BLS) data, the average hourly wage rate for HR specialists is \$35.13.¹⁶⁸ DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and is able to estimate the full opportunity cost per E-Verify user, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.¹⁶⁹

¹⁵⁹ While unrelated to this final rule, we note that on April 20, 2020, a TFR was published to temporarily amend its regulations to allow H-2A workers to immediately work for any new H-2A employer to mitigate the impact on the agricultural industry due to COVID-19. This TFR was effective from April 20, 2020, through August 18, 2020. See 85 FR 21739. Another TFR published August 20, 2020, again allowing H-2A workers to immediately work for any new H-2A employer. That TFR was effective from August 19, 2020, through August 19, 2023 and allowed employers to request the flexibilities under this TFR by filing an H-2A petition on or after August 19, 2020, and through December 17, 2020. See 85 FR 51304.

¹⁶⁰ See DHS, "About E-Verify," <https://www.e-verify.gov/about-e-verify> (last updated Apr. 10, 2018).

¹⁶¹ Employers already participating in E-Verify likely already attend webinars and learn about and incorporate new features and system changes annually because they voluntarily chose to enroll or because of rules or regulations beyond the scope of this proposed rule. DHS anticipates that such employers would continue to use E-Verify regardless of their decision to hire H-2A workers or not.

¹⁶² See DHS, "About E-Verify, Questions and Answers," <https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&page=0> (last updated Sept. 15, 2022).

¹⁶³ See DHS, "Enrolling in E-Verify, The Enrollment Process," <https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process> (last updated Aug. 9, 2022).

¹⁶⁴ An employer that discriminates in its use of E-Verify based on an individual's citizenship status or national origin may also violate the INA's anti-discrimination provision, at 8 U.S.C. 1324b.

¹⁶⁵ See USCIS, "The E-Verify Memorandum of Understanding for Employers" (June 1, 2013), http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.

¹⁶⁶ The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB Control Number 1615-0092) (Mar. 30, 2021). The PRA Supporting Statement can be found at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015, under Question 12 (last accessed Apr. 4, 2023).

¹⁶⁷ *Id.*

¹⁶⁸ See BLS, Occupational Employment and Wages, May 2022, Human Resources Specialists (13-1071), <https://www.bls.gov/oes/2022/may/oes131071.htm>.

¹⁶⁹ The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) ÷ (Wages and Salaries per hour) = \$42.48 ÷ \$29.32 = 1.45 (rounded). See BLS, Economic News Release, *Employer Cost for Employee Compensation—December 2022*, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), https://www.bls.gov/news.release/archives/ecec_03172023.pdf.

Therefore, DHS calculates an average hourly compensation rate of \$50.94 for HR specialists.¹⁷⁰ Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time savings for a new employer to enroll in E-Verify is \$115.12.¹⁷¹ DHS assumes the estimated opportunity cost of time to enroll in E-Verify is a one-time cost to employers. In addition, DHS estimates an opportunity cost of time savings associated with 1 hour of each E-Verify user to attend voluntary webinars and learn about and incorporate new features and system changes for newly enrolled entities would be \$50.94 annually in the years following enrollment.

Newly enrolled employers will also incur opportunity costs of time savings

from not having to enter employee information into E-Verify to confirm their identity and employment authorization. DHS estimates the time burden for an HR specialist to create a case in E-Verify is 7.28 minutes (or 0.121 hours).¹⁷² Therefore, DHS estimates the opportunity cost of time savings would be approximately \$6.57 per case.¹⁷³ These employers will not be able to verify the employment eligibility information of newly hired employees against government data systems if they fail to register and use E-Verify.

Table 8 shows the number of Form I-129 H-2A petitions filed for extensions of stay due to change of employer and Form I-129 H-2A petitions filed for new employment for FY 2018 through FY 2022. The average rate of extension of stay due to change of employer compared to new employment was

approximately 6.7 percent over this time period. USCIS also considered the number of beneficiaries that correspond to the Form I-129 H-2A petitions that filed extensions of stay due to a change of employer to estimate the average number of beneficiaries per petition of six. Table 8 also shows that although petitions have been increasing for extension of stay due to change of employer, the number of beneficiaries on each petition has declined from FY 2018 to FY 2022. This indicates that it may be harder for petitioners to find porting workers. One reason may be because petitioners face certain constraints such as the ability for petitioners to access workers seeking to port or a limited number of workers seeking to port.

Table 8: Number of Form I-129 H-2A Petitions and Beneficiaries Filed for Extension of Stay due to Change of Employer and Form I-129 H-2A Petitions Filed for New Employment, FY 2018 – FY 2022.

Fiscal Year	Form I-129 H-2A Petitions Filed for Extension of Stay Due to Change of Employer	Form I-129 H-2A petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings	Number of Beneficiaries Corresponding to Form I-129 H-2A Extension of Stay Petitions Filed	Average Number of Beneficiaries Per Petition Filed for Extension of Stay Due to Change of Employer
	A	B	C=A/B	D	E=D/A
2018	425	10,841	0.039	3,566	8
2019	626	12,177	0.051	4,265	7
2020	915	12,989	0.070	5,995	7
2021	1,334	15,128	0.088	7,226	5
2022	1,526	18,093	0.084	7,250	5
Total	4,826	69,228		28,302	
5-Year Average	965	13,846	0.067	5,660	6

Source: USCIS, Office of Policy and Strategy -- C3, ELIS USCIS Data System, as of Oct. 18, 2022 and USCIS Analysis.

¹⁷⁰ Calculation: \$35.13 average hourly wage rate for HR specialists × 1.45 benefits-to-wage multiplier = \$50.94 (rounded).

¹⁷¹ Calculation: 2.26 hours for the enrollment process × \$50.94 total compensation wage rate for an HR specialist = \$115.12.

¹⁷² The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB Control Number 1615-0092), Mar. 30, 2021. The PRA Supporting Statement can be found at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015 under Question 12 (last accessed Apr. 4, 2023).

¹⁷³ Calculation: 0.121 hours to submit a query × \$50.94 total compensation wage rate for an HR specialist = \$6.57 (rounded).

DHS expects that existing H-2A petitioners will continue to participate in E-Verify and thus will not realize a cost savings due to this final rule. Employers that do not yet port H-2A workers, but do obtain TLCs from DOL, will experience a cost-savings relevant to avoiding enrollment and participation in E-Verify. However, they will not be able to verify the employment eligibility information of newly hired employees against government data systems. However, for employers that do not yet port H-2A workers and do not yet obtain TLCs, the cost-savings will be offset by their need to submit DOL's Employment and Training Administration (ETA) Form 9142A. The public reporting burden for Form ETA-9142A is estimated to average 3.63 hours per response for H-2A.¹⁷⁴ Depending on the filer, the cost to submit Form ETA-9142A is estimated at \$184.91 for an HR specialist, \$414.44 for an in-house lawyer, and \$714.57 for an out-sourced lawyer.¹⁷⁵ Compared to the absolute minimum opportunity cost of time to enroll in, participate in an hour of training, and submit one query in E-Verify of \$172.63,¹⁷⁶ regardless of the filer, a new H-2A porting employer needing to obtain TLCs will not

experience a cost-savings in the first year following this rule.¹⁷⁷

By removing the requirement for a petitioner to participate in E-Verify to benefit from portability, this provision may result in increased demand for H-2A petitioners to petition to port eligible H-2A workers. DHS expects H-2A petitioners that already hire porting H-2A beneficiaries to continue to use E-Verify in the future. However, DHS is unable to estimate the number of future employers that will opt not to enroll in E-Verify in the future as a result of this rule or how many would need to obtain TLCs. DHS does not expect any reduction in protection to the legal workforce as a result of this rule as some H-2A petitioners will continue to use E-Verify. Any new petitioners for porting H-2A workers will still be required to obtain TLCs through DOL, these H-2A employers will be subject to the site visit requirements and comply with the terms and conditions of H-2 employment set forth in this final rule and under other related regulations, and the porting worker will have already been approved to legally work in the United States as an H-2A worker.

Temporary portability for H-2B workers has been provided as recently as the FY 2025 H-2B Supplemental Cap TFR and was available under previous supplemental caps dating back to FY 2021. 89 FR 95626 (Dec. 2, 2024). However, data show that there is a longer history of extensions of stay due to changes of employer for H-2B petitions filed even in years when portability was not authorized.¹⁷⁸ Since it is difficult to isolate the impacts of inclusion of temporary portability provisions in the FY 2021 through FY 2025 H-2B Supplemental Cap TFRs from the extensions of stay due to changes of employer that are expected in the absence of this provision, we reproduce the FY 2025 H-2B Supplemental Cap TFR's analysis here.¹⁷⁹ Additionally, DHS is unclear

how many additional H-2B visas Congress will allocate in future fiscal years beyond the 66,000 statutory cap for H-2B nonimmigrants.

The population affected by this provision are nonimmigrants in H-2B status who are present in the United States and the employers with valid TLCs seeking to hire H-2B workers. In the FY 2025 H-2B Supplemental Cap TFR, USCIS uses the population of 66,000 H-2B workers authorized by statute and the 64,716 additional H-2B workers authorized by the rule as a proxy for the H-2B population that could be currently present in the United States.¹⁸⁰ DHS uses the number of Form I-129 petitions filed for extension of stay due to change of employer relative to the number of petitions filed for new employment from FY 2011 through FY 2020. This includes the 10 years prior to the implementation of the first portability provision in an H-2B Supplemental Cap TFR. Using these data, we estimate the baseline rate and compare it to the average rate from FY 2011 through FY 2020 (Table 9). We find that the average rate of extension of stay due to change of employer compared to new employment from FY 2011 through FY 2020 is approximately 10.5 percent.

workers to immediately work for any new H-2B employer to mitigate the impact on nonagricultural services or labor essential to the U.S. food supply chain due to COVID-19. Since the analysis is based on annual fiscal years, data from the months between May and September 2020 are not able to be separated out to determine those early impacts on portability. See 85 FR 28843 (May 14, 2020).

¹⁸⁰ This number may overestimate H-2B workers who have already completed employment and departed and may underestimate H-2B workers not reflected in the current cap and long-term H-2B workers. In FY 2022, USCIS approved 522 requests for change of status to H-2B, and Customs and Border Protection (CBP) processed 1,217 crossings of visa-exempt H-2B workers. See USCIS, "Characteristics of H-2B Nonagricultural Temporary Workers FY2022 Report to Congress" (Apr. 17, 2022), https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf. DHS assumes some of these workers, along with current workers with a valid H-2B visa under the cap, could be eligible to port under this provision. DHS does not know the exact number of H-2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

¹⁷⁴ See DOL, Form ETA-9142A, "H-2A Application for Temporary Employment Certification," OMB Control Number 1205-0466, (Expires Oct. 31, 2025). The PRA Supporting Statement can be found at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202303-1205-002 under Question 12 (Last accessed Apr. 4, 2023); See also DOL, Supplementary Documents, Appendix—Breakdown of Hourly Burden Estimates, H-2A Application for Temporary Employment Certification Form ETA-9142A (OMB Control Number 1205-0537), *Id.* at Section C. (Last accessed Apr. 4, 2023). DOL estimates the time burden for completing Form ETA-9142A is 3.63 hours, including 0.33 hours to complete Form ETA-9142A, 1.33 hours to H-2ALC Filing Requirements, 0.50 hours to complete Waiver for Emergency Situations, 0.25 hours to complete Modify Application/Job Order, 0.50 hours to complete Amend Application/Job Order, and 0.50 hours to complete Herder Variance Request.

¹⁷⁵ Calculations: HR specialist: \$50.94 hourly wage × 3.63 hours = \$184.91 (rounded). In-house lawyer: \$114.17 hourly wage × 3.63 hours = \$414.44 (rounded); Out-sourced lawyer = \$196.85 hourly wage × 3.63 hours = \$714.57 (rounded).

¹⁷⁶ Calculation: \$115.12 enrollment + \$50.94 annual training + \$6.57 query submission = \$172.63.

¹⁷⁷ DHS recognizes that the opportunity cost of time would be higher than this absolute minimum because employers would have more than one employee and E-Verify participants are required to query every new employee.

¹⁷⁸ *Id.*

¹⁷⁹ On May 14, 2020, a final rule published to temporarily amend its regulations to allow H-2B

Table 9: Numbers of Form I-129 H-2B Petitions Filed for Extension of Stay due to Change of Employer and Form I-129 H-2B Petitions Filed for New Employment, FY 2011–FY 2020.

Fiscal Year	Form I-129 H-2B petitions filed for extension of stay due to change of employer	Form I-129 H-2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2011	360	3,891	9.3
2012	294	3,690	8.0
2013	264	4,123	6.4
2014	314	4,671	6.7
2015	415	4,596	9.0
2016	427	5,750	7.4
2017	556	5,298	10.5
2018	744	5,136	14.5
2019	812	6,252	13.0
2020	804	3,997	20.1
FY 2011–2020 Total	4,990	47,404	10.5
Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921			

In FY 2021, the first year an H–2B Supplemental Cap TFR included a portability provision, there were 1,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 7,206 petitions filed for new employment.¹⁸¹ In FY 2022, there were 1,795 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,231 petitions filed for new employment.¹⁸² In FY 2023, there were 2,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,579 petitions filed for new employment.¹⁸³ Over the period when a portability provision was

in place for H–2B workers, the rate of petitions filed using Form I–129 for extension of stay due to change of employer relative to new employment was 19.3 percent.¹⁸⁴ This is above the 10.5 percent rate of filings expected when there was no portability provision in place. We estimate that a rate of about 19.3 percent should be expected in periods with portability.

In order to estimate the number of marginal Forms I–129 filed as a result of the final rule’s portability provision, DHS must first estimate the number of beneficiaries per petition. As discussed above, DHS has provided supplemental H–2B visa allocations each year since

FY 2021. These supplemental allocations are based on time-limited authority granted by Congress, however, and should not be included in any prospective analysis as their existence is not certain. As such, the proper reference population for calculating the marginal impact of the portability provision is the annual statutory cap of 66,000 H–2B visas. Table 10 contains the total petitions, total beneficiaries, and beneficiaries per petition for H–2B Forms I–129 filed under the statutory cap for fiscal year 2019 through fiscal year 2023.

¹⁸¹ USCIS, Office of Performance and Quality—SAS PME C3 Consolidated, as of Sep. 09, 2023, TRK 12921.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Calculation, Step 1: 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,795 Form I–129 petitions for

extension of stay due to change of employer in FY 2022 + 2,113 Form I–129 petitions for extension of stay due to change of employer in FY 2023 = 5,021 Form I–129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,206 Form I–129 petitions filed for new employment in FY 2021 + 9,231 Form I–129 petitions filed for new employment in FY 2022 + 9,579 Form I–129 petitions filed for new

employment in FY 2022 = 26,016 Form I–129 petitions filed for new employment in portability provision years.

Calculation, Step 3: 5,021 extensions of stay due to change of employment petitions + 26,016 new employment petitions = 19.3 percent rate of extension of stay due to change of employment to new employment.

Table 10: Forms I-129 H-2B Receipts and Beneficiaries under Annual Statutory Cap, FY 2019- FY 2023

Fiscal Year	Total Petitions	Total Beneficiaries ¹⁸⁵	Beneficiaries per Petition
2019	3,130	74,384	23.76
2020	3,378	73,552	21.77
2021	3,454	73,682	21.33
2022	4,020	80,374	19.99
2023	4,154	74,364	17.9
Average	3,627	75,271	20.75

Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921

Using 3,627 as our estimate for the number of petitions filed using Form I-129 for H-2B new employment in FY 2024, we estimate that 381 petitions for extension of stay due to change of employer will be filed in absence of this rulemaking's portability provision.¹⁸⁶ With the rule's portability provision in effect, we estimate that 700 petitions will be filed using Form I-129 for extension of stay due to change of employer.¹⁸⁷ As a result of this provision, we estimate 319 additional petitions using Forms I-129 will be filed.¹⁸⁸ DHS acknowledges that any future legislation that provides a supplemental allocation of H-2B visas will necessarily increase the number of Forms I-129 filed as a result of the final rule's portability provision. As such, the estimates presented here should be interpreted as a reasonable lower bound for the impact of the final rule's portability provision.

As shown in Table 17, an average 45.84 percent of Form I-129 petitions will be filed by an in-house or

outsourced lawyer. Therefore, we expect that a lawyer will file 146 of these petitions and an HR specialist will file the remaining 173.¹⁸⁹ Similarly, we estimated that about 93.57 percent of petitions using Form I-129 for H-2B beneficiaries are filed with Form I-907 to request premium processing. As a result of this portability provision, we expect that an additional 298 requests using Form I-907 will be filed.¹⁹⁰ We expect lawyers to file 137 requests using Forms I-907 and HR specialists to file the remaining 161 requests.¹⁹¹

Petitioners seeking to hire H-2B nonimmigrants who are currently present in the United States in lawful H-2B status will need to file Form I-129 and pay the associated fees. Additionally, if a petitioner is represented by a lawyer, the lawyer must file Form G-28; if premium processing is desired, a petitioner must file Form I-907 and pay the associated fee. We expect these actions to be performed by an HR specialist, in-house lawyer, or an outsourced lawyer. Moreover, as previously stated, we expect that about 45.84 percent of petitions using Form I-129 would be filed by an in-house or outsourced lawyer. Therefore, we expect that 146

petitions will be filed by a lawyer and the remaining 173 petitions will be filed by an HR specialist. The opportunity cost of time to file a Form I-129 H-2B petition will be approximately \$243.85 for an HR specialist; and the opportunity cost of time to file a Form I-129 H-2B petition with accompanying Form G-28 will be approximately \$641.29 for an in-house lawyer and \$1,105.71 for an outsourced lawyer.¹⁹² Therefore, we estimate the cost of the additional petitions filed using Form I-129 from the portability provision for HR specialists will be approximately \$42,186.¹⁹³ The estimated cost of the additional petitions filed using Form I-129 accompanied by Forms G-28 from the portability provision for lawyers will be about \$93,628 if filed by in-house lawyers and \$161,434 if filed by outsourced lawyers.¹⁹⁴

We previously stated that about 93.57 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this provision, we expect that an additional 298

¹⁸⁵ This number includes beneficiaries who are exempt from the H-2B cap and reflects the number of H-2B workers who are in petitions that have been approved by DHS (including ones that have not yet been issued an H-2B visa or otherwise acquired H-2B status).

¹⁸⁶ Calculation: 3,627 Form I-129 H-2B petitions filed for new employment $\times$ 10.5 percent = 381 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision.

¹⁸⁷ Calculation: 3,627 Form I-129 H-2B petitions filed for new employment $\times$ 19.3 percent = 700 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision.

¹⁸⁸ Calculation: 700 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision—381 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision = 319 Form I-129 H-2B petition increase as a result of portability provision.

¹⁸⁹ Calculation, Lawyers: 319 additional Form I-129 due to portability provision $\times$ 45.84 percent of Form I-129 for H-2B positions filed by an attorney or accredited representative = 146 (rounded) estimated Form I-129 filed by a lawyer.

Calculation, HR specialist: 319 additional Form I-129 due to portability provision—146 estimated Form I-129 filed by a lawyer = 173 estimated Form I-129 filed by an HR specialist.

¹⁹⁰ Calculation: 316 Form I-129 H-2B petitions $\times$ 93.57 percent premium processing filing rate = 298 (rounded) Forms I-907.

¹⁹¹ Calculation, Lawyers: 298 Forms I-907 $\times$ 45.84 percent filed by an attorney or accredited representative = 137 Forms I-907 filed by a lawyer.

Calculation, HR specialists: 298 Forms I-907—137 Forms I-907 filed by lawyer = 161 Forms I-907 filed by an HR specialist.

¹⁹² Calculation, HR Specialist: \$50.94 hourly opportunity cost of time $\times$ 4.787-hour time burden for form I-129 = \$243.85 estimated cost to file a Form I-129 H-2B petition.

Calculation, In-house lawyer: \$114.17 hourly opportunity cost of time $\times$ 5.617-hour time burden for form I-129 and Form G-28 = \$641.29 estimated cost to file a Form I-129 H-2B petition.

Calculation, outsourced lawyer: \$196.85 hourly opportunity cost of time $\times$ 5.617-hour time burden for form I-129 and Form G-28 = \$1,105.71 (rounded) estimated cost to file a Form I-129 H-2B petition.

¹⁹³ Calculation, HR specialist: \$243.85 estimated cost to file a Form I-129 H-2B petition $\times$ 173 petitions = \$42,186 (rounded).

¹⁹⁴ Calculation, In-house Lawyer: \$641.29 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 $\times$ 146 petitions = \$93,628 (rounded).

Calculation, Outsourced Lawyer: \$1,105.71 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 $\times$ 146 petitions = \$161,434 (rounded).

requests for premium processing using Form I-907 will be filed.¹⁹⁵ We expect 136 of those requests will be filed by a lawyer and the remaining 160 will be filed by an HR specialist.¹⁹⁶ The estimated opportunity cost of time to file Form I-907 will be about \$18.85 for an HR specialist; and the estimated opportunity cost of time for an in-house lawyer to file Form I-907 will be approximately \$42.24 and for an outsourced lawyer it will be about \$72.83.¹⁹⁷ The estimated annual cost of

filing additional requests for premium processing using Form I-907 if HR specialists file will be approximately \$3,035.¹⁹⁸ The estimated annual cost of filing additional requests for premium processing using Form I-907 will be about \$5,787 if filed by in-house lawyers, and approximately \$9,978 if filed by outsourced lawyers.¹⁹⁹

The estimated annual cost of this provision ranges from \$144,636 to \$216,633 depending on what share of

the forms are filed by in-house or outsourced lawyers.²⁰⁰

The transfer payments from filing petitions using Form I-129 for an H-2B beneficiary include the filing costs to submit the form. USCIS' current fee rule was published on January 31, 2024, and became effective on April 1, 2024. 89 FR 6194, 6246–6248; 89 FR 20101 (Apr. 1, 2024). Table 11 shows the current fee schedule for Form I-129 requesting H-2A workers.

Table 11: Fee Summary Table for Form I-129 H-2A Petitioners

Benefit Request	Entities with more than 25 Full-Time Equivalent (FTE) Workers	Entities with 25 or Fewer FTE Workers	Nonprofit Entities
H-2A – Named Beneficiaries	\$1,090	\$545	\$545
H-2A – Unnamed Beneficiaries	\$530	\$460	\$460

Furthermore, certain petitioners must pay the \$600 Asylum Program Fee. Small employers with 25 or fewer employees pay a reduced Asylum Program Fee of \$300 while nonprofits

are exempt from the Asylum Program Fee. Therefore, total filing fees for H-2A petitioners range from \$1,690 to \$460 depending on the characteristics of the petitioner.²⁰¹

Similarly, Table 12 shows the base filing fees for petitioners requesting H-2B workers.

Table 12: Fee Summary Table for Form I-129 H-2B Petitioners

Benefit Request	Entities with more than 25 FTE Workers	Entities with 25 or Fewer FTE Workers	Nonprofit Entities
H-2B – Named Beneficiaries	\$1,080	\$540	\$540
H-2B – Unnamed Beneficiaries	\$580	\$460	\$460

As was the case to H-2A petitioners, certain H-2B petitioners also must pay the \$600 Asylum Program Fee. Small employers with 25 or fewer employees pay a reduced Asylum Program Fee of \$300 while nonprofits are exempt from

the Asylum Program Fee. Additionally, petitioners requesting H-2B workers must submit a \$150 Fraud Prevention and Detection Fee. Therefore, total filing fees for H-2B petitioners range from

\$1,830 to \$610 depending on the characteristics of the petitioner.²⁰²

For the purposes of this analysis, USCIS assumes that all marginal Forms I-129 filed due to the final rule's portability provision request named

¹⁹⁵ Calculation: 319 estimated additional Form I-129 H-2B petitions × 93.57 percent accompanied by Form I-907 = 298 (rounded) additional Form I-907.

¹⁹⁶ Calculation, Lawyers: 298 additional Form I-907 × 45.84 percent = 136 (rounded) Form I-907 filed by a lawyer. Calculation, HR specialists: 298 Form I-907—136 Form I-907 filed by a lawyer = 160 Form I-907 filed by an HR specialist.

¹⁹⁷ Calculation, HR Specialist: \$50.94 hourly opportunity cost of time × 0.37-hour time burden to file Form I-907 = \$18.85 cost to file Form I-907.

Calculation, In-house lawyer: \$114.17 hourly opportunity cost of time × 0.37-hour time burden to file Form I-907 = \$42.24 cost to file Form I-907.

Calculation, outsourced lawyer: \$196.85 hourly opportunity cost of time × 0.37-hour time burden to file Form I-907 = \$114.17 cost to file Form I-907.

¹⁹⁸ Calculation, HR specialist: \$18.85 to file a Form I-907 × 161 forms = \$3,035 (rounded).

¹⁹⁹ Calculation, In-house lawyer: \$42.24 to file a Form I-907 × 137 forms = \$5,787 (rounded).

Calculation for an outsourced lawyer: \$72.72 to file a Form I-907 × 137 forms = \$9,978 (rounded).

²⁰⁰ Calculation for HR specialists and in-house lawyers: \$42,186 for HR specialists to file Form I-129 H-2B petitions + \$90,554 for in-house lawyers to file Form I-129 and the accompanying Form G-28 + \$4,728 for HR specialists to file Form I-907

+ \$9,006 for in-house lawyers to file Form I-907 = \$144,636.

Calculation for HR specialists and outsourced lawyers: \$42,186 for HR specialists to file Form I-129 H-2B petitions + \$156,132 for outsourced lawyers to file Form I-129 and the accompanying Form G-28 + \$4,728 for HR specialists to file Form I-907 + \$15,527 for outsourced lawyers to file Form I-907 = \$216,633.

²⁰¹ See USCIS, Form G-1055, "USCIS Fee Schedule," <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf> (last accessed Apr. 18, 2024).

²⁰² *Id.*

beneficiaries and that the petitioners are representative of the greater Form I-129 filing population.²⁰³ More specifically, we assume that of the 319 marginal Form I-129 petitions that were filed as a result of the final rule's portability provision, 30 percent have 26 or more employees, 55 percent have 25 or fewer employees, and that 15 percent have non-profit status.²⁰⁴ This equates to 96 "large" petitioners, 175 "small" petitioners, and 48 non-profit petitioners.²⁰⁵ These petitioners will pay total fees of \$1,830, \$990, and \$690, respectively.²⁰⁶ These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. The annual value of transfers from petitioners to the Government for filing Form I-129 due to the final rule's portability provision will be approximately \$382,050.²⁰⁷

Additionally, employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 to request premium processing for H-2B petitions is \$1,685.²⁰⁸ Based on historical trends, DHS expects that 93.57 percent of petitioners will file a Form I-907 with Form I-129. Applying that rate to the expected number of

filings of Form I-129 petitions will result in 298 requests for premium processing using Form I-907 filed due to the rule.²⁰⁹ We estimate that the annual transfers from petitioners to the Federal Government related to filing Form I-907 due to the rule will be approximately \$502,130.²¹⁰ The undiscounted annual transfers from petitioners to the Federal Government due to the rule are \$884,180.^{211 212}

Portability is a benefit to employers that cannot find U.S. workers, and as an additional flexibility for H-2 employees seeking to begin work with a new H-2 employer. This rule allows petitioners to immediately employ certain H-2 workers who are present in the United States in H-2 status without waiting for approval of the H-2 petition.

c. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

This section is divided into two subheadings where each provision and its expected impacts are discussed. The final rule includes the following: (1) removing the eligible countries lists; and (2) eliminating the calculation of interrupted stays and reducing the period of absence that will reset an individual's 3-year maximum period of stay.

(1) Eligible Countries Lists

DHS will remove the lists that designate certain countries as eligible to participate in the H-2 programs. Currently, nationals of countries that are not eligible to participate in the H-2 programs may still be named as beneficiaries on an H-2A or H-2B petition. However, petitioners must: (1) name each beneficiary who is not from an eligible country; and (2) provide evidence to show that it is in the U.S. interest for the individual to be the beneficiary of such a petition. USCIS also recommends that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately.²¹³

²⁰⁹ Calculation: 319 petitions $\times$ 93.57 Form I-907 rate = 298 Forms I-907 (rounded).

²¹⁰ Calculation: \$1,685 per petition $\times$ 298 Forms I-907 = \$502,130.

²¹¹ Calculation: \$382,050 + \$502,130 = \$884,180.

²¹² It is possible that the combination of porting workers and workers availing themselves of increased grace periods may increase tax transfers from workers to the Federal Government. DHS cannot estimate the magnitude of these transfers, however, because of a lack of detailed data regarding the workers utilizing these provisions separately or jointly.

²¹³ See USCIS, Form I-129, "Instructions for Petition for Nonimmigrant Worker Department of Homeland Security," OMB Control Number 1615-0009 (expires Feb. 28, 2027), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

To understand the population of beneficiaries who come from countries not on the eligible countries lists and the petitioners who apply for these workers, we considered historical data from FY 2013 through FY 2022 on the beneficiary country of birth for both H-2A and H-2B receipts by fiscal year.²¹⁴ The data are extremely limited, with an average of 77 percent and 75 percent of H-2A and H-2B receipts, respectively, missing the beneficiary's country of birth. Data are primarily limited because of the high percentage of H-2 petitions filed requesting unnamed beneficiaries. Additionally, these data are input manually, with only certain fields entered. Country of birth is not a mandatory field and tends to be blank.

On the eligible countries lists published November 10, 2021, FY 2022 data did not identify any H-2A beneficiaries with a country of birth from 55 of 85 eligible countries.²¹⁵ Additionally, 30 petitions with 141 beneficiaries from 12 countries were not on the eligible countries list. Of the 86 eligible countries for H-2B beneficiaries, the FY 2022 data did not identify any beneficiaries with a country of birth from 43 of these countries. It also showed that there was only a total of 12 petitions with 79 beneficiaries from five countries not on the eligible countries list.

From these limited data, we can see that USCIS does receive petitions for beneficiaries outside of those on the eligible countries lists. However, it is unclear if the lists may act as a deterrent with the additional burden on petitioners. The data provide some insight into the potential concentration of H-2 visas in FY 2022, where the greatest number of petitions had beneficiaries listed with Mexico as their country of birth (1,628 petitions and 30,075 H-2A beneficiaries, and 1,523 petitions and 21,136 H-2B beneficiaries, respectively). However, because only about 12 percent of H-2A beneficiaries and 29 percent of H-2B beneficiaries in FY 2022 had a country of birth listed, it is difficult to draw any strong conclusions.

As stated earlier, USCIS recommends that H-2A and H-2B petitions for

²¹⁴ Country of citizenship data are available for about 20 percent of the H-2A category but not for the H-2B category. For consistency and because there are slightly more data available, we use country of birth data in this analysis.

²¹⁵ The publication of the eligible countries lists for H-2A and H-2B visa programs referred to here was published on November 10, 2022. 87 FR 67930. For the purpose of this analysis, we rely on the eligible countries lists from 2021 because we have data from FY 2022 that would include any impacts of that prior lists on the behavior of petitioners and their beneficiaries.

²⁰³ Per Form I-129 instructions, beneficiaries must be named if they are currently in the United States. Therefore, a Form I-129 petition filed as a result of the final rule's portability provision would necessarily be for named beneficiaries. See USCIS, Form I-129, "Instructions for Petition for Nonimmigrant Worker Department of Homeland Security," OMB Control Number 1615-0009, (expires Feb. 28, 2027), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

²⁰⁴ See 89 FR 6194, 6246-6248, Table 25 (Jan. 31, 2024); 89 FR 20101 (Apr. 1, 2024).

²⁰⁵ Calculation, "Large" Petitioners: 319 marginal Form I-129 filings $\times$ 0.3 rate of "large" petitioners = 96 "large" petitioners (rounded).

"Small" Petitioners: 319 marginal Form I-129 filings $\times$ 0.55 rate of "small" petitioners = 175 "small" petitioners (rounded).

Non-profit petitioners: 319 marginal Form I-129 filings $\times$ 0.15 rate of non-profit petitioners = 48 non-profit petitioners (rounded).

²⁰⁶ Fees for "large" petitioner: \$1,080 base filing fee + \$600 Asylum Program Fee + \$150 Fraud Prevention and Detection Fee = \$1,830.

Fees for "Small" Petitioner: \$540 base filing fee + \$300 Asylum Program Fee + \$150 Fraud Prevention and Detection Fee = \$990.

Fees for Non-profit Petitioner: \$540 base filing fee + \$150 Fraud Prevention and Detection Fee = \$690.

For more information regarding the fee schedule for Forms I-129, please see <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf> (accessed Apr. 29, 2024).

²⁰⁷ Calculation: (96 "large" petitioners $\times$ \$1,830 total fees) + (175 "small" petitioners $\times$ \$990 total fees) + (48 nonprofit petitioners $\times$ \$690 total fees) = \$382,050.

²⁰⁸ See USCIS, Form I-907, "Instructions for Request for Premium Processing Service," OMB Control Number 1615-0048, <https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf> (last accessed Apr. 15, 2024).

workers from countries not listed on the respective eligible countries lists be filed separately. DHS does not have data on the number of H-2 employers that file petitions separately for workers from countries not listed on the respective eligible countries lists from those on the eligible countries lists. For those that file separately, though, this provision will result in saved fees.²¹⁶ As discussed above, total filing fees for H-2A petitioners range from \$460 to \$1,690 depending on the characteristics of the petitioner while total filing fees for H-2B petitioners range from \$610 to \$1,830 depending on the characteristics of the petitioner.²¹⁷ Therefore, employers currently filing separate petitions could save \$460 to \$1,640 per H-2A petition and \$610 to \$1,830 per H-2B petition.²¹⁸

To produce the eligible countries lists each year, several DHS components and agencies provide data, collaboration, and research. For DHS, this includes months of work to gather recommendations and information from offices across ICE, CBP, and USCIS, compile statistics, and cooperate closely with DOS. Research in these efforts focuses on topics including overstays, fraud, human trafficking concerns, and more. However, some of the work involved in creating the eligible countries lists is duplicative, time-consuming, and limited in its response to ever-changing global dynamics. For example, DOS already performs regular national interest assessments and would not approve H-2 work visas that it deems problematic regardless of the country's standing on the eligible countries lists.

Benefits of this provision include freeing up resources currently dedicated to publishing the eligible countries lists every year, which could be used more effectively on other pressing projects

across DHS and DOS. This change also will reduce the burden on petitioners that seek to hire H-2 workers from countries not designated as eligible since they will no longer need to meet additional criteria showing that it is in the U.S. interest to employ such workers. This provision also will increase access to workers potentially available to businesses that use the H-2 programs.

(2) Eliminating the "Interrupted Stay" Calculation and Reducing the Period of Absence To Reset an Individual's 3-Year Period of Stay

DHS is eliminating the "interrupted stay" calculation and reduce the period of absence from the United States from 3 months to 60 days to reset an individual's 3-year period of stay.²¹⁹ Under current regulations, an individual's total period of stay in H-2A or H-2B nonimmigrant status may not exceed 3 years. Currently, an individual who has spent 3 years in H-2A or H-2B status may not seek extension, change status, or be readmitted to the United States in H-2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. In the final rule, the total period of stay of 3 years remains unchanged, but the period of absence that resets an individual's 3-year period of stay will be reduced. For ease of understanding, the term "clock" is used in this section to describe the 3-year maximum period of stay for an H-2 worker and the term "absence" generally is used in place of "interruption." As critical context, the estimated population impacted by this change is constrained because the DOL-certified seasonal or temporary nature of H-2A and H-2B labor needs means that, currently, most beneficiaries' clocks are effectively reset each year upon completion of the first and only petitioner's labor need and subsequent

departure from the country. Instructions on DOL's Foreign Labor Application Gateway (FLAG) state that petitioners' certified seasonal or temporary labor needs must not exceed 9 months for H-2B labor certifications and should not normally exceed 10 months for H-2A certifications, so there will be no direct impacts nor costs to an employer from the simplifications to the existing definition of absence for the purpose of resetting the 3-year clock.²²⁰

Additionally, under this simplification, DHS will no longer recognize certain absences as an "interrupted stay" for purposes of pausing the calculation of the 3-year limit of stay. Thus, if a worker leaves the United States for less than 60 days, the absence will not pause the 3-year maximum period of stay clock nor extend the timeframe in which a worker could work in H-2 status upon their return from abroad. This change to the calculation of interrupted stay is not expected to impact the two current subset populations of H-2A and H-2B workers whose accumulated stay is 18 months or less and whose clock currently pauses when leaving the United States for at least 45 days but less than 3 months, and those whose accumulated stay is greater than 18 months but less than 3 years. Under this rule, the 3-year clock will no longer pause when an individual leaves the United States for the period of time specified in rows 2 and 3 of Table 13; rather, the 3-year clock will reset following an uninterrupted absence of 60 days, irrespective of the individual's period of accumulated stay in the United States.

²²⁰ See DOL, "H-2A Temporary Labor Certification for Agriculture Workers," <https://flag.dol.gov/programs/H-2A> (last visited May 31, 2023) ("The need for the work must be seasonal or temporary in nature [. . .] normally lasting 10 months or less" for H-2A Temporary Certification For Agriculture Workers); DOL, "H-2B, Temporary Labor Certification for Non-Agriculture Workers," <https://flag.dol.gov/programs/H-2B> (last visited May 31, 2023) ("The employer's job opportunities must be . . . [t]emporary (9 months or less, except one-time occurrences)"). DOL regulations at 20 CFR 655.6(b) limit an H-2B period of need to 9 months, except where the employer's need is based on a one-time occurrence, but due to an appropriations rider that is currently in place, DOL uses the definition of temporary need as provided in 8 CFR 214.2(h)(6)(ii)(B), which does not list a 9-month limit. Consolidated Appropriations Act 2023, Pub. L. 117–328, Division H, Title I, Sec. 111.

²¹⁶ See USCIS, "Calculating Interrupted Stays for the H-2 Classifications, What do I need to know if I choose to file separate petitions for H-2 workers?" (May 6, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

²¹⁷ See USCIS, Form G–1055, "Fee Schedule," <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf>, (last accessed Apr. 18, 2024).

²¹⁸ See USCIS, Form I–129, "Instructions for Petition for Nonimmigrant Worker Department of Homeland Security," OMB Control Number 1615–0009 (expires Feb. 28, 2027), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

²¹⁹ USCIS officers use the term "interrupted stay" when adjudicating extension of stay requests in the H-2A and H-2B nonimmigrant classifications. It refers to certain periods of time an H-2 worker spends outside the United States during an authorized period of stay that do not count toward the noncitizen's maximum 3-year limit in the classification. See USCIS, "Calculating Interrupted Stays for the H-2 Classifications" (May 6, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

Table 13: H-2 Clock and Absences from the United States During a 3-Year Maximum Period of Stay				
	Current	Proposal and Impact to H-2 Workers and Employers		
Time Worked in H-2 Status	Clock Reset or Interruption*	Proposed Absence Counted as Reset	Cost	Benefit
3 years	Reset at 3 months	Reset at 60 days	N/A	30 fewer days required to reset clock
18 months or less	Interruption pause accrues at 45 days, but less than 3 months	Reset at 60 days	N/A	N/A
More than 18 months, but less than 3 years	Interruption pause accrues at 2 months, but less than 3 months	Reset at 60 days	N/A	N/A
Source: USCIS analysis. *An interruption is when the 3-year clock is paused, meaning the period of time outside the United States, the absence, isn't counted towards 3-year maximum period of stay.				

DHS next considers a potential subpopulation of workers who, under the baseline, might port from one petitioning employer with a labor certification to a subsequent petitioner with a TLC three or more times to maximize earnings over the 3-year (1,095 days) limit. DHS does not have data on the size of the H-2A or H-2B worker populations that currently leave the United States while in H-2 status or for how long. Without information on the number of workers who experience absences from the United States, it is not possible to predict additional impacts to the behavior of H-2 visa holders and the petitioners with DOL-certified seasonal or temporary labor needs, however, the present observed rates of porting shown in Tables 6 and 7 suggest beneficiaries porting more than 3 times without leaving the country is small to non-existent. DOL requires H-2A and H-2B employers to pay workers at least the highest of the prevailing wage rate obtained from the ETA or the applicable Federal, State, or local minimum wage.²²¹ Additionally, the Fair Labor Standards Act covers requirements for all workers in the United States with respect to overtime and a job offer must always be

consistent with Federal, State, and local laws.²²²

To estimate the potential impacts from a small number of H-2 workers choosing to provide 30 additional days of labor every 3 years, we first consider wages. The Federal minimum wage is currently \$7.25.²²³ While using the Federal minimum wage may be appropriate in some instances, DHS recognizes that many States have higher minimum wage rates than the Federal minimum wage. Therefore, DHS believes that a more accurate and timely estimate of wages is available via data from the DOL, BLS National Occupational Employment and Wage Estimates. DHS believes that the unweighted, 10th percentile wage estimate for all occupations of \$13.14 per hour is a reasonable lower bound for the population in question.²²⁴ DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian

workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.²²⁵ Although the Federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the 10th percentile hourly wage is \$19.05, which is 81.3 percent higher than the Federal minimum wage.²²⁶

DHS does not rule out the possibility that some portion of H-2A and H-2B employees might earn more than the 10th percentile wage, but without empirical information, DHS believes that including a range with the lower bound relying on the 10th percentile

²²⁵ The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) ÷ (Wages and Salaries per hour) = \$42.48 ÷ \$29.32 = 1.450 = 1.45 (rounded). See BLS, Economic News Release, "Employer Cost for Employee Compensation—December 2022," Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), https://www.bls.gov/news.release/archives/eccec_03172023.pdf.

²²⁶ Calculations (1) for lower bound compensation: \$13.14 lower bound wage × 1.45 total compensation factor = \$19.05 (rounded to 2 decimal places); (2) ((\$19.05 wage—\$10.51 wage) ÷ \$10.51) wage = 0.813, which rounded and multiplied by 100 = 81.3 percent.

²²¹ See WHD, "Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)" (Feb. 2010), <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs26.pdf>, and "Fact Sheet #78C: Wage Requirements under the H-2B Program" (Apr. 2015), <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs78c.pdf>.

²²² See WHD, "Wages and the Fair Labor Standards Act," <https://www.dol.gov/agencies/whd/flsa> (last visited Dec. 15, 2022).

²²³ See 29 U.S.C. 206; See also WHD, "Minimum Wage," <https://www.dol.gov/general/topic/wages/minimumwage> (the minimum wage in effect as of Dec. 15, 2022).

²²⁴ See Occupational Employment and Wage Estimates United States, May 2022. BLS, "Occupational Employment and Wage Statistics program, All Occupations," https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000 (last visited July 28, 2023).

wage with benefits of \$19.05 is justifiable for both H-2A and H-2B workers. For H-2A workers, DHS uses an upper bound wage specific to agricultural workers of \$17.04.²²⁷ DHS calculates the average total rate of compensation for agricultural workers as \$24.71 per hour, where the mean hourly wage is \$17.04 per hour worked and average benefits are \$7.67 per hour.²²⁸ For H-2B workers, DHS relies on the average wage rate for all occupations of \$29.76 as an upper bound in consideration of the variance in average wages across professions and States.²²⁹ Therefore, DHS calculates the average total rate of compensation for all occupations as \$43.15 per hour, where the mean hourly wage is \$29.76 per

hour worked and average benefits are \$13.39 per hour.²³⁰

Since DHS calculates absences from the United States based on calendar days, and wage estimates are specifically linked to hours, we apply the scalar developed as follows. Calendar days are transformed into workdays to account for the actuality that typically, 5 out of 7 days of the calendar week, or 71.4 percent, is allotted to work-time, and that a workday is typically 8 hours.²³¹ Thus, in limited instances, individuals resetting their clock at or immediately after the 1,095th day of the 3-year limitation may be afforded an opportunity to work 30 additional calendar days, or approximately 21 days of H-2. DHS notes that some H-2

workers may work more days or hours per week in some instances. Additionally, if overtime hours are worked, DHS has no basis for which to measure the extent to which this may occur among these populations. Based on the 10th percentile wage (lower bound), each calendar day generates about \$108.81 in relevant earnings for potential H-2 workers. It follows that for the upper wage bounds that each calendar day generates about \$141.14 per H-2A worker and about \$246.47 per H-2B worker in relevant earnings.²³² Over 30 potential workdays, this equates to a lower bound of \$3,264 in additional earnings with upper bounds of \$4,234 for H-2A workers and \$7,394 for H-2B workers (see Table 14).²³³

Table 14: Earnings Estimates for H-2 Workers with 30 Additional Days.

	Hourly Wage	Calendar Day Scalar	Work Hours	Daily Additional Wages	Additional Wages for 30 Days	Additional Taxes
	A	B	C	D=A×B×C	E=D×30	F=E×15.3%
Lower Bound	\$19.05	0.714	8	\$108.81	\$3,264	0 *
H-2A Upper Bound	\$24.71			\$141.14	\$4,234	0 *
H-2B Upper Bound	\$43.15			\$246.47	\$7,394	\$1,131

Source: USCIS analysis.

* H-2A workers and employers are not subject to U.S. social security and Medicare taxes

In instances where an employer with a DOL-certified temporary labor need cannot transfer the 21 days of work onto other H-2 workers, DHS acknowledges that this additional work may result in additional tax revenue to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely,²³⁴ but DHS estimates the potential payments to

other employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).²³⁵ While H-2A wages are exempt from these taxes, H-2B wages are not.²³⁶ With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated tax transfer for

Medicare and Social Security is 15.3 percent.²³⁷ DHS recognizes this quantified estimate is not representative of all potential tax losses by Federal, State, and local governments and we make no claims this quantified estimate includes all tax losses. We continue to acknowledge the potential for additional Federal, State, and local government tax losses in the scenario where a company

²²⁷ The average wage for agricultural workers is found at BLS, Occupational Employment and Wages—May 2022 (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, https://www.bls.gov/news.release/archives/ocwage_04252023.pdf. DHS notes that the agricultural wages contained in the OEWS survey represent a subset all agricultural workers.

²²⁸ Calculation of the weighted mean hourly wage for agricultural workers: \$17.04 per hour × 1.45 benefits-to-wage multiplier = \$24.71 (rounded).

²²⁹ The average wage for all occupations is found at BLS, Occupational Employment and Wages—May 2022 (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, https://www.bls.gov/news.release/archives/ocwage_04252023.pdf.

²³⁰ The calculation of the weighted mean hourly wage for applicants: \$29.76 per hour × 1.45

benefits-to-wage multiplier = \$43.15 (rounded) per hour.

²³¹ USCIS did review DOL disclosure data on basic number of hours and found the average number of hours per week to be around 40 hours. For this reason, we assume a typical 40-hour workweek for both H-2A and H-2B workers for this analysis.

²³² Calculations: 10th percentile wage (lower bound): 0.714 × 8 hours per day × \$19.05 wage = \$108.81 (rounded). H-2A average wage for agricultural workers (upper bound): 0.714 × 8 hours per day × \$24.71 wage = \$141.14 (rounded). H-2B average wage for all occupations (upper bound): 0.714 × 8 hours per day × \$43.15 wage = \$246.47 rounded.

²³³ Calculations: 10th percentile wage (lower bound): \$108.81 × 30 days = \$3,264 (rounded).

H-2A average wage for agricultural workers (upper bound): \$141.14 × 30 days = \$4,234 (rounded).

H-2B average wage for all occupations (upper bound): \$246.47 × 30 days = \$7,394 (rounded).

²³⁴ See Quentin Fottrell, MarketWatch, “More than 44 percent of Americans pay no federal income tax,” (Aug. 28, 2019), <https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16>.

²³⁵ The various employment taxes are discussed in more detail at <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes>. See Internal Revenue Service Publication 15, Circular E, “Employer’s Tax Guide” (Dec. 16, 2021), <https://www.irs.gov/pub/irs-pdf/p15.pdf>, for specific information on employment tax rates.

²³⁶ See IRS, “Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H-2A Visa,” <https://www.irs.gov/pub/irs-pdf/p5144.pdf> (last accessed July 31, 2023).

²³⁷ Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax transfer payment to government.

cannot transfer additional work onto current employees and cannot hire replacement labor for the position the H-2 worker is absent. As seen in Table 14, tax transfers could range from \$0 for H-2A workers to as much as \$1,131 for H-2B workers over a 30-day period. One benefit of this provision is that it will make it easier for DHS, petitioners, and beneficiaries to calculate when a beneficiary reaches their 3-year limit on stay, irrespective of how long the individual has been in the United States in H-2 status. As described earlier, to accurately demonstrate when an

individual's limit on H-2 status will be reached, employers and workers currently need to monitor and document the accumulated time in H-2 status and calculate the total time in H-2 status across multiple time periods following interruptive absences. USCIS adjudicators must also make these same determinations in adjudicating H-2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. No longer needing to monitor absences from the United States of less than 60 days simplifies calculations for employers,

workers, and adjudicators. Additionally, DHS expects that USCIS adjudicators may issue fewer RFEs related to the 3-year maximum period of stay to workers with absences, which would reduce the burden on employers, workers, and adjudicators and save time in processing petitions. As shown in Table 15, RFEs related to the 3-year maximum period of stay have increased since FY 2020 for H-2A workers and have generally remained stable at between 200 to 300 each year since FY 2020 for H-2B workers.

Table 15: RFEs Relating to 3-Year Maximum Stay for H-2 Workers.		
Fiscal Year	H-2A	H-2B
2018	63	134
2019	53	649
2020	22	207
2021	272	292
2022	436	208
Total	846	1,490
5-Year Average	169	298
Source: USCIS Office of Policy and Strategy -- C3, ELIS USCIS Data System as of Oct. 8, 2022.		

While it is not clear how many RFEs are directly related to the calculation of interruptions while in H-2 status, as opposed to RFEs for those who may be reaching the maximum 3-year period of stay generally, DHS anticipates that eliminating the calculation for interrupted stays will at least render some RFEs unnecessary.²³⁸ This will in turn reduce the burden on employers, workers, and adjudicators associated with calculating interruptions and through subsequent RFEs and petitions could be processed more expeditiously. Collectively, Tables 6, 7, and 10 indicate very few H-2 workers approach the 3-year limitation despite existing potential to port from certified temporary labor need for 3 years before exiting the country for 90 days. Nevertheless, DHS has considered as an

upper bound, possible additional earnings and related labor market impacts should workers already approaching the 3-year limit respond to this proposed change by working 30 additional days at the end of their 1,095 days or at the start of their subsequent 3-year period. Recall that if the worker intended to return to their home country before 3-years, as most do upon completing their temporary labor for the initial petitioner, this change has no impact to the employer nor to wages earned by the worker. Multiplying the H-2A population of 169 in Table 15 by \$4,234 in additional wages for 30 days in Table 14 bounds potential additional annual earnings at \$715,546. Additionally, the H-2B population of 298 in Table 15 multiplied by \$7,394 in Table 14 bounds additional annual H-2B earnings at \$2,203,412 with estimated tax transfers of \$337,122. For H-2A and H-2B workers, the total impact from this change is approximately \$2,918,958 in additional earnings and about \$337,122 in tax transfers (\$168,561 from workers + \$168,561 from employers).

d. Other Impacts of the Final Rule
(1) Form I-129 Updates
The costs for filing Form I-129 include the opportunity costs of time to complete and file the form. The estimated time needed to complete and file Form I-129 is 2.487 hours.²³⁹ There is also an estimated time burden of 2.07 hours for petitioners to complete the H classification supplement for Form I-129. The total time burden of 4.557 hours for Form I-129 also includes the time for reviewing instructions, to file and retain documents, and submit the request. In this final rule, only the estimated burden to complete the H classification supplement will change. This rule will increase the public reporting burden for the H Classification Supplement by 0.23 hours, for a total of 2.3 hours. The increased time burden will result in a total time burden of 4.787 hours for Form I-129 H-2

²³⁸ On July 25, 2022, USCIS extended its COVID-19-related flexibilities for responding to RFEs through October 23, 2022. This provided recipients an additional 60 calendar days after the due date on an RFE to provide a response. Ultimately, while this flexibility may have been helpful to petitioners it also added up to an additional 2 months of time to the adjudication process. See USCIS, "USCIS Extends COVID-19-related Flexibilities" (July 25, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities>.

²³⁹ The public reporting burden for this form is 2.487 hours for Form I-129 and an additional 2.07 hours for H Classification Supplement. See USCIS, Form I-129, "Instructions for Petition for Nonimmigrant Worker Department of Homeland Security," OMB Control Number 1615-0009 (expires Feb. 28, 2027), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

petitioners. The petition must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). DHS was unable to obtain data on the number of Form I-129 H-2A and H-2B petitions filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs, including if only HR specialists file Form I-129 or if only lawyers file Form I-129.²⁴⁰ Further, DHS presents cost estimates for lawyers filing on behalf of petitioners based on whether all Form I-129 petitions are filed by in-house lawyers or by outsourced lawyers.²⁴¹ DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I-129, DHS uses the mean hourly wage rate of HR specialists of \$35.13 as the base wage rate.²⁴² If

applicants hire an in-house or outsourced lawyer to file Form I-129 on their behalf, DHS uses the mean hourly wage rate of \$78.74 as the base wage rate.²⁴³ DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate the full cost of employee wages. The total per hour wage is \$50.94 for an HR specialist and \$114.17 for an in-house lawyer.²⁴⁴ In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I-129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is \$196.85 for an outsourced lawyer.²⁴⁵ If a lawyer submits Form I-129 on behalf of the petitioner, Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I-129 submission.²⁴⁷ DHS estimates the time

burden to complete and submit Form G-28 for a lawyer is 50 minutes (0.83 hours, rounded).²⁴⁸

Since only the time burden for the H Classification Supplement will change, this analysis only considers the additional opportunity cost of time for 0.23 hours as a direct cost of this rule. Therefore, the estimated additional opportunity cost of time for an HR specialist to complete and file Form I-129 for an H-2 petition is \$11.72, for an in-house lawyer to complete and file is \$26.26, and for an outsourced lawyer to complete and file is \$45.28.²⁴⁹

DHS expects this rule to impose costs on the population of employers that currently petition for H-2 workers, an estimated 36,762 petitioners.²⁵⁰ We expect filing the relevant forms will be performed by an HR specialist, in-house lawyer, or outsourced lawyer, with the assumption that this will be done at the same rate as petitioners who file a Form G-28.

To properly account for the costs associated with filing across the entire H-2 population, DHS must calculate a weighted average rate for G-28 filing across the separate H-2A and H-2B populations. Table 16 and Table 17 show the recent G-28 filing trends for each separate H-2 population.

²⁴⁸ See USCIS, Form G-28, "Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative," OMB Control Number 1615-0105 (expires May 31, 2021), <https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf>.

²⁴⁹ HR specialist calculation: $\$50.94 \times (0.23 \text{ hours}) = \$11.72$.

In-house lawyer calculation: $\$114.17 \times (0.23 \text{ hours}) = \$26.26$.

Outsourced lawyer calculation: $\$196.85 \times (0.23 \text{ hours}) = \$45.28$ (rounded).

²⁵⁰ Calculation: $24,370 \text{ H-2A} + 12,392 \text{ H-2B} = 36,762$ H-2 petitioners in FY 2022 as estimated as the population who would be most likely be affected by this rule.

²⁴⁰ For the purposes of this analysis, DHS assumes an HR specialist, or some similar occupation, completes and files these forms as the employer or petitioner who is requesting the H-2 worker. However, DHS understands that not all entities have HR departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

²⁴¹ For the purposes of this analysis, DHS adopts the terms "in-house" and "outsourced" lawyers as they were used in ICE, *Final Small Entity Impact Analysis: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, at G-4 (posted Nov. 5, 2008), <http://www.regulations.gov/document/ICEB-2006-0004-0922>. The ICE analysis highlighted the variability of attorney wages and was based on information received in public comment to that rule. We believe the distinction between the varied wages among lawyers is appropriate for our analysis.

²⁴² See BLS, Occupational Employment and Wages, May 2022, Human Resources Specialists (13-1071), <https://www.bls.gov/oes/2022/may/oes131071.htm>.

²⁴³ See BLS, Occupational Employment and Wages, May 2022, Lawyers (23-1011), <https://www.bls.gov/oes/2022/may/oes231011.htm>.

²⁴⁴ Calculation for the total wage of an in-house lawyer: $\$78.74 \times 1.45 = \$114.17$ (rounded).

²⁴⁵ Calculation: Average hourly wage rate of lawyers $\times$ Benefits-to-wage multiplier for outsourced lawyer = $\$78.74 \times 2.5 = \$196.85$ (rounded).

²⁴⁶ The ICE "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis for that rule remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, see ICE, "Small Entity Impact Analysis (Final): Supplemental Proposed Rule 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,'" p. G-4 (Sept. 1, 2015), <https://www.regulations.gov/document/ICEB-2006-0004-0922>.

²⁴⁷ USCIS, "Filing Your Form G-28" (Aug. 10, 2020), <https://www.uscis.gov/forms/filing-your-form-g-28>.

Table 16: Form I-129 H-2A Petition Receipts That Were Accompanied by a Form G-28, FY 2017-2021.

Fiscal Year	Number of Form I-129 H-2A petitions accompanied by a Form G-28	Total Number of Form I-129 H-2A petitions received	Percent of Form I-129 H-2A petitions accompanied by a Form G-28
2017	1,648	11,602	14.20%
2018	2,166	13,444	16.11%
2019	2,617	15,509	16.87%
2020	2,854	17,012	16.78%
2021	3,322	20,323	16.35%
2017 - 2021 Total	12,607	77,890	16.19%

Source: USCIS, Office of Policy & Strategy-- C3, ELIS USCIS Data System

Table 17: Form I-129 H-2B Petition Receipts That Were Accompanied by a Form G-28, FY 2018-2022.

Fiscal Year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total Number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
2018	2,625	6,148	42.70%
2019	3,335	7,461	44.70%
2020	2,434	5,422	44.89%
2021	4,228	9,160	46.16%
2022	5,983	12,392	48.28%
2018 - 2022 Total	18,605	40,583	45.84%

Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921

Using the data from Table 16 and Table 17, DHS calculates that the weighted average rate of G-28 filing across the entire H-2 population is 26.35 percent.²⁵¹

Therefore, we estimate that 9,687 lawyers will incur additional filing costs, and 27,075 HR specialists will incur additional filing costs.²⁵²

The estimated total opportunity cost of time for 27,075 HR specialists to file

petitions under this final rule is approximately \$317,319.²⁵³ The estimated annual opportunity cost of time for 9,687 lawyers to file petitions under this rule is approximately \$254,381 if all are in-house lawyers and \$438,627 if all are outsourced lawyers.²⁵⁴ Therefore, the estimated annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this rule will range from \$571,700 to \$755,946.²⁵⁵

(2) Technical Definitional Updates

As a technical update in this rule, DHS is removing the phrase “abscond” and the definition “abscondment” for clarification purposes. DHS expects these changes will have only marginal impacts.

(3) Familiarization Costs

DHS expects this rule will impose one-time familiarization costs associated with reading and understanding this rule on the population of employers that currently petition for H-2 workers, an estimated 36,762 petitioners.²⁵⁶ We expect familiarization with the rule will be performed by a HR specialist, in-house lawyer, or outsourced lawyer,

²⁵¹ Calculation: Step 1. 12,607 H-2A petitions with G-28 + 18,605 H-2B petitions with G-28 = 31,212 H-2 petitions with G-28; Step 2. 77,890 total H-2A petitions + 40,583 total H-2B petitions = 118,473 total H-2 petitions; Step 3. 31,212 H-2 petitions with G-28 ÷ 118,473 total H-2 petitions = 0.2635 (rounded).

²⁵² Calculation for lawyers: 36,762 H-2 petitioners × 26.35 percent represents by a lawyer = 9,687 (rounded) represented by a lawyer. Calculation for HR specialists: 36,762 H-2 petitioners – 9,687 represented by a lawyer = 27,075 represented by a HR specialist.

²⁵³ Calculation: \$11.72 additional burden × 27,075 HR specialists = \$317,319.

²⁵⁴ Calculations: \$26.26 additional burden × 9,687 in-house lawyers = \$254,381; \$45.28 additional burden × 9,687 outsourced lawyers = \$438,627 (rounded).

²⁵⁵ Calculation: HR specialists \$317,319 + in-house lawyers \$254,381 = \$571,700; HR specialists \$317,319 + outsourced lawyers \$438,627 = \$755,946.

²⁵⁶ Calculation: 24,370 H-2A + 12,392 H-2B = 36,762 H-2 petitioners in FY 2022 as estimated as the population who would be most likely to read this rule.

with the assumption that this will be done at the same rate as petitioners who file a Form G–28. An estimated 26.34 percent will be performed by lawyers and the remaining 73.66 percent by an HR specialist. Therefore, we estimate that 27,075 HR specialists and 9,687 lawyers will incur familiarization costs.²⁵⁷

To estimate the cost of rule familiarization, we estimate the time it would take to read and understand the rule by assuming a reading speed of 238 words per minute.²⁵⁸ This rule has approximately 56,000 words.²⁵⁹ Using a reading speed of 238 words per minute, DHS estimates it will take approximately 3.92 hours to read and become familiar with this rule.²⁶⁰ The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are \$50.94, \$114.17, and \$196.85, respectively. The estimated opportunity cost of time for each of these filers to familiarize themselves with the rule are \$199.68, \$447.55, and \$771.65, respectively.²⁶¹ The estimated total opportunity cost of time for 27,075 HR specialists to familiarize themselves with this rule is approximately \$5,406,336. Additionally, the estimated total opportunity cost of time for 9,687 lawyers to familiarize themselves with this rule is approximately \$4,335,417 if all are in-house lawyers or \$7,474,974 if all are outsourced lawyers. Thus, the estimated total opportunity costs of time for petitioners or their representatives to familiarize themselves with this rule ranges from \$9,741,753 to \$12,881,310,

which we assume will be incurred in the first year of the period of analysis.²⁶²

e. Total Costs of the Rule

In the previous sections, we presented the estimates of the impacts of the final rule. The quantifiable costs of this rule that will impact petitioners consistently and directly are the costs associated with an increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Annual costs due to the rule range from \$716,336 to \$972,579 depending on the filer.²⁶³ Over the 10-year period of analysis, DHS estimates the total costs of the final rule will be approximately \$16,905,113 to \$22,607,100 (undiscounted).²⁶⁴ DHS estimates the annualized costs of this final rule will range from \$1,825,104 to \$2,438,679 at a 3-percent discount rate, with a midpoint of \$2,131,891, and \$2,012,604 to \$2,686,606 at a 7-percent discount rate, with a midpoint of \$2,349,605. The midpoints of these ranges are presented as the primary estimates.

In addition, the rule results in transfers from consumers of goods and services to a limited number of H–2A and H–2B workers that may choose to supply additional labor. The total annualized transfer is approximately \$2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers are approximately \$337,122 (\$168,561 from these workers + \$168,561 from employers).

²⁶² Calculation, lower bound: \$5,406,336 familiarization costs, HR Representative + \$4,335,417 familiarization costs, in-house lawyer = \$9,741,753.

Calculation, upper bound: \$5,406,336 familiarization costs, HR Representative + \$7,474,974 familiarization costs, outsourced lawyer = \$12,881,310.

²⁶³ Calculation, lower bound: \$571,700 annual costs from marginal OCT to file Forms I–129 + \$144,636 in costs due to the portability provision = \$716,336 annual costs in years 1 through 10.

Calculation, upper bound: \$755,946 annual costs from marginal OCT to file Forms I–129 + \$216,633 in costs due to the portability provision = \$972,579 annual costs in years 1 through 10.

²⁶⁴ Calculation, lower bound: familiarization costs of \$9,741,753 (year 1) + \$716,336 annual costs due to the rule (year 1–10) = \$16,905,113 over 10-year period of analysis.

Calculation, upper bound: familiarization costs of \$12,881,310 (year 1) + \$972,579 annual costs due to the rule (year 1–10) = \$22,607,100 over 10-year period of analysis.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An “individual” is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered to be costs for RFA purposes.

This final rule may have direct impacts to those entities that petition on behalf of H–2 workers. Generally, petitions are filed by a sponsoring employer who would incur some additional costs from the Form I–129 H Classification Supplement burden change and familiarization of the rule. Petitioning employers may also incur costs they would not have otherwise incurred if they opt to transport and house H–2A workers earlier as well as opportunity costs of time if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition. Therefore, DHS examines the direct impact of this rule on small entities in the analysis that follows.

Small entities primarily impacted by this final rule are those that will incur additional direct costs to complete an H–2 petition. DHS conducted an analysis using a statistically valid sample of H–2 petitions to determine the number of small entities directly impacted by this final rule. These costs are related to the additional opportunity cost of time for a selected small entity to complete the updated Form I–129 H Classification Supplement in this rule.

²⁵⁷ Calculation for lawyers: 36,762 H–2 petitioners × 44.43 percent represents by a lawyer = 9,687 (rounded) represented by a lawyer. Calculation for HR specialists: 36,762 H–2 petitioners – 9,687 represented by a lawyer = 27,075 represented by a HR specialist.

²⁵⁸ Marc Brysbaert, “How many words do we read per minute? A review and meta-analysis of reading rate,” (Apr. 12, 2019) <https://doi.org/10.1016/j.jml.2019.104047> (accessed Dec. 15, 2022). We use the average speed for silent reading of English nonfiction by adults.

²⁵⁹ Please note that the actual word count of the final rule may differ from the estimated length presented here.

²⁶⁰ Calculation: 56,000 words ÷ 238 words per minute = 235 (rounded) minutes. 235 minutes ÷ 60 minutes per hour = 3.92 (rounded) hours.

²⁶¹ Calculation: Total respective hourly compensation HR \$50.94 × 3.92 hours = \$199.68, In-house Lawyer \$114.17 × 3.92 = \$447.55, or Outsourced Lawyer \$196.85 × 3.92 hours = \$771.65.

Final Regulatory Flexibility Analysis (FRFA)

1. A Statement of the Need for, and Objectives of, the Rule

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program. Through this rule, DHS seeks to strengthen worker protections and the integrity of the H-2 programs, provide greater flexibility for H-2A and H-2B workers, and improve program efficiency.

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

DHS requested comments on the IRFA as part of the NPRM and received several specific to the IRFA. A brief summary of those comments and USCIS' response are below.²⁶⁵

Comment: Various stakeholders expressed concern that affected small entities may lack resources needed to understand the rule's changes and may unintentionally violate certain provisions, harming such entities in a disproportionate manner.

Response: DHS acknowledged the comments but declines to implement any changes to the rule as a result of this comment. DHS emphasizes that all regulatory requirements and procedures will be explained and analyzed through multiple channels (the promulgation of this rule as evidenced by publication after consideration of comments received during the notice and comment period, relevant form instructions, and established communication materials such as the "Small Entity Compliance Guide"). Additionally, DHS believes

that marginal burdens being placed on small entities in order to ensure that they comply with program requirements and worker protections is justified by the benefits of increased program integrity discussed in the preamble.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule

The Chief Counsel for Advocacy of the Small Business Administration did not provide any comments on the IRFA.

4. A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

DHS conducted the analysis using a statistically valid sample of H-2 petitions to determine the maximum potential number of small entities directly impacted by this final rule. DHS used a subscription-based online database of U.S. entities—Hoovers Online—as well as two other open-access, free databases of public and private entities—Manta and Cortera—to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.²⁶⁶ In order to determine the size of a small entity, DHS first classified each entity by its NAICS code, and then used Small Business Administration (SBA) guidelines to note the requisite revenue or employee count threshold for each entity.²⁶⁷ Some entities were

²⁶⁶ The Hoovers website can be found at <http://www.hoovers.com/>; the Manta website can be found at <http://www.manta.com/>; and the Cortera website can be found at <https://www.cortera.com/>. NAICS 2017 classifications were used for the purpose of this analysis as provided by these databases.

²⁶⁷ The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect. SBA size standards effective August 19, 2019, <https://www.sba.gov/sites/default/files/2019->

classified as "small" based on their annual revenue and some by number of employees.

Using FY 2018 to FY 2022 data on H-2A petitions, DHS collected internal data for each filing organization.²⁶⁸ Each entity may make multiple filings. For instance, there were 90,658 H-2A petitions filed over the 5-fiscal-year period of analysis, but only 13,244 unique entities that filed H-2A petitions. DHS developed a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 13,244 entities, DHS determined that a minimum sample size of 374 entities was necessary. However, DHS drew a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 411 to increase the likelihood that our matches would meet or exceed the minimum required sample.²⁶⁹ Of the 411 entities sampled, 387 instances resulted in entities defined as small (*see* Table 18). Of the 387 small entities, 344 entities were classified as small by revenue or number of employees. The remaining 63 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 24 entities were classified as not small. Therefore, of the 13,244 entities that filed at least one Form I-129 in FY 2018 through FY 2022, DHS estimates that 96 percent or 12,714 entities are considered small based on SBA size standards.²⁷⁰

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08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.

²⁶⁸ USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

²⁶⁹ Calculation: $368 + (368 \times 10 \text{ percent}) = 405$.

²⁷⁰ Calculation: $13,244 \text{ entities} \times 96 \text{ percent} = 12,714 \text{ small entities (rounded)}$.

²⁶⁵ More thorough comment summaries and responses are contained in the rule's preamble.

Table 18: Summary and Results of Small Entity Analysis of H-2A Petitions.		
Parameter	Quantity	Proportion of Sample (percent)
Population — H-2A petitions	90,658	-
Population — Unique H-2A Entities	13,244	-
Minimum Required Sample	374	-
Selected Sample	411	100
Entities Classified as “Not Small”		
by revenue	23	6
by number of employees	1	0
Entities Classified as “Small”		
by revenue	281	69
by number of employees	43	11
because not enough information found in databases	63	16
Total Number of Small Entities	387	96^a
Source: USCIS analysis.		
^a Calculation: 69 percent (Entities classified as small by revenue) + 11 percent (Entities classified as small by number of employees) + 16 percent (Entities classified as small because no information found in database) = 96 percent (total number of small entities, rounded).		

As previously stated, DHS classified each entity by its NAICS code to determine the size of each entity. Table

19 shows a list of the top 10 NAICS industries that submit H-2A petitions.

Table 19: Top 10 NAICS Industries Submitting Form I-129 for H-2A Petitions, Small Entity Analysis Results.

Rank	NAICS Code	NAICS U.S. Industry Title	Frequency	Size Standards in Millions of Dollars ^a	Size Standards in Number of Employees ^a	Percent
1	111998	All Other Miscellaneous Crop Farming	79	\$1.0	-	19.2
2	N/A	Unclassified Establishments	25	\$8.0	-	6.1
3	561499	All Other Business Support Services	15	\$16.5	-	3.6
4	111331	Apple Orchards	12	\$1.0	-	2.9
5	112111	Beef Cattle Ranching and Farming	12	\$1.0	-	2.9
6	112990	All Other Animal Production	9	\$1.0	-	2.2
7	111421	Nursery and Tree Production	8	\$1.0	-	1.9
8	424910	Farm Supplies Merchant Wholesalers	8	-	200	1.9
9	112112	Cattle Feedlots	7	\$8.0	-	1.7
10	561990	All Other Support Services	7	\$12.0	-	1.7

Source: USCIS analysis.

Notes:

^a The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

DHS used the same methodology developed for H-2A petitions for analyzing H-2B petitions. Using FY 2018 to FY 2022 data on H-2B petitions, DHS collected internal data for each filing organization.²⁷¹ Each entity may make multiple filings. For instance, there were 40,579 H-2B petitions filed over these 5 fiscal years by 8,506 unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level

and a 5 percent confidence interval on a population of 8,506 entities, DHS determined that a minimum sample size of 368 entities was necessary. DHS created a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 368 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.²⁷² Of the 405 entities sampled, 384 instances resulted in entities defined as small (*see* Table 20). Of the 384 small entities, 307 entities were classified as small by

revenue or number of employees. The remaining 46 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 21 entities were classified as not small. Therefore, of the 8,506 entities that filed at least one Form I-129 in FY 2018 through FY 2022, DHS estimates that 95 percent or 8,081 entities are considered small based on SBA size standards.²⁷³

²⁷¹ USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

²⁷² Calculation: $368 + (368 \times 10 \text{ percent}) = 405$.

²⁷³ Calculation: $8,506 \text{ entities} \times 95 \text{ percent} = 8,081 \text{ small entities (rounded)}$.

Table 20: Summary and Results of Small Entity Analysis of H-2B Petitions.		
Parameter	Quantity	Proportion of Sample (percent)
Population — H-2B petitions	40,579	-
Population — Unique H-2B Entities	8,506	-
Minimum Required Sample	368	-
Selected Sample	405	100
Entities Classified as “Not Small”		
by revenue	20	5
by number of employees	1	0
Entities Classified as “Small”		
by revenue	307	76
by number of employees	31	8
because not enough information found in databases	46	11
Total Number of Small Entities	384	95^a
Source: USCIS analysis.		
Note:		
^a Calculation: 76 percent (Entities classified as small by revenue) + 8 percent (Entities classified as small by number of employees) + 11 percent (Entities classified as small because no information found in database) = 95 percent (total number of small entities, rounded).		

As previously stated, DHS classified each entity by its NAICS code to

determine the size of each business. Table 21 shows a list of the top 10

NAICS industries that submit H-2B petitions.

Table 21: Top 10 NAICS Industries Submitting Form I-129 for H-2B Petitions, Small Entity Analysis Results.

Rank	NAICS Code	NAICS U.S. Industry Title	Frequency	Size Standards in Millions of Dollars ^a	Size Standards in Number of Employees ^a	Percent
1	561730	Landscaping Services	56	8.0	-	13.8
2	541320	Landscape Architectural Services	55	8.0	-	13.6
3	721110	Hotels (except Casino Hotels) and Motels	22	35.0	-	5.4
4	N/A	Unclassified Establishments	19	8.0	-	4.7
5	722511	Full-Service Restaurants	12	8.0	-	3.0
6	713910	Golf Courses and Country Clubs	12	16.5	-	3.0
7	236115	New Single-Family Housing Construction (except For-Sale Builders)	10	39.5	-	2.5
8	424460	Fish and Seafood Merchant Wholesalers	9	-	100	2.2
9	238160	Roofing Contractors	6	16.5	-	1.5
10	561990	All Other Support Services	6	12.0	-	1.5

Source: USCIS analysis.

Note:

^a The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

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As stated above, petitioning employers may incur costs they would not have otherwise incurred if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition, but fail or refuse to comply with such reviews or inspections. Because the random sample is drawn from the H-2 petitioner population at-large, it is not practical to estimate small entities' representation within this noncooperative subpopulation. Thus, the FRFA assumes 12 percent of small entities, like larger entities, may have underestimated the reasonable, existing compliance burden of site visits and thus incur some additional compliance costs.

Petitioner-employers are not expected to be impacted by changes to the interrupted stay calculation. DHS cannot determine how beneficiaries' behavior would change as a result of this simplification to the calculation. Similarly, DHS does not expect flexibilities that allow beneficiaries to arrive in-country earlier would impose any compliance costs upon industries that choose to petition for or employ H-2 workers.

Table 5 shows that an average 13,722 H-2A petitions are received annually. Table 18 shows that 96 percent of

entities that petition for H-2A workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 13,722 H-2A petitions received, 13,500²⁷⁴ petitions are submitted by small entities.

Table 6 shows that USCIS receives an average of 6,867 H-2B petitions annually. Table 20 shows that 95 percent of entities that petition for H-2B workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 6,867 H-2B petitions received, 6,524 petitions are submitted by small entities.²⁷⁵

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

This final rule does not impose any new or additional direct "reporting" or "recordkeeping" requirements on filers of H-2 petitions. The final rule does not

²⁷⁴ Calculation: 13,722 petitions received annually × 96 percent = 13,173 submitted by small entities (rounded).

²⁷⁵ Calculation: 6,867 annually selected petitions × 95 percent = 6,524 submitted by small entities (rounded).

require any new professional skills for reporting. As discussed, to the extent that existing statutorily and regulatorily authorized site visits described in the current Form I-129 instructions result in neither a finding of compliance nor noncompliance (described throughout this rule as noncooperation), the provision to revoke or deny petitions may result in unquantified additional compliance burdens to those petitioners that underestimate the reasonable burden of compliance with unannounced site visits. Under the final rule, a petitioner that was selected for a site visit and would not have cooperated under the baseline would face (up to) a 1.7-hour marginal time burden (on average) in order to comply with the provisions of the rule. Also, the provisions of this final rule regarding prohibited fees and labor law violations (see 8 CFR 214.2(h)(5)(xi)(A) through (C), 8 CFR 214.2(h)(6)(i)(B) through (D) regarding prohibited fees, and 8 CFR 214.2(h)(10)(iv) regarding labor law violations and other violations) will subject petitioners, including small entities, to petition denials should they engage in activities that are prohibited by the final rule.

Denial or revocation of petitions for noncooperation with existing site visit and verification requirements is

expected to impact 12 percent of petitioners who, despite agreeing to permit the statutorily and regulatorily authorized site visits on their Form I-129 petition, yielded inconclusive (“not defined”) site visit results. Petitioners that do not cooperate with all site visit requirements may have underestimated the reasonable compliance burden they assented to, and, due to this final rule, would experience or expect to experience additional compliance burden associated with unchanged site visits and verification activities. DHS notes that employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses such as potential lost revenue or potential lost profits due to not having access to workers.

Furthermore, the final rule causes direct costs to accrue to affected petitioners due to opportunity costs of time from both marginal time burden increases (for H Classification Supplement to Form I-129) and increased filing volumes (additional Forms I-129 filed due to the rule’s portability provision).

The increase in cost per petition to file the H classification supplement for Form I-129 on behalf of an H-2 worker is the additional opportunity cost of time of 0.23 hours. As previously stated in Section d(1) of the regulatory impact analysis, this final rule will add \$11.72 in costs if an HR specialist files, \$26.26 in costs if an in-house lawyer files, and \$45.28 in costs if an outsourced lawyer files.²⁷⁶ USCIS acknowledges that the rule could impose other indirect costs on small entities including, but not limited to, the time required to comply with site visits and any actions required to remain compliant with the rule’s strengthened worker provisions. These indirect impacts are not explicitly included within the RFA because of uncertainty related to how many small entities would be affected and the degree to which affected entities would be impacted. The Regulatory Impact Analysis included above contains more in-depth analysis of those possible impacts and how they may impact small entities. Those entities not in compliance with the program would experience direct impacts as a result of this rule; DHS does not know how many entities are noncompliant.

In all instances, DHS acknowledges that several aspects of the rule impose

costs on affected entities. DHS has determined, however, that these costs are outweighed by the benefits of increased program integrity and compliance. DHS has considered opportunities to achieve the rule’s stated objectives while minimizing costs to small entities.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency Was Rejected

DHS considered alternatives to elements of the final rule that would minimize the impact on small entities while still accomplishing the rule’s objectives, such as improving the integrity and efficiency of the H-2 program. First, DHS acknowledges that, as discussed above, the vast majority (approximately 96 percent of H-2A petitioners and 95 percent of H-2B petitioners) of affected petitioners are small businesses. Therefore, costs due to the rule would necessarily be borne by those small businesses. Minimizing any costs due to the rule would therefore compromise the ability of this regulation to effectively address the goals stated in the preamble.

DHS considered not proposing regulations that would revoke or deny petitioners refusing to cooperate with current statutorily and regulatorily authorized USCIS site visit and verification activities. Roughly 12 percent of current H-2 site visits are inconclusive due to noncooperation on the part of petitioners. USCIS’ inability to reach a conclusion concerning compliance or noncompliance concerning petitioners that triggered a site visit is critical to oversight of the program and integrity measures. The compliance burden for a small entity is not the duration of the site visit and verification activities, but rather the discrepancy between what USCIS and the assenting petitioner estimated such reasonable compliance burdens to be. DHS will not consider permitting any small entity to willfully violate the statutory and regulatory requirements explained in the existing Form I-129 instructions, thus the IRFA alternative considered was rejected for failing to meet the rule’s objective of improving H-2 program integrity. Furthermore, 12 percent of USCIS resources dedicated toward investigating noncompliance with H-2 program requirements are

sunk, resulting in no findings. USCIS investigative officers are an important tool and a scarce resource. These investigatory resources could be made more effective if, at some additional compliance costs to would-be noncooperative small entities, USCIS was able to reach a finding. For this reason, DHS rejected the IRFA alternative for failing to meet the rule’s objective of improving H-2 efficiency with respect to USCIS investigative resources.

Finally, an additional objective of the rule is enhancement of worker protections. The IRFA alternative of minimizing additional compliance burdens to 12 percent of entities from site visits and verification activities was rejected because it risks undermining the impacts of other proposed provisions of this rule that are expected to achieve greater protections for workers who report violations. Furthermore, DHS considered not expanding porting to minimize those impacts to small entities, but concluded that the availability of porting is integral to accomplishing the objectives of enhancing program integrity and increasing worker protections.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule, or final rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a).

In addition, the inflation-adjusted value of \$100 million in 1995 is approximately \$192 million in 2022 based on the Consumer Price Index for All Urban Consumers (CPI-U).²⁷⁷

²⁷⁷ See BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month,” <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202403.pdf> (last visited Apr. 29, 2024). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2022 – Average monthly CPI-U for 1995) ÷ (Average monthly CPI-U for 1995)] × 100 = [(292.655 – 152.383) ÷ 152.383] × 100 = (140.272 ÷ 152.383) × 100 = 0.92052263 × 100 = 92.05 percent = 92 percent (rounded). Calculation

Continued

²⁷⁶ Calculations: HR specialist calculation: \$50.94 × (0.23 hours) = \$11.72 (rounded).

In-house lawyer calculation: \$114.17 × (0.23 hours) = \$26.26 (rounded).

Outsourced lawyer calculation: \$196.85 × (0.23) = \$45.28 (rounded).

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. See 2 U.S.C. 1502(1), 658(6). The term “Federal intergovernmental mandate” means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). 2 U.S.C. 658(5). The term “Federal private sector mandate” means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). 2 U.S.C. 658(7).

This final rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. 2 U.S.C. 1502(1), 658(6). The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the regulatory impact analysis above.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final does not meet the definitional criteria outlined in 5 U.S.C. 804(2), for purposes of Congressional review of agency rulemaking pursuant to the Congressional Review Act, Pub. L. 104–121, title II, sec. 251 (Mar. 29, 1996), 110 Stat. 868 (codified at 5 U.S.C. 801–808). This rule will not result in an annual effect on the economy of \$100 million or more.

DHS will send this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in

accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This final rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

G. Executive Order 13175

This final rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. National Environmental Policy Act (NEPA)

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act²⁷⁸ (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01, Rev. 01 (Directive) and Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual)²⁷⁹ establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. See 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions (“categorical exclusions”) that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not

require preparation of an Environmental Assessment or Environmental Impact Statement. See 40 CFR 1501.4(a). Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.²⁸⁰

This final rule amends administrative and procedural requirements to modernize and improve H–2 programs. The final rule will improve program integrity while increasing flexibility, efficiency, and improving access to the H–2 programs. Specifically, DHS is clarifying which fees are prohibited to be collected under H–2 regulations, strengthening the prohibition on collecting or agreeing to collect such fees from H–2 workers, extending grace periods for H–2 workers to give them the same amount of flexibility to come to the United States early and prepare for employment, and to remain in the United States after their employment ends to prepare for departure or seek new employment. The final rule also includes a new, longer grace period for H–2 workers whose employment terminated early. DHS is also making portability permanent in the H–2 programs, and allowing H–2 workers to take certain steps toward becoming permanent residents of the United States while still maintaining lawful nonimmigrant status. DHS is also codifying additional efficiencies in the H–2 programs by eliminating the H–2 eligible countries lists and the H–2 “interrupted stay” provisions, and by reducing the period of absence needed to reset a worker’s 3-year maximum period of stay.

DHS is not aware of any significant impact on the environment, or any change in environmental effect from current H–2 program rules, that will result from the final rule changes. DHS therefore finds that this final rule clearly fits within categorical exclusion A3 established in the Department’s implementing procedures in Instruction Manual, Appendix A.

The amendments contained in this final rule are stand-alone rule changes for USCIS H–2 programs and are not a part of any larger action. In accordance with its implementing procedures, DHS finds no extraordinary circumstances

²⁷⁸ See Pub. L. 91–190, 42 U.S.C. 4321 through 4347.

²⁷⁹ See DHS, Directive 023–01, Rev 01, “Implementation of the National Environmental Policy Act,” (Oct. 31, 2014), and DHS Instruction Manual 023–01–001–01, Revision 01, “Implementation of the National Environmental Policy Act (NEPA)” (Nov. 6, 2014), <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>.

²⁸⁰ See Instruction Manual, section V.B.2 (a–c).

associated with this final rule that may give rise to significant environmental effects requiring further environmental analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis is required.

I. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104–13, all agencies must submit to OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt.

In compliance with the PRA, DHS requested comments to the information collection associated with this rulemaking in the NPRM published in the **Federal Register** on September 20, 2023. DHS would have addressed any comments received on information collection activities in Section IV. of this final rule. After the publication of the NPRM, DHS published the Fee Schedule Final Rule (“Fee Rule”) on January 31, 2024, and that rule went into effect on April 1, 2024. 89 FR 6194. Subsequently, DHS updated the information collection and the baseline estimated total number of respondents and the amount of time estimated for an average respondent to respond, to reflect the changes to the information collection approved in connection with the Fee Rule. As a result, the estimated total public burden in hours and cost associated with the information collection has changed since the publication of the NPRM.²⁸¹

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant worker. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the nonimmigrant worker. The form serves the purpose of

standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–129 is 572,606 and the estimated hour burden per response is 2.487 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 12,050 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 12,945 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 471,983 and the estimated hour burden per response is 2.3 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 398,936 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 40,358 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 28,434 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 54 and the estimated hour burden per response is 0.34 hour; and the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,782 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,023,717 hours. This is a 108,556 increase from the current estimate of 2,915,161 burden hours annually. The overall change in burden

estimates reflects the changes in the rule related to the removal of the list of countries of citizenship section on the form and eligible countries list from the instructions, addition of question on exception to the 3-year limit and requests for evidence, rewriting of questions and instructional content on prohibited fees and evidence and other H–2A and H–2B violations, addition of clarifying language to H–2A and H–2B petitioner and employer obligations questions, addition of questions and reformatting for the joint employer section, removal of E-Verify and corresponding H–2A petitions instructions, addition of instructional content in the recruitment of H–2A and H–2B workers section, removal of instructional content on interrupted stays, and addition of clarifying language to the notification requirements instructional content.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$294,892,090.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

Accordingly, DHS is amending chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1188, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Section 214.2 is amended by:

■ a. Revising paragraph (h)(2)(i)(D);

²⁸¹ In the NPRM, DHS estimated that the total estimated number of respondents for the information collection I–129 was 294,751 and the estimated hour burden per response was 2.34 hours.

- b. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J) and adding a new paragraph (h)(2)(i)(I);
- c. Revising paragraphs (h)(2)(ii) and (iii);
- d. Removing paragraph (h)(5)(i)(F);
- e. Removing and reserving paragraph (h)(5)(iii)(B);
- f. Revising and republishing paragraph (h)(5)(vi);
- g. Revising paragraphs (h)(5)(viii)(B) and (C) and adding (D);
- h. Revising paragraphs (h)(5)(ix) and (xi);
- i. Removing paragraph (h)(5)(xii);
- j. Revising and republishing paragraph (h)(6)(i);
- m. Revising paragraph (h)(6)(vii);
- n. Adding paragraph (h)(10)(iv);
- o. Adding paragraph (h)(11)(iv);
- p. Revising paragraphs (h)(13)(i), (iv), and (v);
- q. Revising paragraph (h)(16)(ii) and adding (h)(16)(iii);
- r. Revising paragraph (h)(20); and
- s. Adding paragraph (h)(30).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition for a nonimmigrant worker requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided in paragraph (h)(2)(i)(I) of this section, 8 CFR 274a.12(b)(21), or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.

* * * * *

(I) *H-2A and H-2B portability.* An eligible H-2A or H-2B nonimmigrant is authorized to start new employment upon the proper filing, in accordance with 8 CFR 103.2(a), of a nonfrivolous H-2A or H-2B petition on behalf of such alien requesting the same classification that the nonimmigrant alien currently holds, or as of the requested start date, whichever is later.

(1) *Eligible H-2A or H-2B nonimmigrant.* For H-2A and H-2B portability purposes, an eligible H-2A or H-2B nonimmigrant is defined as an alien:

(i) Who has been lawfully admitted into the United States in, or otherwise provided, H-2A or H-2B nonimmigrant status;

(ii) On whose behalf a nonfrivolous H-2A or H-2B petition for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H-2A or H-2B nonimmigrant's stay in the same classification that the nonimmigrant currently holds, before the H-2A or H-2B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(iii) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(2) *Length of employment.*

Employment authorized under this paragraph (h)(2)(i)(I) automatically ceases upon the adjudication or withdrawal of the H-2A or H-2B petition described in paragraph (h)(2)(i)(I)(1)(ii) of this section.

(3) *Application of H-2A or H-2B program requirements during the pendency of the petition.* The petitioner and any employer is required to comply with all H-2A or H-2B program requirements, as applicable under the relevant program, with respect to an alien who has commenced new employment with that petitioner or employer based on a properly filed nonfrivolous petition and while that petition is pending, even if the petition is subsequently denied or withdrawn. During the pendency of the petition, the alien will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the new petition, even if the petition is subsequently denied or withdrawn.

(4) *Successive H-2A or H-2B portability petitions.* (i) An alien maintaining authorization for employment under this paragraph (h)(2)(i)(I), whose status, as indicated on the Arrival-Departure Record (Form I-94), has expired, will be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(I)(1)(ii) of this section. If otherwise eligible under this paragraph (h)(2)(i)(I), such alien may begin working in a subsequent position upon the filing of another H-

2A or H-2B petition in the same classification that the nonimmigrant alien currently holds or from the requested start date, whichever is later, notwithstanding that the previous H-2A or H-2B petition upon which employment is authorized under this paragraph (h)(2)(i)(I) remains pending and regardless of whether the validity period of an approved H-2A or H-2B petition filed on the alien's behalf expired during such pendency.

(ii) A request to amend the petition or for an extension of stay in any successive H-2A or H-2B portability petition requesting the same classification that the nonimmigrant alien currently holds cannot be approved if a request to amend the petition or for an extension of stay in any preceding H-2A or H-2B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-2A or H-2B status remains valid.

(iii) Denial of a successive portability petition does not affect the ability of the H-2A or H-2B beneficiary to continue or resume working in accordance with the terms of an H-2A or H-2B petition previously approved on behalf of the beneficiary if that petition approval remains valid, and the beneficiary has either maintained H-2A or H-2B status, as appropriate, or been in a period of authorized stay and has not been employed in the United States without authorization.

* * * * *

(ii) *Multiple beneficiaries.* Up to 25 named beneficiaries may be included in an H-1C, H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period, and in the same location. If more than 25 named beneficiaries are being petitioned for, an additional petition is required.

(iii) *Naming beneficiaries.* H-1B, H-1C, and H-3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H-2A and H-2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. USCIS may require the petitioner to name H-2B beneficiaries where the name is needed to establish eligibility for H-2B nonimmigrant status. If all of the beneficiaries covered by an H-2A or H-2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at

different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification.

* * * * *

(5) * * *

(vi) *Petitioner consent and notification requirements*—(A) *Consent*. In filing an H-2A petition, a petitioner and each employer consents to allow Government access to all sites where the labor is being or will be performed and where workers are or will be housed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-2A petition for H-2A workers performing services at the location or locations that are a subject of inspection or compliance review.

(B) *Agreements*. The petitioner agrees to the following requirements:

(1) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if:

(i) An H-2A worker does not report for work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by their employer, whichever is later;

(ii) The agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H-2A petition; or

(iii) The H-2A worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of agricultural labor or services for which they were hired.

(2) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification. To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(3) To pay \$10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(C) *Process*. If DHS has determined that the petitioner has violated the notification requirements in paragraph (h)(5)(vi)(B)(1) of this section and has not received the required notification, the petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages*. If liquidated damages are not paid within 10 days of assessment, an H-2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(vii) *Validity*. An approved H-2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H-2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.

(viii) * * *

(B) *Period of admission*. An alien admissible as an H-2A nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(5)(viii)(C) of this section following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(C) *Limits on an individual's stay*. Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H-2A nonimmigrant is limited by the period of time stated in an approved petition. An alien may

remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A or H-2B status for a total of 3 years may not again be granted H-2A status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(5)(viii)(C) will be determined during adjudication of a request for admission, change of status or extension. An alien found eligible for a shorter period of H-2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) will only be admitted for that shorter period.

(D) *Period of absence*. An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H-2 stay. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(ix) *Substitution of beneficiaries after admission*. An H-2A petition may be filed to replace H-2A workers whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work; who do not report for work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by their employer, whichever is later; or who do not report for work for a period of 5 consecutive workdays without the consent of the employer. The petition must be filed with a copy of the temporary labor certification, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving the name, date and country of birth, termination date, and the reason for termination, if applicable, for such worker and the date that USCIS was notified that the worker was terminated or did not report for work for a period of 5 consecutive workdays without the consent of the employer. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(1) of this section.

* * * * *

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition for prohibited fees.* As a condition of approval of an H-2A petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H-2A employment (collectively, “prohibited fees”) may be collected at any time from a beneficiary of an H-2A petition or any person acting on the beneficiary’s behalf by a petitioner, a petitioner’s employee, agent, attorney, facilitator, recruiter, or similar employment service, or by any employer (if different from the petitioner) or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers. The term “similar employment service” refers to any person or entity that recruits or solicits prospective beneficiaries of the H-2A petition. The passing of a cost to the beneficiary that, by statute or applicable regulations, is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees. This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with statute or regulations governing the H-2A program.

(1) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H-2A petition, has collected, or entered into an agreement to collect, a prohibited fee related to the H-2A employment, USCIS will deny or revoke the H-2A petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process; extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for

collection of prohibited fees; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and the petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the beneficiaries’ designees.

(2) If USCIS determines that the beneficiary has paid or agreed to pay a prohibited fee related to the H-2A employment, whether before or after the filing of the H-2A petition, to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, USCIS will deny or revoke the H-2A petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such parties throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and that all affected beneficiaries, or their designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed. A written contract between the petitioner and the agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(3) For purposes of paragraph (h)(5)(xi) of this section, a designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(B) *One-year denial period of subsequent H-2A petitions.* USCIS will deny any H-2A petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H-2B or H-2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section, provided that the denied or revoked petition was filed on or after January 17, 2025. In addition, USCIS will deny any H-2A

petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H-2A or H-2B petition filed on or after January 17, 2025, that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section.

(C) *Reimbursement as condition of approval of future H-2A petitions*—(1) *Additional 3-year denial period of subsequent H-2A petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(5)(xi)(B) of this section, USCIS will deny any H-2A petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner, successor in interest, or the petitioner’s or successor in interest’s agent, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, reimbursed in full each beneficiary, or the beneficiary’s designee only if such beneficiary cannot be located or is deceased, of the denied or revoked petition from whom a prohibited fee was collected. USCIS will deny H-2A petitions under this provision based on the denial or revocation decision(s) issued pursuant to paragraph (h)(5)(xi)(A) or (h)(6)(i)(B) of this section on a prior petition filed on or after January 17, 2025.

(2) *Successor in interest.* For the purposes of paragraphs (h)(5)(xi)(B) and (C) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Substantial continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(viii) Similarity of products and services;

(ix) Familial or close personal relationships between predecessor and successor owners of the entity; and

(x) Use of the same or related remittance sources for business payments.

(6) * * *

(i) *Petition*—(A) *H-2B nonagricultural temporary worker*. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

(B) *Denial or revocation of petition for prohibited fees*. As a condition of approval of an H-2B petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H-2B employment (collectively, “prohibited fees”) may be collected at any time from a beneficiary of an H-2B petition or any person acting on the beneficiary’s behalf by a petitioner, a petitioner’s employee, agent, attorney, facilitator, recruiter, or similar employment service, or any employer (if different from the petitioner). The term “similar employment service” refers to any person or entity that recruits or solicits prospective beneficiaries of the H-2B petition. The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including their employees), employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees. This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations governing the H-2B program.

(1) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H-2B petition, has collected or entered

into an agreement to collect a prohibited fee related to the H-2B employment, USCIS will deny or revoke the H-2B petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; extraordinary circumstances beyond the petitioner’s control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and the petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed their designees.

(2) If USCIS determines that the beneficiary has paid or agreed to pay any employer, agent, attorney, facilitator, recruiter, or similar employment service a prohibited fee related to the H-2B employment, whether before or after the filing of the H-2B petition, USCIS will deny or revoke the H-2B petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee(s) collection or agreement by such parties throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement; and all affected beneficiaries, or their designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed. A written contract between the petitioner and the facilitator, recruiter, or similar employment service stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(3) For purposes of paragraph (h)(6)(i) of this section, a designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(C) *One-year denial period of subsequent H-2B petitions*. USCIS will

deny any H-2B petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H-2B or H-2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section, provided that the denied or revoked petition was filed on or after January 17, 2025. In addition, USCIS will deny any H-2B petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H-2B or H-2A petition filed on or after January 17, 2025, that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section.

(D) *Reimbursement as condition of approval of future H-2B petitions*—(1) *Additional 3-year denial period of subsequent H-2B petitions*. For an additional 3 years after the 1-year period described in paragraph (h)(6)(i)(C) of this section, USCIS will deny any H-2B petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner or successor in interest, or the petitioner’s or successor in interest’s agent, facilitator, recruiter, or similar employment service, reimbursed in full each beneficiary, or the beneficiary’s designee only if such beneficiary cannot be located or is deceased, of the denied or revoked petition from whom a prohibited fee was collected. USCIS will deny H-2B petitions under this provision based on the denial or revocation decision(s) issued pursuant to paragraph (h)(6)(i)(B) or (h)(5)(xi)(A) of this section on a prior petition filed on or after January 17, 2025.

(2) *Successor in interest*. For the purposes of paragraphs (h)(6)(i)(C) and (D) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Substantial continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(viii) Similarity of products and services;

(ix) Familial or close personal relationships between predecessor and successor owners of the entity; and

(x) Use of the same or related remittance sources for business payments.

(E) [Reserved]

(F) *Petitioner agreements and notification requirements*—(1) *Agreements*. The petitioner must notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H-2B worker does not report for work within 5 workdays after the employment start date stated on the petition; the nonagricultural labor or services for which H-2B workers were hired were completed more than 30 days early; or an H-2B worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of the nonagricultural labor or services for which they were hired. The petitioner must also retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(2) *Consent*. In filing an H-2B petition, the petitioner and each employer (if different from the petitioner) consent to allow Government access to all sites where the labor is being or will be performed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate

in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-2B petition for H-2B workers performing services at the location or locations that are a subject of inspection or compliance review.

* * * * *

(vii) *Admission*—(A) *Period of admission*. An alien admissible as an H-2B nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(6)(vii)(B) of this section following the expiration of the H-2B petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(B) *Limits on an individual's stay*. Except as provided in paragraph (h)(6)(vii)(A) of this section, an alien's stay as an H-2B nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary nonagricultural employment by obtaining an extension of stay. However, an individual who has held H-2A or H-2B status for a total of 3 years may not again be granted H-2B status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(6)(vii)(B) will be determined during adjudication of a request for admission, change of status or extension of stay. An alien found eligible for a shorter period of H-2B status than that indicated by the petition due to the application of this paragraph (h)(6)(vii)(B) will only be admitted for that shorter period.

(C) *Period of absence*. An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H-2 stay. The limitation in paragraph (h)(6)(vii)(B) of this section will not apply to H-2B aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitation in paragraph (h)(6)(vii)(B) of this section will not apply to aliens who reside abroad and regularly commute to the United States

to engage in part-time employment. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(D) *Traded professional H-2B athletes*. In the case of a professional H-2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new application or petition for H-2B nonimmigrant classification. If a new application or petition is not filed within 30 days, employment authorization will cease. If a new application or petition is filed within 30 days, the professional athlete will be deemed to be in valid H-2B status, and employment will continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

* * * * *

(10) * * *
(iv) *H-2A and H-2B violators*. (A) USCIS will deny any H-2A or H-2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(2) and (h)(6)(i)(D)(2) of this section, that has been the subject of one or more of the following actions:

(1) A final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 debarring the petitioner from filing or receiving a future labor certification, or a final administrative determination by the Governor of Guam debarring the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is filed on or after January 17, 2025 and during the debarment period, or if the debarment occurs during the pendency of the petition filed on or after January 17, 2025, and the final administrative determination debarring the petitioner is made on or after January 17, 2025; or

(2) A final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that includes a finding of fraud or willful misrepresentation of a material fact with respect to a previously filed H-2A or H-2B petition. This provision will only apply if the final denial or revocation decision was issued on a petition filed on or after January 17, 2025; or

(3) A final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition if the final determination of violation(s) under section 274(a) of the Act is made on or after January 17, 2025 and the petition is filed on or after January 17, 2025.

(B) Except as provided in paragraph (h)(10)(iv)(A) of this section, USCIS may deny any H-2A or H-2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(2) and (h)(6)(i)(D)(2) of this section on or after January 17, 2025, that has been the subject of one or more of the following actions during the pendency of the petition or within 3 years prior to filing the petition, regardless of whether the action(s) or underlying violation(s) occurred before, on, or after January 17, 2025. USCIS may deny such a petition if it determines that the petitioner or successor has not established its intention and/or ability to comply with H-2A or H-2B program requirements. The violation(s) underlying the following actions that may call into question a petitioner's or successor's intention and/or ability to comply include:

(1) A final administrative determination by the Secretary of Labor or the Governor of Guam with respect to a prior H-2A or H-2B temporary labor certification that includes:

(i) Revocation of an approved temporary labor certification under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules;

(ii) Debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded prior to filing the petition; or

(iii) Any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts.

(2) A final USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of section 101(a)(15)(H) of the Act or this paragraph (h); or

(3) Any final administrative or judicial determination (other than one described in paragraph (h)(10)(iv)(A) of this section) that the petitioner violated any applicable employment-related laws or regulations, including health and safety laws or regulations.

(C) In determining whether the underlying violation(s) in paragraph (h)(10)(iv)(B) of this section calls into question the intention and/or ability of the petitioner or its successor in interest to comply with H-2A or H-2B program requirements, USCIS will consider all relevant factors, including, but not limited to:

(1) The recency and number of violations;

(2) The egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers;

(3) Overall history or pattern of prior violations;

(4) The severity or monetary amount of any penalties imposed;

(5) Whether the final determination, decision, or conviction included a finding of willfulness;

(6) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers;

(7) Timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and

(8) Other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations.

(D) For purposes of paragraph (h)(10)(iv) of this section, a criminal conviction or final administrative or judicial determination against any one of the following individuals will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest:

(1) An individual acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor; or

(2) With respect to paragraph (h)(10)(iv)(B) of this section, an employee of the petitioning entity who a reasonable person in the H-2A or H-2B worker's position would believe is acting on behalf of the petitioning entity.

(E)(1) With respect to denials under paragraph (h)(10)(iv)(A) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the mandatory ground of denial

will also apply in the adjudication of any other pending or future H-2 petition filed by the petitioner or a successor in interest during the applicable time period.

(2) With respect to denials under paragraph (h)(10)(iv)(B) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the discretionary ground of denial may also apply in the adjudication of any other pending or future H-2 petition filed by the petitioner or a successor in interest during the applicable time period.

(F) If USCIS has determined in the course of a prior adjudication that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H-2A or H-2B program requirements notwithstanding relevant violation determination(s) under paragraph (h)(10)(iv)(B) of this section, USCIS will not seek to deny a subsequent petition under paragraph (h)(10)(iv)(B) based on the same previous violation determination(s) unless USCIS becomes aware of a new material fact or finds that its previous determination was based on a material error of law.

(11) * * *

(iv) *Effect of H-2A or H-2B petition revocation.* Upon revocation of the approval of an employer's H-2A or H-2B petition, the beneficiary and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the date of the revocation, or until the end of the authorized period of admission, whichever is shorter. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved petition in the same classification filed by a different employer.

* * * * *

(13) * * *

(i) *General.* (A) An H-3 beneficiary will be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under section 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count toward fulfillment of the required time abroad. A certain period of absence from the United States of H-2A and H-2B aliens, as set forth in 8 CFR 214.2(h)(5)(viii)(D) and 8 CFR 214.2(h)(6)(vii)(C), respectively, will provide a new total of 3 years that H-2A or H-2B status may be granted. The petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

(C) An alien admitted or otherwise provided status in H-2A or H-2B classification and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the employment on which the alien's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter, once during each authorized period of admission. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.

(D) An alien in any authorized period described in paragraph (C) of this section may apply for and be granted an extension of stay under 8 CFR 214.1(c)(4) or change of status under 8 CFR 248.1, if otherwise eligible.

(iv) *H-3 limitation on admission.* An H-3 alien participant in a special education program who has spent 18 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act; and an H-3 alien trainee who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) *Exceptions.* The limitations in paragraphs (h)(13)(iii) and (iv) of this

section will not apply to H-1B and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

* * * * *

(16) * * *

(ii) *H-2A or H-2B classification.* The approval of a permanent labor certification, the filing of an immediate relative or preference petition for or by an alien or a diversity visa petition with the Department of State, or an application by an alien to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H-2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H-2 status. The approval of a permanent labor certification, filing of an immediate relative petition, preference petition, or diversity visa petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H-2 nonimmigrant is maintaining his or her H-2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning.

(iii) *H-3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, will be a reason, by itself, to deny the alien's extension of stay.

* * * * *

(20) *Retaliatory action claims.* (i) If credible documentary evidence is provided in support of a petition seeking an extension of H-1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary

circumstances" as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

(ii) If credible documentary evidence is provided in support of a petition seeking an extension of H-2A or H-2B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity, USCIS may consider a loss or failure to maintain H-2A or H-2B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). USCIS will determine the reasonableness of any claim from the perspective of a reasonable person in the H-2A or H-2B worker's position.

* * * * *

(30) *Severability.* The Department intends that should any of the revisions effective on January 17, 2025, to provisions in paragraphs (h)(2), (5), (6), (10), (11), (13), (16) and (20) of this section or to the provision in 8 CFR 274a.12(b)(21) be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law, unless any such provision is held to be wholly invalid and unenforceable, in which event the provision(s) should be severed from the remainder of the provisions and the holding should not affect the other provisions or the application of those other provisions to persons not similarly situated or to dissimilar circumstances.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 3. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599; Title VII of Pub. L. 110-229, 122 Stat. 754; Pub. L. 115-218, 132 Stat. 1547; 8 CFR part 2.

■ 4. Section 274a.12 is amended by revising paragraph (b)(21) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) or 8 CFR

214.2(h)(1)(ii)(D) for whom a nonfrivolous petition requesting an extension of stay is properly filed pursuant to 8 CFR 214.2 and 8 CFR 103.2(a) requesting the same classification that the nonimmigrant alien currently holds. Pursuant to 8 CFR 214.2(h)(2)(i)(I), such alien is authorized

to start new employment upon the proper filing of the nonfrivolous petition requesting an extension of stay in the same classification, or as of the requested start date, whichever is later. The employment authorization under this paragraph (b)(21) automatically ceases upon the adjudication or

withdrawal of the H-2A or H-2B petition;

* * * * *

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

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Part IV

Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 212, 216, 225, et al.

Defense Federal Acquisition Regulation Supplement: Small Business
Innovation Research Program Data Rights (DFARS Case 2019–D043);
Final Rule

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 227, and 252**

[Docket DARS–2020–0033]

RIN 0750–AK84

Defense Federal Acquisition Regulation Supplement: Small Business Innovation Research Program Data Rights (DFARS Case 2019–D043)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the data rights portions of the Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directives.

DATES: Effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Mr. David Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the *Federal Register* at 87 FR 77680 on December 19, 2022, to implement in the DFARS the intellectual property (e.g., data rights) portions of the Small Business Administration's (SBA's) revised Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directive. DoD had previously published an advance notice of proposed rulemaking (ANPR) at 85 FR 53758 on August 31, 2020. Six respondents submitted written public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments submitted in writing and discussed by the attendees at the virtual public meetings on February 2, 2023, and March 2, 2023, in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

Based on the comments received, the following DFARS guidance, contract

clauses, and solicitation provisions are revised:

- DFARS 227.7104–1 is revised to further explain the scope of SBIR/STTR Phase III work to which the SBIR/STTR data rights clauses apply.
- DFARS 227.7104–2 is revised to provide a list of applicable clauses and policies that govern the Government's license rights in any data that are not SBIR/STTR data.
- The following provision and clauses are revised to ensure consistent definitions of the term “SBIR/STTR data” and the term “generated”: DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions; and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.
- DFARS 252.227–7018(c)(2)(ii)(B) is revised to remove language that may have been misinterpreted to imply that special licenses may be negotiated prior to contract award when the standard license rights are SBIR/STTR data rights.
- The provision at DFARS 252.227–7040, Additional Preaward Requirements for Small Business Technology Transfer Program, and the clause at DFARS 252.227–7041, Additional Postaward Requirements for Small Business Technology Transfer Program, are revised to clarify STTR program requirements regarding consistency between the clause at DFARS 252.227–7018 and written agreements between the offeror and a research institution, and regarding written representations related to the written agreements in preaward submissions and postaward updates.
- Proposed changes to the marking requirements related to restrictions on third-party recipients of technical data and computer software (in the clauses at DFARS 252.227–7013, 252.227–7014, and 252.227–7018) have been removed from this rule. Proposed changes regarding restrictive markings on technical data related to commercial technology in the clause at DFARS 252.227–7015, Technical Data—Commercial Products and Commercial Services, have also been removed from this rule.

*B. Analysis of Public Comments***1. Restrictive Marking Requirements**

Comment: Several respondents provided comments and recommended revisions to proposed changes to restrictive marking requirements in DFARS 252.227–7013, 252.227–7014, 252.227–7015, and 252.227–7018.

Response: As discussed in the ANPR, DoD proposed revisions to address the SBIR/STTR Policy Directive's emphasis on requiring restrictive markings for SBIR/STTR data, while ensuring appropriate procedures to address the inadvertent omission of restrictive markings by SBIR/STTR contractors. These issues are addressed by clarifying that the long-standing requirements for identification and marking of deliverable other than commercial technical data and software, including the procedures to address inadvertent omission of restrictive markings, apply to SBIR/STTR data. For example, this final rule adds references to the clause at DFARS 252.227–7018 at DFARS 227.7103–10 and 227.7103–12 for other than commercial technical data and DFARS 227.7203–10 and 227.7203–12 for other than commercial computer software; and incorporating such procedures into all associated clauses at DFARS 252.227–7013, 252.227–7014, and 252.227–7018).

As discussed in the proposed rule, DoD proposed further revisions to address additional related matters regarding the absence of restrictive markings (e.g., the lack of an unlimited rights marking), and to address additional public comments and recent case precedent regarding requirements, restrictions, and procedures for correcting nonconforming markings, in cases of commercial markings and markings directed to non-Government, third-party recipients of marked data. The vast majority of the public comments were directed to complex matters related to these additional markings issues, rather than the more limited markings topics addressed in the SBIR/STTR Policy Directive. To expedite implementation of the primary SBIR/STTR policy elements of this DFARS case while enabling further consideration of comments and recommendations from the public on proposed revisions directed to such additional important marking requirements in these clauses, these regulatory changes related to marking requirements have been removed from this final rule (e.g., unlimited rights markings, markings for commercial technical data, and markings directed to third-party recipients).

2. Scope and Applicability of Clauses and Scope of License Rights

a. Applicability Section of the Clauses

Comment: Several respondents recommended removal or revision of the proposed applicability sections in the data rights clauses. A respondent asserted that proposed applicability sections of the clauses should indicate that the SBIR/STTR clauses are no longer applicable to SBIR/STTR data once the related product becomes commercial. Other respondents recommended revisions to the proposed applicability sections to remove applicability of DFARS 252.227–7013 to portions of a commercial item that was developed in any part at Government expense. Lastly, other respondents recommended moving the applicability sections to a later section of the clauses to reduce the administrative burden on contractors resulting from changes in paragraph numbering in restrictive markings.

Response: In view of DFARS drafting conventions, DoD added applicability sections to paragraph (b) of the clauses and the associated guidance to contracting officers to clarify contractors' and contracting officers' understanding of the scope of DFARS 252.227–7013, 252.227–7014, 252.227–7015, and 252.227–7018. These revisions reflect the existing prescriptive guidance found in DFARS 227.7102–4, 227.7104, and the SBIR/STTR Policy Directive, none of which exclude or limit the applicability of the SBIR/STTR program requirements once the related product becomes commercial. These revisions will ensure proper application of the SBIR/STTR data rights clause, as prescribed in the SBIR/STTR Policy Directive, and other clauses. For this reason, DoD has not adopted the respondents' recommendations for removal or revision of the applicability sections.

b. Guidance on Scope of SBIR/STTR Contracts, Including Phase III Work

Comment: One respondent asserted that part 227 should be revised to define the scope of SBIR/STTR contracts by referencing the definition in the SBIR/STTR Policy Directive. Another respondent recommended clarifying the scope of Phase III work.

Response: DoD has partially adopted these recommendations. Based on guidance from the SBIR/STTR Policy Directive, DFARS 227.7104–1 is revised to further clarify the scope of applicability of SBIR/STTR data rights and the scope of SBIR/STTR Phase III work.

c. Guidance on the SBIR Protection Period

Comment: A respondent recommended providing guidance on how the SBIR protection period applies to multiple awards at various SBIR phases.

Response: DFARS 227.7104–2(a)(2) provides the guidance recommended by the respondent. In addition, DFARS Procedures, Guidance, and Information 227.7104–2 provides examples and guidance on how the SBIR or SBIR/STTR protection period applies in each example.

d. Guidance on Applicability of Commercial Computer Software Licenses

Comment: A respondent recommended revising DFARS 227.7104–4 to discuss the applicability of commercial computer software licenses.

Response: DoD has adopted this recommendation. DFARS 227.7104–2 is revised to provide a list of applicable clauses and policies that govern the Government's license rights in any data that are not SBIR/STTR data. DFARS 227.7104–2 references commercial computer software and the applicability of licenses customarily provided to the public, in accordance with DFARS 227.7202–3.

e. New STTR Provision and Clause

Comment: A respondent recommended edits to DFARS 252.227–7040 and DFARS 252.227–7041 regarding potential conflicts with DFARS 252.227–7018 in the STTR agreements and associated representation.

Response: DoD has adopted this recommendation. DFARS 252.227–7040 and DFARS 252.227–7041 are revised to clarify requirements for written agreements between the offeror and a research institution, preaward submissions, and postaward updates.

f. Consistent Inclusion of Definitions in the Clauses

Comment: A respondent asserted that DFARS 252.227–7013, 252.227–7014, 252.227–7017, and 252.227–7018 should consistently include definitions of the term “SBIR/STTR” data and “generated” when referenced in the clauses. In addition, a respondent asserted that the definition of the term “generated” in the clause at DFARS 252.227–7013 should not reference computer software.

Response: DFARS 252.227–7013, 252.227–7014, 252.227–7017, and 252.227–7018 are revised to ensure consistent inclusion of the definitions of

the terms “SBIR/STTR data” and “generated.” However, DoD has not adopted the second recommendation. For the sake of consistency, the definition of the term “generated” is the same in both DFARS 252.227–7013 and 252.227–7014.

g. License Rights in Computer Software Documentation Under DFARS 252.227–7018

Comment: A respondent asserted that computer software documentation should not be a separate category of unlimited rights data in paragraph (c)(1) of DFARS 252.227–7018. The respondent asserted that the edits to DFARS 252.227–7018 expand the scope of the Government's license rights in computer software documentation.

Response: Under both DFARS 252.227–7014 and DFARS 252.227–7018, the Government has an unlimited rights license in computer software documentation. The edits to DFARS 252.227–7018(c)(1) do not expand the scope of the Government's existing license rights in computer software documentation. For the sake of clarity, these edits align the format of the “unlimited rights” license grant in DFARS 252.227–7014 with DFARS 252.227–7018. The Government's unlimited rights license in computer software documentation is based in the requirements of 10 U.S.C. 3771(b)(3) (see 60 FR 33464, 33467 (June 28, 1995)). The statute at 10 U.S.C. 3771 provides an unlimited rights license in technical data necessary for operation, maintenance, installation, or training purposes. Computer software documentation is technical data. It is defined narrowly to include only owner's manuals, user's manuals, installation instructions, operating instructions, and similar items that explain the capabilities of computer software or provide instructions for using the software. Such data are necessary for operation, maintenance, installation, or training. Consequently, under 10 U.S.C. 3771, a contractor may not restrict the Government's rights to release or disclose computer software documentation or to permit others to use the data. Accordingly, these revisions to DFARS 252.227–7018(c) are aligned with the Government's license rights to computer software documentation in 10 U.S.C. 3771 and DFARS 252.227–7014.

h. Assertion Requirements

Comment: Several respondents commented that the identification and assertion requirements in DFARS 252.227–7017 should not be applied to SBIR/STTR data. Another respondent

recommended that this provision should include permission for SBIR contractors to add new assertions after contract award.

Response: The assertion requirements are necessary to identify and protect the intellectual property interests of contractors and subcontractors under SBIR/STTR contracts, because they provide a practical document that specifically identifies deliverable technical data and software to be furnished with restrictions. These procedures help ensure appropriate protections for deliverable technical data and software, and these protections should be equally applicable to SBIR/STTR data. In addition, these procedures will help clarify the protection period(s) applicable to deliverable SBIR/STTR data (e.g., see discussion at section II.2.c. of this preamble). In addition, DFARS 252.227–7018 already permits post-award revisions to the assertions table “when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision.” For these reasons, DoD has not adopted the respondent’s recommendations.

3. Evaluation of Proposals and Post-Award Negotiations of SBIR/STTR Data Rights

a. Evaluation of Proposals in SBIR/STTR Contracts

Comment: Respondents asserted that the revisions to DFARS 227.7104–1(c) are inconsistent with the SBIR/STTR Policy Directive because they imply that the Government may reject a proposal due to SBIR data rights. A respondent asserted that the effect of this language will be inconsistent with the intent of the SBIR/STTR Policy Directive and may result in violations of the Directive.

Response: The rule revises DFARS 227.7104–1 to mirror the policies at DFARS 227.7103–10(a)(5) and DFARS 227.7203–10(a)(5), and it adds cross-references at DFARS 227.7104–1 to policies at DFARS 227.7103–10 and DFARS 227.7203–10. These instructions expressly prohibit contracting officers from requiring offerors to relinquish SBIR/STTR data rights or from rejecting offerors solely due to SBIR/STTR data rights restrictions. The guidance also indicates that, during the source selection process, the Government may evaluate the impact of restrictions on the Government’s ability to use or disclose technical data or computer software in a manner consistent with acquisition preferences and other

guidance applicable to SBIR/STTR offerors.

b. Negotiation in SBIR/STTR Contracts

Comment: A respondent recommended revisions to DFARS 252.227–7018(c)(2)(ii)(B). The respondent asserted that the proposed rule may be misinterpreted to imply that special licenses may be negotiated prior to contract award where the standard license rights are SBIR/STTR data rights.

Response: DFARS 252.227–7018(c)(2)(ii)(B) is revised to remove this language. In addition, DFARS 227.7104–2(c) is added to indicate that the Government and the SBIR/STTR contractor or subcontractor may negotiate special license rights only after contract award. Note that DFARS Case 2018–D071, Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses, addresses proposed DFARS revisions to implement policies and procedures regarding negotiation of special licenses, including applicable SBIR/STTR policies and procedures.

4. Guidance in the SBIR/STTR Policy Directive Outside of the Scope of Part 227

a. Restrictions on Prototypes

Comment: Some respondents recommended applying the marking requirements to prototypes, end items, or products themselves.

Response: The ANPR, proposed rule, and this final rule recognize and reference the SBIR/STTR Policy Directive guidance on prototypes in DFARS 227.7104–2(c). Because the license rights and marking requirements prescribed in DFARS Part 227 apply only to technical data and computer software rather than hardware, DoD has not adopted the respondents’ recommended revision to Part 227 and the associated clauses.

b. Guidance From SBIR/STTR Policy Directive Not Related to Data Rights

Comment: Respondents recommended revising part 227 to include guidance from the SBIR/STTR Policy Directive that is not related to data rights, including guidance on agency notices of intent to award, SBA notices of intent to appeal, SBA appeals, suspensions of work, and sole-source awards.

Response: The respondents’ recommendations are not related to license rights to technical data or software. Therefore, they are beyond the scope of part 227 and this rule.

C. Other Changes

Editorial changes were made, including updates to comport with DFARS content and formatting conventions. The rule also adds cross-references at DFARS 227.7104–1 for SBIR/STTR technical data and software to the policies at DFARS 227.7103–9 through 227.7103–12 and 227.7203–9 through 227.7203–12 related to other than commercial technical data and other than commercial computer software. These policies have also been revised to clarify their applicability to SBIR/STTR data.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products (Including Commercially Available Off-the-Shelf Items), and for Commercial Services

The rule clarifies the following DFARS solicitation provision and contract clauses to reflect the objectives of the SBIR/STTR Policy Directive: 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services; 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227–7015, Technical Data—Commercial Products and Commercial Services; 252.227–7016, Rights in Bid or Proposal Information; 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions; 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program; and 252.227–7025, Limitation on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

DFARS clauses 252.227–7013, 252.227–7015, and 252.227–7037 will continue to apply to contracts at or below the SAT and for the acquisition of commercial products, including COTS items, and commercial services. In addition, DFARS 252.227–7018 applies to contracts at or below the SAT and for the acquisition of commercial products, including COTS items, and commercial services.

This rule also creates a new provision and a new clause: (1) DFARS 252.227–7040, Additional Preaward Requirements for Small Business Technology Transfer Program, and (2) DFARS 252.227–7041, Additional Postaward Requirements for Small Business Technology Transfer Program. The new provision and clause apply to

acquisitions at or below the SAT and to acquisitions of commercial products, including COTS items, and commercial services. Not applying this provision and clause to contracts at or below the SAT and for the acquisition of commercial products, including COTS items, and commercial services would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule. Consequently, the rule applies to contracts at or below the SAT and for the acquisition of commercial products, including COTS items, and commercial services.

IV. Expected Impact of the Rule

The SBIR/STTR Policy Directive updates the SBIR/STTR data protection period to a single, non-extendable 20-year period, rather than an extendable 5-year period. The rule also provides the Government with perpetual government purpose rights license after the expiration of the SBIR/STTR data protection period, rather than unlimited rights. In addition, the rule implements STTR-unique requirements in the SBIR/STTR Policy Directive related to allocation of intellectual property rights between partnering institutions and contractors under the STTR program. The rule removes an alternate clause for DFARS 252.227–7018, which previously allowed the Government to elect not to exercise its right to publish or authorize others to publish SBIR data.

This rule therefore impacts the Government's license rights in SBIR/STTR data. The SBIR/STTR Policy Directive emphasizes the need to protect the intellectual property interests of small businesses. This rule provides a transparent and consistent framework that protects the intellectual property interests of our small-business industry partners.

V. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

DoD is amending the DFARS to implement the data-rights portions of the revised SBA Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directive. The final combined SBA SBIR/STTR Policy Directive became effective on May 2, 2019. The objectives of this rule are to implement the data-rights portions of the SBA SBIR/STTR Policy Directive. Accordingly, the rule provides the following:

- A single, non-extendable, 20-year SBIR/STTR data protection period, rather than a 5-year period that can be extended indefinitely;
- Perpetual government purpose rights license rights after the expiration of the SBIR/STTR data protection period, rather than unlimited rights; and
- Definitions that harmonize terminology used in the Policy Directive and the Federal Acquisition Regulation and DFARS implementations.

The rule provides a new DFARS solicitation provision and a contract clause applicable to STTR awards where no such coverage has existed. Further, the rule updates the following DFARS provision and clauses: 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services; 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227–7015, Technical Data—Commercial Products and Commercial Services; 252.227–7016, Rights in Bid or Proposal Information; 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions; 252.227–7018, Rights in Other Than Commercial Technical Data and

Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program; 252.227–7019, Validation of Asserted Restrictions—Computer Software; and 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

The SBIR/STTR Policy Directive emphasizes the need to protect the intellectual property interests of small businesses. The rule provides a transparent and consistent framework that protects the intellectual property interests of our small-business industry partners.

DoD received no comments in response to the initial regulatory flexibility analysis.

This rule will apply to small entities that have contracts with DoD requiring delivery of data, including technical data and computer software. Based on data from Electronic Data Access for fiscal year (FY) 2022 through FY 2024, DoD estimates that 3,341 contractors may be impacted by the changes in this final rule. Of those entities, approximately 3,258 (98 percent) are small entities.

This rule imposes new reporting, recordkeeping, or other compliance requirements for small entities participating in the STTR program. This rule adds a requirement for offerors responding to solicitations under the STTR program to submit, to be eligible for award, both a written agreement and a written representation to the contracting officer for review. Further, the rule requires STTR contractors to submit both an updated written agreement and an updated written representation to the contracting officer as occasioned by postaward modifications of the written agreement. Based on data from SBA for FY 2022 through FY 2024, DoD estimates that an average of 618 unique small entities are awarded an average of 359 STTR contract actions on an annual basis. DoD estimates that senior employees are necessary to prepare the written agreement and written representation because of the complexity of the matter, and the written representation requires execution by an employee authorized to bind the company.

There are no known, significant, alternative approaches that would meet the requirements.

VIII. Paperwork Reduction Act

This final rule contains information collection requirements that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

This information collection requirement has been assigned OMB Control Number 0750-0010, Defense Federal Acquisition Regulation Supplement Part 227, Patents, Data, and Copyrights; Small Business Technology Transfer Program.

List of Subjects in 48 CFR Parts 212, 227, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System amends 48 CFR parts 212, 227, and 252 as follows:

■ 1. The authority citation for 48 CFR parts 212, 227, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 2. Amend section 212.301 by revising paragraph (f)(xii) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *

(xii) *Part 227—Patents, Data, and Copyrights.* (A) Use the clause at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, as prescribed in 227.7102-4(b) and 227.7103-6(a). Use the clause with its Alternate I as prescribed in 227.7103-6(b)(1). Use the clause with its Alternate II as prescribed in 227.7103-6(b)(2), to comply with 10 U.S.C. 8687 and 17 U.S.C. 1301, *et seq.*

(B) Use the clause at 252.227-7015, Technical Data—Commercial Products and Commercial Services, as prescribed in 227.7102-4(a)(1), to comply with 10 U.S.C. 3772(a). Use the clause with its Alternate I as prescribed in 227.7102-4(a)(2), to comply with 10 U.S.C. 8687 and 17 U.S.C. 1301, *et seq.*

(C) Use the clause at 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, as prescribed in 227.7104-4(a)(1).

(D) Use the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, as prescribed in 227.7102-4(c).

(E) Use the provision at 252.227-7040, Additional Preaward Requirements for Small Business

Technology Transfer Program, as prescribed in 227.7104-4(c)(1).

(F) Use the clause at 252.227-7041, Additional Postaward Requirements for Small Business Technology Transfer Program, as prescribed in 227.7104-4(c)(2).

* * * * *

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 3. Amend section 227.7103-5—

■ a. In paragraph (b)(4) introductory text, by removing “government may” and adding “Government may” in its place;

■ b. In paragraph (b)(4)(i), by removing “non-disclosure” and adding “nondisclosure” in its place;

■ c. By revising paragraphs (b)(5) and (6) and (c)(4).

The revisions read as follows:

227.7103-5 Government rights.

* * * * *

(b) * * *

(5) When technical data marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227-7025, the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and nondisclosure agreement.

(6) Contracting activities shall establish procedures to assure that technical data marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and nondisclosure restrictions. Public announcements in the System for Award Management or other publications must provide notice of the use and nondisclosure requirements. Class use and nondisclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights data. Documents transmitting government purpose rights data to persons under class agreements shall identify the technical data subject to government purpose rights and the class agreement under which such data are provided.

(c) * * *

(4) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(2)(i), (ii), or

(iii) of this section, the intended recipient must complete the use and nondisclosure agreement at 227.7103-7, or receive the data for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, prior to release or disclosure of the limited rights data.

* * * * *

■ 4. Amend section 227.7103-6 in paragraph (a) by revising the second sentence and adding a new third sentence to read as follows:

227.7103-6 Contract clauses.

(a) * * * Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial products or commercial services developed exclusively at private expense (see 227.7102-4), existing works (see 227.7105), or special works (see 227.7106). When contracting under the Small Business Innovation Research (SBIR) Program or the Small Business Technology Transfer (STTR) Program, see 227.7104-4(a). * * *

* * * * *

■ 5. Amend section 227.7103-7—

■ a. By revising the section heading and paragraph (a);

■ b. In paragraph (b) and paragraph (c) introductory text, by removing “non-disclosure” and adding “nondisclosure” in its place;

■ e. In the agreement “Use and Non-Disclosure Agreement”, by revising the agreement heading, paragraphs (1) and (5) of the agreement, and the parenthetical clause at the end of the agreement.

The revisions read as follows:

227.7103-7 Use and nondisclosure agreement.

(a) Except as provided in paragraph (b) of this section, technical data or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties, unless the intended recipient completes and signs the use and nondisclosure agreement at paragraph (c) of this section prior to release or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data subject to limited rights or SBIR/STTR data rights, or computer software subject to restricted rights or SBIR/STTR data rights must be

stipulated in an attachment to the use and nondisclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph (1)(d) of the use and nondisclosure agreement in paragraph (c) of this section to enter the conditions, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display, or disclosure of the data or software.

* * * * *

Use and Nondisclosure Agreement

* * * * *

(1) The Recipient shall—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with government purpose rights or SBIR/STTR data rights legends (after expiration of the SBIR/STTR data protection period provided in the SBIR/STTR data rights legend) only for government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the “Contractor”), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and nondisclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends or SBIR/STTR data rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights or SBIR/STTR data

rights legends only in performance of Contract Number ____ [*insert contract number(s)*]. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend. The Recipient shall promptly notify the software licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends. [*To be completed by the contracting officer. See 227.7103–7(a)(2). Omit if none of the data requested is marked with special license rights legends.*]

* * * * *

(5) The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys' fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data.

* * * * *

(End of use and nondisclosure agreement)

■ 6. Revise section 227.7103–9 to read as follows:

227.7103–9 Copyright.

(a) *Copyright license.* (1) The clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor to grant or obtain for the Government license rights which permit the Government to reproduce data, distribute copies of the data, publicly perform or display the data or, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies

for each of the standard data rights licenses obtained under the clauses. When non-standard license rights in technical data will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate a copyright license that provides less rights than the standard limited rights license in technical data.

(2) The clauses at 252.227–7013 and 252.227–7018 do not permit a contractor to incorporate a third party's copyrighted data into a deliverable data item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third-party copyrighted data in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third-party material or when the use of the third-party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—acquisition of existing and special works.* See 227.7105 or 227.7106 for copyright considerations when acquiring existing or special works that are not SBIR/STTR data.

■ 7. Amend section 227.7103–10—

■ a. In paragraph (a)(3), by revising the third sentence;

■ b. By revising paragraphs (a)(5) and (b);

■ c. In paragraph (c)(1), by removing “subsection” and adding “section” in its place;

■ d. In paragraph (c)(2) introductory text, by removing “six months” and adding “6 months” in its place; and

■ e. In paragraph (c)(2)(ii), by removing “clause at 252.227–7013” and adding “clauses at 252.227–7013 and 252.227–7018” in its place.

The revisions read as follows:

227.7103–10 Contractor identification and marking of technical data to be furnished with restrictive markings.

(a) * * *

(3) * * * Subsequent to contract award, the clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, permit the contractor to make additional assertions under certain conditions. * * *

* * * * *

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, contracting officers shall not—

(i) Prohibit offerors from offering products for which the offeror is entitled to provide the technical data with restrictions; or

(ii) Require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish rights in technical data except for the standard rights specified in the applicable clauses.

(b) *Contractor marking requirements.* The clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program—

(1) Require a contractor that desires to restrict the Government's rights in technical data to place restrictive markings on the data, provide instructions for the placement of the restrictive markings, and authorize the use of certain restrictive markings; and

(2) Require a contractor to deliver, furnish, or otherwise provide to the Government any technical data in which the Government has previously obtained rights with the Government's preexisting rights in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data with the appropriate restrictive legend for which the data qualified.

* * * * *

■ 8. Amend section 227.7103–11—

■ a. By revising paragraph (a); and
■ b. In paragraph (b), by removing “Technical Data requires” and adding “Technical Data, requires” in its place. The revision reads as follows:

227.7103–11 Contractor procedures and records.

(a) The clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program

and Small Business Technology Transfer Program, require a contractor, and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data.

* * * * *

■ 9. Amend section 227.7103–12 by revising paragraph (a)(1) to read as follows:

227.7103–12 Government right to establish conformity of markings.

(a) * * *

(1) Authorized markings are identified in the clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clauses at 252.227–7013 and 252.227–7018 is also a nonconforming marking.

* * * * *

227.7103–16 [Amended]

■ 10. Amend section 227.7103–16 in paragraph (b) by removing “non-disclosure” and adding “nondisclosure” in its place.

■ 11. Revise section 227.7104 to read as follows:

227.7104 Contracts under the Small Business Innovation Research Program and Small Business Technology Transfer Program.

■ 12. Add sections 227.7104–1, 227.7104–2, 227.7104–3, and 227.7104–4 to read as follows:

* * * * *

Sec.

227.7104–1 Policy.
227.7104–2 Rights in SBIR or STTR data.
227.7104–3 STTR program requirements.
227.7104–4 Solicitation provisions and contract clauses.

* * * * *

227.7104–1 Policy.

(a) Do not require an offeror, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components, or processes developed under a SBIR/STTR contract or any rights in computer

software generated under a SBIR/STTR contract except for the standard rights identified at 227.7104–2.

(b) Do not prohibit contractors and offerors from furnishing or offering to furnish items, components, or processes developed under a SBIR/STTR contract or computer software generated under a SBIR/STTR contract solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose such computer software or technical data pertaining to those items, components, or processes may be restricted.

(c) Consistent with the guidance in this section, 227.7103–10(a)(5), 227.7203–10(a)(5), and other acquisition guidance applicable to SBIR/STTR solicitations, the Government may use information provided by offerors in response to a solicitation in the source selection process to evaluate the impact of proposed restrictions on the Government's ability to use or disclose technical data or computer software.

(d) SBIR/STTR data rights apply to SBIR/STTR data that are delivered, developed, or generated in the performance of a contract or agreement that is covered by SBIR/STTR policies, including contracts and subcontracts that include phase III work. Phase III work refers to work that derives from, extends, or completes an effort made under prior SBIR/STTR contracts or agreements, and is funded by sources other than SBIR/STTR programs (see PGI 227.7104–1).

(e) For SBIR/STTR data that is other than commercial technical data, and other than commercial computer software and computer software documentation, see—

(1) 227.7103–9 and 227.7203–9 for guidance on copyright licenses;

(2) 227.7103–10 and 227.7203–10 for guidance on contractor identification and marking of technical data and computer software to be furnished with restrictive markings;

(3) 227.7103–11 and 227.7203–11 for guidance on maintenance of contractor records; and

(4) 227.7103–12 and 227.7203–12 for guidance on nonconforming and unjustified markings.

227.7104–2 Rights in SBIR or STTR data.

(a) Under the clause at 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, the Government obtains the following standard license rights:

(1) Unlimited rights in the technical data and computer software listed in paragraph (c)(1) of the clause.

(2) SBIR/STTR data rights in all other technical data and computer software developed or generated under the phase I, II, or III SBIR/STTR contract or subcontract and marked with the SBIR/STTR data rights marking. SBIR/STTR data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR/STTR data protection period commencing on the date of contract award and ending 20 years after that date unless, after award, the agency and the contractor negotiate for some other protection period for the SBIR/STTR data. Upon expiration of the SBIR/STTR data protection period, the Government has government purpose rights in the SBIR/STTR data. These government purpose rights do not expire. See 252.227–7018 for the definition of the SBIR/STTR data protection period and PGI 227.7104–2 for additional guidance on the SBIR/STTR data protection period.

(b) During the SBIR/STTR data protection period, the Government may not release or disclose technical data or computer software that is subject to SBIR/STTR data rights to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

(c) The Government and contractor or subcontractor may negotiate special license rights only after contract award. The Government shall not make contract award conditional on the contractor or subcontractor negotiating or consenting to negotiate special license rights. Negotiation of special license rights is authorized only after contract award by mutual agreement of the parties.

(d) The Small Business Administration's SBIR and STTR Program Policy Directive (effective May 3, 2023) provides for special consideration regarding the handling (e.g., disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives and to allow the SBIR/STTR awardee to retain rights in SBIR/STTR data during the SBIR/STTR data protection period.

(e) The clause at 252.227–7018 governs the Government's license rights in SBIR/STTR data. However, the following clauses or guidance governs the Government's license rights in any data that are not SBIR/STTR data:

(1) For technical data pertaining to other than commercial products or commercial services or to any portion of

a commercial product or commercial service that was developed in any part at Government expense, the clause at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, governs such technical data in accordance with 227.7102–4(b).

(2) For technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense, the clause at 252.227–7015, Technical Data—Commercial Products and Commercial Services, governs such technical data, in accordance with 227.7102–4(b).

(3) For other than commercial computer software or computer software documentation, the clause at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, governs such software and computer software documentation, in accordance with 227.7203–6(a)(1).

(4) For commercial computer software and computer software documentation, the license customarily provided to the public governs such software and documentation, in accordance with 227.7202–3.

227.7104–3 STTR program requirements.

(a) Before award of a contract under the STTR program requirements only, the provision at 252.227–7040, Additional Preaward Requirements for Small Business Technology Transfer Program, requires offerors to submit, as part of their proposal, a written agreement between the offeror and a research institution that allocates any rights in intellectual property and the offeror's written representation that the offeror is satisfied with the agreement. The contracting officer shall review the agreement to ensure it does not conflict with the requirements of the solicitation or any right to carry out follow-on research. If such conflicts exist and cannot be resolved, the submitted proposal is not eligible for award.

(b) At contract award for STTR program requirements, in accordance with the clause at 252.227–7041, Additional Postaward Requirements for Small Business Technology Transfer Program, the contracting officer shall attach to the contract the accepted written agreement and representation provided by the contractor pursuant to the provision at 252.227–7040.

(c) After contract award, for any modification to the written agreement between the contractor and research institution, the contracting officer shall review the agreement and representation to ensure the modified

agreement adheres to the requirements of 252.227–7041. If acceptable, the contracting officer shall attach the modified agreement to the contract.

227.7104–4 Solicitation provisions and contract clauses.

(a)(1) Use the clause at 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when SBIR/STTR data are delivered, developed, or generated during contract performance, and when any portion of contract performance is governed by SBIR or STTR policies (e.g., performance of one or more subcontracts qualifies as a phase III SBIR or STTR award). See 227.7104–1(d) for guidance on contracts or subcontracts governed by SBIR or STTR policies.

(2) For the remainder of the technical data or computer software that is delivered, developed, or generated under the contract, use the following clauses as applicable, in accordance with the prescriptions for those clauses:

(i) 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services.

(ii) 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

(iii) 252.227–7015, Technical Data—Commercial Products and Commercial Services.

(b) Use the following provision in solicitations and the following clauses in solicitations and contracts that include the clause at 252.227–7018, in accordance with the prescriptions for the provision and clauses:

(1) 252.227–7016, Rights in Bid or Proposal Information.

(2) 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions.

(3) 252.227–7019, Validation of Asserted Restrictions—Computer Software.

(4) 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government.

(6) 252.227–7030, Technical Data—Withholding of Payment.

(7) 252.227–7037, Validation of Restrictive Markings on Technical Data

(paragraph (e) of the clause contains information that must be included in a challenge).

(c)(1) Use the provision at 252.227–7040, Additional Preaward Requirements for Small Business Technology Transfer Program, in solicitations that contain the clause at 252.227–7041.

(2) Use the clause at 252.227–7041, Additional Postaward Requirements for Small Business Technology Transfer Program, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, for acquisitions under the STTR program.

227.7108 [Amended]

■ 13. Amend section 227.7108 in paragraph (a)(5) by removing “non-disclosure” and adding “nondisclosure” in its place.

■ 14. Amend section 227.7203–5—

■ a. In paragraph (b)(5), by removing “non-disclosure” and adding “nondisclosure” in its place; and

■ b. By revising paragraph (b)(6) to read as follows:

227.7203–5 Government rights.

* * * * *

(b) * * *

(6) Contracting activities shall establish procedures to assure that computer software or computer software documentation marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and nondisclosure restrictions. Public announcements in the System for Award Management or other publications must provide notice of the use and nondisclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights software or documentation. Documents transmitting government purpose rights software or documentation to persons under class agreements shall identify the specific software or documentation subject to government purpose rights and the class agreement under which such software or documentation are provided.

* * * * *

■ 15. Amend section 227.7203–6 by revising the section heading to read as follows:

227.7203–6 Solicitation provisions and contract clauses.

* * * * *

■ 16. Amend section 227.7203–9—

■ a. In paragraph (a)(1), by revising the first sentence; and

■ b. By revising paragraphs (a)(2) and (b).

The revisions read as follows:

227.7203–9 Copyright.

(a) * * *

(1) The clauses at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor to grant, or obtain for the Government license rights which permit the Government to reproduce the software or documentation, distribute copies, perform or display the software or documentation and, through the right to modify data, prepare derivative works. * * *

(2) The clauses at 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, do not permit a contractor to incorporate a third party’s copyrighted software into a deliverable software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government’s behalf, or has obtained the contracting officer’s written approval to do so. Grant approval to use third-party copyrighted software in which the Government will not receive a copyright license only when the Government’s requirements cannot be satisfied without the third-party material or when the use of the third-party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—special works.* See 227.7205 for copyright considerations when acquiring special works that are not SBIR/STTR data.

■ 17. Amend section 227.7203–10—

■ a. In paragraph (a)(3), by revising the third sentence;

■ b. By revising paragraphs (a)(5) and (b);

■ c. In paragraph (c)(1), by removing “subsection” and adding “section” in its place;

■ d. In paragraph (c)(2) introductory text, by removing “six months” and adding “6 months” in its place; and

■ e. In paragraph (c)(2)(ii), by removing “clause at 252.227–7014” and adding “clauses at 252.227–7014 and 252.227–7018” in its place.

The revisions read as follows:

227.7203–10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

(a) * * *

(3) * * * Subsequent to contract award, the clauses at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, permit a contractor to make additional assertions under certain conditions. * * *

* * * * *

(5) Information provided by offerors in response to the solicitation provision at 252.227–7017 may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government’s ability to use or disclose computer software or computer software documentation. However, contracting officers shall not—

(i) Prohibit offerors from offering products for which the offeror is entitled to provide the computer software with restrictions; or

(ii) Require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish rights in computer software except for the standard rights specified in the applicable clauses.

(b) *Contractor marking requirements.* The clauses at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program—

(1) Require a contractor who desires to restrict the Government’s rights in computer software or computer software documentation to place restrictive markings on the software or documentation, provide instructions for the placement of the restrictive markings, and authorize the use of certain restrictive markings. When it is

anticipated that the software will or may be used in combat or situations which simulate combat conditions, do not permit contractors to insert instructions into computer programs that interfere with or delay operation of the software to display a restrictive rights legend or other license notice; and

(2) Require a contractor to deliver, furnish, or otherwise provide to the Government any computer software or computer software documentation in which the Government has previously obtained rights with the Government's preexisting rights in that software or documentation unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, produce, release, or disclose the software or documentation have expired. When restrictions are still applicable, the contractor is permitted to mark the software or documentation with the appropriate restrictive legend.

* * * * *

■ 18. Amend section 227.7203–11 by revising paragraph (a) to read as follows:

227.7203–11 Contractor procedures and records.

(a) The clauses at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of restrictive markings.

* * * * *

■ 19. Amend section 227.7203–12 by revising paragraph (a)(1) to read as follows:

227.7203–12 Government right to establish conformity of markings.

(a) * * *

(1) Authorized markings are identified in the clauses at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.

All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clauses at 252.227–7014 and 252.227–7018 is also a nonconforming marking.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 20. Amend section 252.227–7013—

■ a. By revising the introductory text and clause date;

■ b. By revising paragraph (a);

■ c. By redesignating paragraphs (b) through (k) as paragraphs (c) through (l), respectively;

■ d. By adding a new paragraph (b);

■ e. By revising newly redesignated paragraphs (c) introductory text, (c)(2), (c)(3)(i) and (iv), and (c)(4) through (c)(6);

■ f. In newly redesignated paragraph (e), by removing “paragraph (b)” and adding “paragraph (c)” in its place;

■ g. In newly redesignated paragraph (f)(2), by removing “(e)(3)” and adding “(f)(3)” in its place;

■ h. In newly redesignated paragraph (f)(3)—

■ i. By removing “Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data.”;

■ ii. By adding a heading to the table; and

■ iii. In note 3, by removing “SBIR” and adding “SBIR/STTR” in its place;

■ j. In newly redesignated paragraph (f)(4), by removing “of the Validation of Restrictive Markings on Technical Data” and adding “in the DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data,” in its place;

■ k. By revising newly redesignated paragraph (g);

■ l. In newly redesignated paragraph (i)(1), by removing “Validation of Restrictive Markings on Technical Data” and adding “DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data,” in its place;

■ m. By revising newly redesignated paragraph (i)(2);

■ n. In newly redesignated paragraph (k)(2), by removing “(j)(1)” and adding “(k)(1)” in its place;

■ o. By revising newly redesignated paragraph (l);

■ p. In alternate I—

■ i. By revising the clause date and the introductory text;

■ ii. By redesignating paragraph (l) as paragraph (m);

■ iii. In newly redesignated paragraph (m)(2), by removing “paragraph (l)” and “twenty-four (24)” and adding

“paragraph (m)” and “24” in their places, respectively;

■ q. In alternate II by—

■ i. Revising the clause date and the introductory text; and

■ ii. Redesignating paragraphs (a)(17) and (b)(7) as paragraphs (a) and (c)(7), respectively.

The revisions and additions read as follows:

252.227–7013 Rights in Technical Data—Other Than Commercial Products and Commercial Services.

As prescribed in 227.7102–4(b) and 227.7103–6(a), use the following clause:

Rights in Technical Data—Other Than Commercial Products or Commercial Services (JAN 2025)

(a) *Definitions.* As used in this clause—

Computer data base means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204–7014) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort, rather than to directly furnish an end item or service to accomplish a program or effort, provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the

type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

Developed exclusively with Government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Generated means, with regard to technical data or computer software, first created in the performance of this contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and

(2) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contract for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

Unlimited rights means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Applicability.* (1) Except as provided in paragraph (b)(2) of this clause—

(i) This clause governs all technical data pertaining to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense; and

(ii) The clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227–7015, Technical Data—Commercial Products and Commercial Services, governs the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense.

(2) The clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, governs technical data that are SBIR/STTR data.

* * * * *

(c) *Rights in technical data.* The Contractor grants or shall obtain for the Government the following royalty free,

worldwide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see the DFARS 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause of this contract for rights in computer software documentation):

* * * * *

(2) *Government purpose rights.* (i) The Government shall have government purpose rights for a 5-year period, or such other period as may be negotiated, in technical data—

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in paragraphs (c)(1)(ii) and (c)(1)(iv) through (c)(1)(ix) of this clause; or

(B) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The 5-year period, or such other period as may have been negotiated, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in paragraph (c)(2)(i)(B) of this clause. Upon expiration of the 5-year or other negotiated period, the Government shall have unlimited rights in the technical data.

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at DFARS 227.7103-7; or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (g)(3) of this clause.

* * * * *

(3) * * *

(i) Except as provided in paragraphs (c)(1)(ii) and (c)(1)(iv) through (c)(1)(ix) of this clause, the Government shall have limited rights in technical data—

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (g) of this clause; or

(B) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

* * * * *

(iv) The Contractor acknowledges that—

(A) Limited rights data are authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions as identified in the limited rights legend) may require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a nondisclosure agreement; and

(D) Any such nondisclosure agreement shall address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(4) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (c)(1) through (c)(3) of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in the definition of "limited rights" of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Technical data that will be delivered, furnished, or otherwise provided to the Government

under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the preexisting rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data made in accordance with the definition of "limited rights" or paragraph (c)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (c)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

* * * * *

(f) * * *
(3) * * *

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data

* * * * *

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (g)(6) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; the special license rights legend at paragraph (g)(5) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted

restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Omitted markings.* (i) Technical data delivered or otherwise provided under this contract without restrictive markings will be presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (g)(2)(ii) of this clause) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the technical data pending evaluation of the request.

(ii) The Contractor may request permission to have conforming and justified restrictive markings placed on unmarked technical data at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of such technical data, or any extension of that time approved by the Contracting Officer. The Contractor shall—

(A) Identify the technical data that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data contained in this clause; and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data made prior to the addition of the marking or resulting from the omission of the marking.

(3) *Government purpose rights markings.* Data delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

Government Purpose Rights

Contract Number _____
Contractor Name _____
Contractor Address _____
Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (c)(2) of the DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services, clause contained in the above identified contract. No restrictions apply after the expiration date shown

above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Data delivered or otherwise furnished to the Government with limited rights shall be marked as follows:

Limited Rights

Contract Number _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (c)(3) of the DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services, clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(5) *Special license rights markings.* (i) Data in which the Government's rights stem from a specifically negotiated license shall be marked as follows:

Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract Number [Insert contract number], License Number [Insert license identifier]. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(5) of this clause).

(6) *Preexisting data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this contract, and those restrictions are still applicable, the Contractor may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license. The Contractor shall

follow the marking procedures in paragraph (g)(1) of this clause.

* * * * *

(i) * * *
(2) *Nonconforming technical data markings.* A nonconforming marking is a marking placed on technical data delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data, clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking within 60 days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

* * * * *

(l) *Subcontractors or suppliers.* (1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 3771–3775, 10 U.S.C. 3781–3786, 15 U.S.C. 638(j)(1)(B)(iii) and (v), and the identification, assertion, and delivery processes of paragraph (f) of this clause are recognized and protected.

(2) Whenever any technical data for other than commercial products or commercial services, or for commercial products or commercial services developed in any part at Government expense, are to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use the following clauses in the subcontract or other contractual instrument, including subcontracts or other contractual instruments for commercial products or commercial services, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties;

(i)(A) Except as provided in paragraph (l)(2)(ii) of this clause, use this clause to govern the technical data pertaining to other than commercial products and commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense.

(B) Use the clause at DFARS 252.227–7015, Technical Data—Commercial Products and Commercial Services, to govern the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense.

(ii) Use the clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation

Research Program and Small Business Technology Transfer Program, to govern technical data that are SBIR/STTR data.

(3) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

(4) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(5) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.

(6) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligations to the Government.

* * * * *

Alternate I (JAN 2025). As prescribed in 227.7103–6(b)(1), add the following paragraph (m) to the basic clause:

* * * * *

Alternate II (JAN 2025). As prescribed in 227.7103–6(b)(2), add the following definition of “Vessel design” in alphabetical order to paragraph (a) and add paragraph (c)(7) to the basic clause:

* * * * *

■ 21. Amend section 252.227–7014—

- a. By revising the clause date and paragraph (a);
- b. By redesignating paragraphs (b) through (k) as paragraphs (c) through (l), respectively;
- c. By adding a new paragraph (b);
- d. By revising newly redesignated paragraphs (c)(2), (c)(3), (c)(4)(i), (c)(5) introductory text, and (c)(6);
- e. In newly redesignated paragraph (e) introductory text, by removing “paragraph (b)” and adding “paragraph (c)” in its place;
- f. In newly redesignated paragraph (f)(2), by removing “paragraph (e)(3)” and adding “paragraph (f)(3)” in its place;
- g. In newly redesignated paragraph (f)(3)—
- i. By removing “Identification and Assertion of Restrictions on the

Government's Use, Release, or Disclosure of Technical Data.”;

- ii. By revising newly redesignated paragraph (f)(3) table;
- h. In newly redesignated paragraph (f)(4), by removing “of the Validation of Asserted Restrictions—Computer Software” and adding “in the DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software,” in its place;
- i. By revising newly redesignated paragraph (g);
- j. By revising newly redesignated paragraph (i);
- k. In newly redesignated paragraph (k)(2), by removing “(j)(1)” and adding “(k)(1)” in its place;
- l. By revising newly redesignated paragraph (l);
- m. In alternate I—
- i. By revising the clause date and the introductory text;
- ii. By redesignating paragraph (l) as paragraph (m); and
- iii. In newly redesignated paragraph (m)(2), by removing “paragraph (l)” and “twenty-four (24)” and adding “paragraph (m)” and “24” in their places, respectively.

The revisions and additions read as follows:

252.227–7014 Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

* * * * *

Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation (JAN 2025)

(a) *Definitions.* As used in this clause—

Commercial computer software means software developed or regularly used for nongovernmental purposes which—

- (1) Has been sold, leased, or licensed to the public;
- (2) Has been offered for sale, lease, or license to the public;
- (3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or
- (4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines, recorded

in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204–7014) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Developed means that—

(1) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(2) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(3) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

Developed exclusively with government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Generated means, with regard to technical data or computer software, first created in the performance of this contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the Government without restriction; and

(2) Release or disclose computer software or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type

customarily provided in the commercial marketplace.

Other than commercial computer software means software that does not qualify as commercial computer software under the definition of “commercial computer software” of this clause.

Restricted rights apply only to other than commercial computer software and mean the Government’s rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(2) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(3) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (1), (2), and (4) through (7) of this definition;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (1) and (3) of this definition; and

(ii) Not release or disclose the modified software except as provided in paragraphs (2), (5), (6), and (7) of this clause;

(5) Use, and permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use, computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(i) The Government notifies the party which has granted restricted rights that any such release or disclosure to particular contractors or subcontractors was made;

(ii) Such contractors or subcontractors are subject to the use and nondisclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS) or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of

Government-Furnished Information Marked with Restrictive Legends;

(iii) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(iv) Such use is subject to the limitations in paragraphs (1) through (3) of this definition;

(6) Use, and permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use, the computer software when necessary to perform or overhaul, or to modify the computer software to reflect the emergency repairs or overhaul made, provided that—

(i) The intended recipient is subject to the use and nondisclosure agreement at DFARS 227.7103–7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(ii) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(iii) Such use is subject to the limitations in paragraphs (1) through (3) of this definition; and

(7) Use, modify, reproduce, perform, display, or release or disclose computer software to a person authorized to receive restricted rights computer software for management and oversight of a program or effort, and permit covered Government support contractors in the performance of covered Government support contracts that contain the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(i) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(ii) Such use is subject to the limitations in paragraphs (1) through (4) of this definition.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

Unlimited rights means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Applicability.* This clause governs all other than commercial computer software or other than commercial computer software documentation, except that the clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, governs any computer software or computer software documentation that is SBIR/STTR data.

(c) * * *

(2) *Government purpose rights.*

(i) Except as provided in paragraph (c)(1) of this clause, the Government shall have government purpose rights in computer software development with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of 5 years unless a different period has been negotiated. Upon expiration of the 5-year or other negotiated period, the Government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The Government shall not release or disclose computer software in which it has government purpose rights to any other person unless—

(A) Prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at DFARS 227.7103–7; or

(B) The recipient is a Government contractor receiving access to the software or documentation for performance of a Government contract that contains the clause at DFARS

252.227–7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(3) *Restricted rights.* (i) The Government shall have restricted rights in other than commercial computer software required to be delivered or otherwise provided to the Government under this contract that were developed exclusively at private expense.

(ii) The Contractor, its subcontractors, or suppliers are not required to provide the Government additional rights in other than commercial computer software delivered or otherwise provided to the Government with restricted rights. However, if the Government desires to obtain additional rights in such software, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All other than commercial computer software in which the Contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (c)(4) of this clause). The license shall enumerate the additional rights granted the Government.

(iii) The Contractor acknowledges that—

(A) Restricted rights computer software is authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions, as identified in the restricted rights legend) may require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such software, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a nondisclosure agreement; and

(D) Any such nondisclosure agreement shall address the restrictions on the covered Government support contractor's use of the restricted rights software as set forth in the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement shall not include any

additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

(4) * * *

(i) The standard license rights granted to the Government under paragraphs (c)(1) through (3) of this clause, including the period during which the Government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated in the definition of “restricted rights” of this clause, or lesser rights in computer software documentation than are enumerated in the definition of “limited rights” of the DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, clause of this contract.

* * * * *

(5) *Prior government rights.* Computer software or computer software documentation that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the preexisting rights, unless—

* * * * *

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of computer software made in accordance with the definition of “restricted rights” or paragraph (c)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (c)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor software marked with restrictive legends.

* * * * *

(f) * * *

(3) * * *

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted:

Computer software to be furnished with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST)	(LIST)	(LIST)	(LIST)

¹ Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

² Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

³ Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR/STTR data generated under another contract, or specifically negotiated licenses).

⁴ Corporation, individual, or other person, as appropriate.

Date _____
Printed Name and Title _____
Signature _____

(End of identification and assertion)
* * * * *

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (g)(6) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (g)(3) of this clause; the restricted rights legend at paragraph (g)(4) of this clause; the special license rights legend at paragraph (g)(5) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the transmitted document or software storage container and each page, or portions thereof, of printed material containing computer software for which restrictions are asserted. Computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software, or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

(2) *Omitted markings.* (i) Computer software or computer software documentation delivered or otherwise provided under this contract without restrictive markings will be presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (g)(2)(ii) of this clause) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the software or documentation pending evaluation of the request.

(ii) The Contractor may request permission to have conforming and justified restrictive markings placed on unmarked computer software or computer software documentation at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of such software or documentation, or any extension of that time approved by the Contracting Officer. The Contractor shall—

(A) Identify the software or documentation that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of computer software or computer software documentation contained in this clause; and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the software or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(3) *Government purpose rights markings.* Computer software delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

Government Purpose Rights

Contract Number _____
Contractor Name _____
Contractor Address _____
Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are

restricted by paragraph (c)(2) of the DFARS 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4) *Restricted rights markings.* Software delivered or otherwise furnished to the Government with restricted rights shall be marked as follows:

Restricted Rights

Contract Number _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (c)(3) of the DFARS 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(5) *Special license rights markings.* (i) Computer software or computer documentation in which the Government's rights stem from a specifically negotiated license shall be marked as follows:

Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by Contract Number [Insert contract number], License Number [Insert license identifier]. Any reproduction of computer software, computer software documentation, or portions thereof marked with this

marking must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(5) of this clause).

(6) *Preexisting markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, the Contractor may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The Contractor shall follow the marking procedures in paragraph (g)(1) of this clause.

* * * * *

(i) *Removal of unjustified and nonconforming markings.* (1) *Unjustified computer software or computer software documentation markings.* The rights and obligations of the parties regarding the validation of restrictive markings on computer software or computer software documentation furnished or to be furnished under this contract are contained in the DFARS 252.227-7019, Validation of Asserted Restrictions—Computer Software, and the DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming computer software or computer software documentation markings.* A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the DFARS 252.227-7019, Validation of Asserted Restrictions—Computer Software, or the DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within 60 days, the Government may ignore or, at the

Contractor's expense, remove or correct any nonconforming markings.

* * * * *

(l) *Subcontractors or suppliers.* (1)(i) Except as provided in paragraph (l)(1)(ii) of this clause, whenever any other than commercial computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties.

(ii) The Contractor shall use the clause at DFARS 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, to govern computer software or computer software documentation that is SBIR/STTR data.

(iii) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The Contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (f) of this clause.

(4) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the Government.

* * * * *

Alternate I (JAN 2025). As prescribed in 227.7203-6(a)(2), add the following paragraph (m) to the basic clause:

* * * * *

■ 22. Amend section 252.227-7015—

- a. By revising the clause date and paragraph (a);
- b. By redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively;
- c. By adding a new paragraph (b);
- d. In newly redesignated paragraph (c)(2) introductory text, by removing

“paragraph (b)(1)” and adding “paragraph (c)(1)” in its place;

■ e. By revising newly redesignated paragraph (c)(3);

■ f. By revising newly redesignated paragraph (f);

■ g. In alternate I by—

■ i. Revising the clause date and the introductory text; and

■ ii. Redesignating paragraphs (a)(6) and (b)(4) as paragraphs (a) and (c)(4), respectively.

The revisions and addition read as follows:

252.227-7015 Technical Data—Commercial Products and Commercial Services.

* * * * *

Technical Data—Commercial Products and Commercial Services (JAN 2025)

(a) *Definitions.* As used in this clause—

Commercial product and commercial service includes commercial components and commercial processes but does not include commercial computer software.

Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204-7014) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Technical data means recorded information, regardless of the form or method of recording, of a scientific or

technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

(b) *Applicability.* This clause governs the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense. If the commercial product or commercial service was developed in any part at Government expense—

(1) The clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, governs technical data that are generated during any portion of performance that is covered under the Small Business Innovation Research (SBIR) Program or Small Business Technology Transfer (STTR) Program; and

(2) The clause at DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, governs the technical data pertaining to any portion of a commercial product or commercial service that was developed in any part at Government expense and is not covered under the SBIR or STTR program.

(c) * * *

(3) The Contractor acknowledges that—

(i) Technical data covered by paragraph (c)(2) of this clause are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor (or the party asserting restrictions as identified in a restrictive legend) may require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a nondisclosure agreement; and

(iv) Any such nondisclosure agreement shall address the restrictions on the covered Government support contractor's use of the data as set forth in the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information

Marked with Restrictive Legends. The nondisclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

* * * * *

(f) *Subcontractors or suppliers.* (1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 3771–3775, 10 U.S.C. 3781–3786, and 15 U.S.C. 638(j)(1)(B)(iii) and (v).

(2) Whenever any technical data related to commercial products or commercial services developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this clause in the subcontract or other contractual instrument, including subcontracts and other contractual instruments for commercial products or commercial services, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense, and the Contractor shall use the following clauses to govern the technical data pertaining to any portion of a commercial product or commercial service that was developed in any part at Government expense:

(i) Use the clause at DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, to govern any technical data that are not generated during any portion of performance that is covered under the SBIR or STTR program.

(ii) Use the clause at 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, to govern technical data that are generated during any portion of performance that is covered under the SBIR or STTR program.

* * * * *

Alternate I (JAN 2025). As prescribed in 227.7102–4(a)(2), add the following definition of “Vessel design” in alphabetical order to paragraph (a) and add (c)(4) to the basic clause:

* * * * *

■ 23. Amend section 252.227–7016 by revising the introductory text and clause date and paragraphs (a) and (c)(2) to read as follows:

252.227–7016 Rights in Bid or Proposal Information.

As prescribed in 227.7103–6(e)(1), 227.7104–4(b)(1), or 227.7203–6(b), use the following clause:

Rights in Bid or Proposal Information (JAN 2025)

(a) *Definitions.* As used in this clause—

Computer software is defined in—

(1) The 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause of this contract; or

(2) If this is a contract awarded under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

Technical data is defined in—

(1) The 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, clause of this contract; or

(2) If this is a contract awarded under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

* * * * *

(c) * * *

(2) The Government's right to use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Defense Federal Acquisition Regulation Supplement (DFARS) 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services; DFARS 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; or DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this contract.

* * * * *

■ 24. Amend section 252.227–7017 by—
 ■ a. Revising the introductory text and the provision date;
 ■ b. Revising paragraphs (a) and (b);

■ c. Removing from paragraph (d) introductory text “suppliers shall” and adding “suppliers, shall” in its place; and

■ d. Revising the paragraph (d) table.

The revisions read as follows:

252.227–7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

As prescribed in 227.7103–3(b), 227.7104–4(b)(2), or 227.7203–3(a), use the following provision:

Identification and Assertion of Use, Release, or Disclosure Restrictions (JAN 2025)

(a) *Definitions.* As used in this provision—

Computer software is defined in—

(1) The 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause of this solicitation; or

(2) If this solicitation contemplates a contract under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 252.227–7018, Rights in Other Than

Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

SBIR/STTR data is defined in the 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

Technical data is defined in—

(1) The 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, clause of this solicitation; or

(2) If this solicitation contemplates a contract under the Small Business Innovation Research Program or Small Business Technology Transfer Program, the 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause of this solicitation.

(b) The identification and assertion requirements in this provision apply

only to technical data, including computer software documentation, or computer software to be delivered with other than unlimited rights. For contracts to be awarded under the Small Business Innovation Research (SBIR) Program or Small Business Technology Transfer Program (STTR) Program, these requirements apply to SBIR/STTR data that will be generated under the resulting contract and will be delivered with SBIR/STTR data rights and to any other data that will be delivered with other than unlimited rights. Notification and identification are not required for restrictions based solely on copyright.

* * * * *

(d) * * *

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical data or computer software to be furnished with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST) ⁵	(LIST)	(LIST)	(LIST)

¹For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software documentation identify the software or documentation.

²Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

³Enter asserted rights category (*e.g.*, government purpose license rights from a prior contract, rights in SBIR/STTR data generated under a contract resulting from this solicitation or under another contract, limited, restricted, or government purpose rights under a contract resulting from this solicitation or under a prior contract, or specially negotiated licenses).

⁴Corporation, individual, or other person, as appropriate.

⁵Enter “none” when all data or software will be submitted without restrictions.

Date _____
Printed Name and Title _____
Signature _____

(End of identification and assertion)

* * * * *

■ 25. Amend section 252.227–7018—

■ a. By revising the section heading, introductory text, clause title, and clause date;

■ b. By revising paragraph (a);

■ c. By redesignating paragraphs (b) through (k) as paragraphs (c) through (l), respectively;

■ d. By adding a new paragraph (b);

■ e. By revising newly redesignated paragraph (c);

■ f. In newly redesignated paragraph (e) introductory text, by removing “paragraph (b)” and adding “paragraph (c)” in its place;

■ g. In newly redesignated paragraph (f)(2), by removing “paragraph (e)(3)” and adding “paragraph (f)(3)” in its place;

■ h. By revising the newly redesignated paragraph (f)(3) table;

■ i. In newly redesignated paragraph (f)(4), by removing “of the Validation of Asserted Restrictions—Computer Software and/or Validation of Restrictive Markings on Technical Data” and adding “in the DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, and/or DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data,” in its place;

■ j. By revising newly redesignated paragraphs (g) and (i);

■ k. In newly redesignated paragraph (k)(2) introductory text, by removing “(j)(1)” and adding “(k)(1)” in its place;

■ l. By revising newly redesignated paragraph (l); and

■ m. By removing Alternate I.

The revisions and addition read as follows:

252.227–7018 Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.

As prescribed in 227.7104–4(a)(1), use the following clause:

Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program (JAN 2025)

(a) *Definitions.* As used in this clause—

Commercial computer software means software developed or regularly used for nongovernmental purposes which—

(1) Has been sold, leased, or licensed to the public;

(2) Has been offered for sale, lease, or license to the public;

(3) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(4) Satisfies a criterion expressed in paragraph (1), (2), or (3) of this definition and would require only minor modification to meet the requirements of this contract.

Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, re-created, or recompiled. Computer software does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Covered Government support contractor means a contractor (other than a litigation support contractor covered by 252.204–7014) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on

the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to the technical data or computer software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means—

(1) (Applicable to technical data other than computer software documentation.) An item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(2) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(3) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(4) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Developed exclusively at private expense means development was accomplished entirely with costs

charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

Developed exclusively with government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

Form, fit, and function data means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

Generated means, with respect to technical data or computer software, first created in the performance of this contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(2) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform,

display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contracts for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

Other than commercial computer software means software that does not qualify as commercial computer software under the definition of “commercial computer software” of this clause.

Restricted rights apply only to other than commercial computer software and mean the Government’s rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(2) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer.

Transferred programs remain subject to the provisions of this clause;

(3) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (1), (2), and (4) through (7) of this definition;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (1) and (3) of this definition; and

(ii) Not release or disclose the modified software except as provided in paragraphs (2), (5), (6), and (7) of this definition;

(5) Use, and permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use, computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(i) The Government notifies the party which has granted restricted rights that any such release or disclosure to particular contractors or subcontractors was made;

(ii) Such contractors or subcontractors are subject to the nondisclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(iii) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(iv) Such use is subject to the limitations in paragraphs (1) through (3) of this definition;

(6) Use, and permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use, the computer software when necessary to perform the emergency repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(i) The intended recipient is subject to the nondisclosure agreement at

227.7103–7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(ii) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(iii) Such use is subject to the limitations in paragraphs (1) through (3) of this definition; and

(7) Use, modify, reproduce, perform, display, or release or disclose computer software to a person authorized to receive restricted rights computer software for management and oversight of a program or effort, and permit covered Government support contractors in the performance of covered Government support contracts that contain the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(i) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (4) of this definition, for any other purpose; and

(ii) Such use is subject to the limitations in paragraphs (1) through (4) of this definition.

Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) data means all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract.

SBIR/STTR data protection period means the time period during which the Government is obligated to protect SBIR/STTR data against unauthorized use and disclosure in accordance with SBIR/STTR data rights. The SBIR/STTR data protection period begins on the date of award of the contract under which the SBIR/STTR data are developed or generated and ends 20 years after that date unless, after the award, the agency and the Contractor negotiate for some other protection period for the SBIR/STTR data

developed or generated under that contract.

SBIR/STTR data rights means the Government's rights, during the SBIR/STTR data protection period, in SBIR/STTR data covered by paragraph (c)(5) of this clause, as follows:

(1) Limited rights in such SBIR/STTR technical data; and

(2) Restricted rights in such SBIR/STTR computer software.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

Unlimited rights means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Applicability*. This clause governs all SBIR/STTR data. For any data that are not SBIR/STTR data—

(1) The clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, governs the technical data pertaining to other than commercial products and commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at DFARS 252.227–7015, Technical Data—Commercial Products and Commercial Services, governs the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense;

(2) The clause at DFARS 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, governs other than commercial computer software and other than commercial computer software documentation; and

(3) A license consistent with DFARS 227.7202 governs commercial computer software and commercial computer software documentation.

(c) *Rights in technical data and computer software*. The Contractor grants or shall obtain for the Government the following royalty-free, worldwide, nonexclusive, irrevocable license rights in technical data or other than commercial computer software. All

rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights*. The Government shall have unlimited rights in technical data or computer software, including such data generated under this contract, that are—

(i) Form, fit, and function data;

(ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to Government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions on further use, release, or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Technical data or computer software in which the Government has acquired previously unlimited rights under another Government contract or as a result of negotiations

(vi) Technical data or computer software furnished to the Government, under this or any other Government contract or subcontract thereunder, with license rights for which all restrictive conditions on the Government have expired; and

(vii) Computer software documentation generated or required to be delivered under this contract.

(2) Government purpose rights.

(i) The Government shall have government purpose rights for the period specified in paragraph (c)(2)(ii) of this clause in data that are—

(A) Not SBIR/STTR data, and are—

(1) Technical data pertaining to items, components, or processes developed with mixed funding, or are computer software developed with mixed funding, except when the Government is entitled to unlimited rights in such data as provided in paragraph (c)(1) of this clause;

(2) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes; or

(B) SBIR/STTR data, upon expiration of the SBIR/STTR data protection period.

(ii)(A) For the non-SBIR/STTR data described in paragraph (c)(2)(i)(A) of this clause, the Government shall have government purpose rights for a period of 5 years, or such other period as may be negotiated. This period shall

commence upon award of the contract, subcontract, letter contract (or similar contractual instrument), or contract modification (including a modification to exercise an option) that required development of the items, components, or processes, or creation of the data described in paragraph (c)(2)(i)(A)(2) of this clause. Upon expiration of the 5-year or other negotiated period, the Government shall have unlimited rights in the data.

(B) For the SBIR/STTR data described in paragraph (c)(2)(i)(B) of this clause, the Government shall have government purpose rights perpetually. This Government purpose rights period commences upon the expiration of the SBIR/STTR data protection period.

(iii) The Government shall not release or disclose data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at DFARS 227.7103–7; or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights marking prescribed in paragraph (g)(3) of this clause.

(3) *Limited rights*. The Government shall have limited rights in technical data that were not generated under this contract, pertain to items, components, or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (g)(1) of this clause, with the legend prescribed in paragraph (g)(4) of this clause.

(4) *Restricted rights in computer software*. The Government shall have restricted rights in other than commercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated under this contract.

(5) *SBIR/STTR data rights*. Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (c)(1) of this clause, the Government shall

have SBIR/STTR data rights, during the SBIR/STTR data protection period of this contract, in all SBIR/STTR data developed or generated under this contract. This protection period is not extended by any subsequent SBIR/STTR contracts under which any portion of that SBIR/STTR data is used or delivered. The SBIR/STTR data protection period of any such subsequent SBIR/STTR contract applies only to the SBIR/STTR data that are developed or generated under that subsequent contract. The SBIR/STTR data protection period is governed by the version of this clause that is incorporated in the contract under which the SBIR/STTR data are developed or generated. If the SBIR/STTR data were developed or generated under a contract that included a previous version of this clause, then the SBIR/STTR data protection period is governed by that previous version of this clause.

(6) *Specifically negotiated license rights.* After contract award, the standard license rights granted to the Government under paragraphs (c)(1) through (5) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in the definition of “limited rights” of this clause or lesser rights in computer software than are enumerated in the definition of “restricted rights” of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(7) *Prior government rights.* Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the preexisting rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government’s rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(8) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with the definitions of “Government purpose,” “other than commercial computer software,” or paragraph (c)(5) of this clause, or in accordance with the terms of a license negotiated under paragraph (c)(6) of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data or software marked with restrictive legends.

(9) *Covered Government support contractors.* The Contractor acknowledges that—

(i) Limited rights technical data and restricted rights computer software are authorized to be released or disclosed to

covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor may require each such covered Government support contractor to enter into a nondisclosure agreement directly with the Contractor (or the party asserting restrictions as identified in a restrictive legend) regarding the covered Government support contractor’s use of such data or software, or alternatively that the Contractor (or party asserting restrictions) may waive in writing the requirement for a nondisclosure agreement; and

(iv) Any such nondisclosure agreement shall address the restrictions on the covered Government support contractor’s use of the data or software as set forth in the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The nondisclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement.

* * * * *

(f) * * *

(3) * * *

Identification and Assertion of Restrictions on the Government’s Use, Release, or Disclosure of Technical Data or Computer Software

The Contractor asserts for itself, or the persons identified below, that the Government’s rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical data or computer software to be furnished with restrictions ¹	Basis for assertion ²	Asserted rights category ³	Name of person asserting restrictions ⁴
(LIST)	(LIST)	(LIST)	(LIST)

¹ If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

² Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government’s rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government’s rights should be restricted.

³ Enter asserted rights category (e.g., limited rights, restricted rights, or government purpose rights from a prior contract, SBIR/STTR data rights under this or another contract, or specifically negotiated licenses).

⁴ Corporation, individual, or other person, as appropriate.

Date _____
Printed Name and Title _____
Signature _____

(End of identification and assertion)

* * * * *

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government’s rights to use, modify, reproduce, release, perform, display, or disclose technical data or

computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (g)(8) of this clause, only the following markings are authorized under this contract: the government purpose rights marking at paragraph (g)(3) of this clause; the limited rights legend at paragraph (g)(4) of this clause; the restricted rights legend at paragraph

(g)(5) of this clause; the SBIR/STTR data rights legend at paragraph (g)(6) of this clause; or the special license rights legend at paragraph (g)(7) of this clause; and a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical data and computer

software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Omitted markings.* (i) Technical data, computer software, or computer software documentation delivered or otherwise provided under this contract without restrictive markings shall be presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (g)(2)(ii) of this clause) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the technical data, software, or documentation pending evaluation of the request.

(ii) The Contractor may request permission to have conforming and justified restrictive markings placed on unmarked technical data, computer software, or computer software documentation at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of such technical data, software, or documentation, or any extension of that time approved by the Contracting Officer. The Contractor shall—

(A) Identify the technical data, software, or documentation that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and

conforms with the requirements for the marking of technical data, computer software, or computer software documentation contained in this clause; and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data, software, or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(3) *Government purpose rights markings.* Technical data or computer software delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

Government Purpose Rights

Contract Number _____
Contractor Name _____
Contractor Address _____
Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by paragraph (c)(2) of the DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or computer software or portions thereof marked with this restrictive marking must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked as follows:

Limited Rights

Contract Number _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (c)(3) of the DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the

Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked as follows:

Restricted Rights

Contract Number _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (c)(4) of the DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(6) *SBIR/STTR data rights markings.* Except for technical data or computer software in which the Government has acquired unlimited rights under paragraph (c)(1) of this clause or negotiated special license rights as provided in paragraph (c)(6) of this clause, technical data or computer software generated under this contract shall be marked as follows. The Contractor shall enter the expiration date for the SBIR/STTR data protection period on the legend:

SBIR/STTR Data Rights

Contract Number _____
Contractor Name _____
Contractor Address _____
Expiration of SBIR/STTR Data Protection Period _____
Expiration of the Government Purpose Rights Period _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (c)(5) of the DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, clause contained in the above identified contract. After the

SBIR/STTR data protection period expiration date shown above, the Government has perpetual government purpose rights as provided in paragraph (c)(4) of that clause, unless otherwise indicated by the government purpose rights expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(7) *Special license rights markings.* (i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license shall be marked as follows:

Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract Number *[Insert contract number]*, License Number *[Insert license identifier]*. Any reproduction of technical data, computer software, or portions thereof marked with this marking must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(7) of this clause).

(8) *Preexisting data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The Contractor shall follow the marking procedures in paragraph (g)(1) of this clause.

* * * * *

(i) *Removal of unjustified and nonconforming markings.* (1)

Unjustified markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data, and the DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the

Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data, or the DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within 60 days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

* * * * *

(l) *Subcontractors or suppliers.* (1) The Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 3771–3775, 10 U.S.C. 3781–3786, 15 U.S.C. 638(j)(1)(B)(iii) and (v), and the identification, assertion, and delivery processes required by paragraph (f) of this clause are recognized and protected.

(2) Whenever any other than commercial technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use the following clause(s) in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties:

(i) Except as provided in paragraph (l)(2)(ii) of this clause, use this clause to govern SBIR/STTR data.

(ii) For data that are not SBIR/STTR data—

(A) Use the clause at DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, to govern the technical data pertaining to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, and use the clause at DFARS 252.227–7015, Technical Data—Commercial Products and Commercial Services, to govern the technical data pertaining to any portion

of a commercial product or commercial service that was developed exclusively at private expense;

(B) Use the DFARS clause at 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, to govern other than commercial computer software and computer software documentation; and

(C) Use the license under which the data are customarily provided to the public, in accordance with DFARS 227.7202, for commercial computer software and commercial computer software documentation.

(iii) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher tier contractor, subcontractor, or supplier.

(4) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

* * * * *

■ 26. Amend section 252.227–7019—

■ a. By revising the introductory text and clause date;

■ b. By revising paragraphs (a) and (d)(2)(i)(B);

■ c. In paragraph (e)(1), by revising the second sentence;

■ d. In paragraph (f)(1)(ii), by removing “sixty (60) days” and adding “60 days” in its place;

■ e. In paragraph (f)(1)(iv), by removing “three-year” and adding “3-year” in its place;

■ f. In paragraph (f)(7), by removing “provides the contractor” and adding “provides the Contractor” in its place; and

- g. By revising paragraph (g).
The revisions read as follows:

252.227–7019 Validation of Asserted Restrictions—Computer Software.

As prescribed in 227.7104–4(b)(3) or 227.7203–6(c), use the following clause:

Validation of Asserted Restrictions—Computer Software (JAN 2025)

(a) *Definitions.* As used in this clause—

Contractor, unless otherwise specifically indicated, means the Contractor and its subcontractors or suppliers.

Other terms are defined in the 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, clause of this contract.

* * * * *

(d) * * *

(2) * * *

(i) * * *

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restrictions and return the corrected software to the Contracting Officer within 60 days following receipt of the software, the Contracting Officer may correct or strike the markings at the Contractor's expense;

* * * * *

(e) * * *

(1) * * * Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within 3 years after the date(s) the software is delivered or otherwise furnished to the Government, or 3 years following final payment under this contract, whichever is later.

* * * * *

(g) *Contractor appeal—Government obligation.* (1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (g)(3) of this clause, it will honor the asserted restriction—

(i) For a period of 90 days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of 1 year from the date of the Contracting Officer's final decision if, within the first 90 days following the Contracting Officer's final

decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has—

(A) Appealed to the Board of Contract Appeals or filed suit in an appropriate court within 90 days; or

(B) Submitted, within 90 days, a notice of intent to file suit in an appropriate court and filed suit within 1 year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within 90 days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within 90 days from such date; or

(iii) File suit within 1 year after the date of the Contracting Officer's final decision if the Contractor had provided notice of intent to file suit within 90 days following the date of the Contracting Officer's final decision.

(3)(i) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances.

Notwithstanding paragraph (g)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with—

(A) Government purpose legends for any purpose, and authorize others to do so; or

(B) Restricted or special license rights for government purposes only.

(ii) The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at Defense Federal Acquisition Regulation Supplement (DFARS) 227.7103–7, or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its

asserted restrictions are ultimately upheld.

* * * * *

■ 27. Amend section 252.227–7025—

■ a. By revising the introductory text and clause date;

■ b. By adding paragraph (a) introductory text;

■ c. By revising paragraphs (a)(3) and (b)(1) through (4);

■ d. In paragraph (b)(5)(iii), by removing “thirty (30) days” and adding “30 days” in its place;

■ e. By revising paragraph (b)(5)(iv);

■ f. in paragraph (c)(2), by removing “third party beneficiary” and adding “third-party beneficiary” in its place;

■ g. In paragraph (d), by removing “non-disclosure” and adding “nondisclosure” in its place; and

■ h. By adding “(End of clause)” at the end of the clause.

The revisions and addition read as follows:

252.227–7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

As prescribed in 227.7103–6(c), 227.7104–4(b)(4), or 227.7203–6(d), use the following clause:

Limitations on the Use or Disclosure of Government-Furnished Information Marked With Restrictive Legends (JAN 2025)

(a) *Definitions.* As used in this clause—

* * * * *

(3) For Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program contracts, the terms “covered Government support contractor,” “government purpose rights,” “limited rights,” “restricted rights,” and “SBIR/STTR data rights” are defined in the clause at 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program.

(b) * * *

(1) *GFI marked with limited rights, restricted rights, or SBIR/STTR data rights legends.* (i) The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends, computer software received with restricted rights legends, or SBIR/STTR technical data or computer software received with SBIR/STTR data rights legends (during the SBIR/STTR data protection period) only in the performance of this contract. The Contractor shall not, without the

express written permission of the party whose name appears in the legend, release or disclose such data or software to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause.

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the nondisclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement (DFARS).

(3) *GFI marked with specially negotiated license rights legends.* (i) The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the nondisclosure agreement at DFARS 227.7103-7. The Contractor shall modify paragraph (1)(c) of the nondisclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(ii) If the Contractor is a covered Government support contractor, the Contractor may also be subject to some or all of the additional terms and conditions at paragraph (b)(5) of this clause, to the extent such terms and conditions are required by the specially negotiated license.

(4) *GFI technical data marked with commercial restrictive legends.* (i) The Contractor shall use, modify, reproduce, perform, or display technical data that are or pertain to a commercial product or commercial service and are received

from the Government with a commercial restrictive legend (*i.e.*, marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial products or commercial services, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(5) of this clause.

(5) * * *

(iv) The Contractor will enter into a nondisclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such nondisclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause. The nondisclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the nondisclosure agreement; and

* * * * *

(End of clause)

■ 28. Revise the section 252.227-7028 heading and introductory text to read as follows:

252.227-7028 Technical Data or Computer Software Previously Delivered to the Government.

As prescribed in 227.7103-6(d), 227.7104-4(b)(5), or 227.7203-6(e), use the following provision:

* * * * *

■ 29. Revise the section 252.227-7030 heading and introductory text to read as follows:

252.227-7030 Technical Data—Withholding of Payment.

As prescribed at 227.7103-6(e)(2) or 227.7104-4(b)(6), use the following clause:

* * * * *

■ 30. Revise the section 252.227-7037 introductory text to read as follows:

252.227-7037 Validation of Restrictive Markings on Technical Data.

As prescribed in 227.7102-4(c), 227.7103-6(e)(3), 227.7104-4(b)(7), or 227.7203-6(f), use the following clause:

* * * * *

■ 31. Add sections 252.227-7040 and 252.227-7041 to read as follows:

252.227-7040 Additional Preaward Requirements for Small Business Technology Transfer Program.

As prescribed in 227.7104-4(c)(1), use the following provision:

Additional Preaward Requirements for Small Business Technology Transfer Program (JAN 2025)

(a) *Definitions.* As used in this provision, the terms “research institution” and “United States” have the meaning given in the 252.227-7041, Additional Postaward Requirements for Small Business Technology Transfer Program, clause of this solicitation.

(b) Offers submitted in response to this solicitation shall include the following:

(1) The written agreement between the Offeror and a research institution, which shall contain—

(i) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from the Small Business Technology Transfer (STTR) Program award;

(ii) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a STTR award; and

(iii) No terms or conditions that conflict with the requirements of the clause at 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, or this provision, including the rights of the United States, the Offeror, and the research institution regarding intellectual property, and regarding any right to carry out follow-on research.

(2) The Offeror's written representation that—

(i) The Offeror is satisfied with its written agreement with the research institution; and

(ii) The written agreement does not conflict with the requirements of this solicitation.

(c) The Offeror shall submit the written representation required by paragraph (b)(2) of this provision as an attachment to its offer, dated and signed by an official authorized to contractually obligate the Offeror.

(d) The Offeror's failure to submit the written agreement or written representation required by paragraph (b) of this provision with its offer may render the offer ineligible for award.

(e) If the Offeror is awarded a contract, the Contracting Officer will include the written agreement and written representation required by

paragraph (b) of this provision in an attachment to that contract.

(End of provision)

252.227–7041 Additional Postaward Requirements for Small Business Technology Transfer Program.

As prescribed in 227.7104–4(c)(2), use the following clause:

Additional Postaward Requirements for Small Business Technology Transfer Program (JAN 2025)

(a) *Definitions.* As used in this clause—

Research institution means an institution or entity that—

(1) Has a place of business located in the United States;

(2) Operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor; and

(3) Is either—

(i) A nonprofit institution that is owned and operated exclusively for scientific or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual (section 4(3) of the Stevenson-Wydler Technology Innovation Act of 1980); or

(ii) A federally-funded research or research and development center as identified by the National Science Foundation (<https://www.nsf.gov/statistics/ffrdclist/>) in accordance with the guidance at Federal Acquisition Regulation 35.017.

United States means the 50 States and the District of Columbia, the territories and possessions of the Government, the Commonwealth of Puerto Rico, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(b) *Preaward submissions.* Attached to this contract are the following documents, submitted by the Contractor pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) 252.227–7040, Additional Preaward Requirements for Small Business Technology Transfer Program:

(1) The written agreement between the Contractor and a research institution.

(2) The Contractor's written representation that the Contractor is satisfied with that written agreement, which does not conflict with the clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, or this clause.

(c) *Postaward updates.* The Contractor shall not allow any modification to its written agreement with the research institution, unless the written agreement, as modified, contains—

(1) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from performance of this contract;

(2) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a Small Business Technology Transfer Program award;

(3) The Contractor's written, dated, and signed representation that—

(i) The Contractor is satisfied with its written agreement with the research institution, as modified; and

(ii) The written agreement, as modified, does not conflict with the clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, or this clause; and

(4) No terms and conditions that conflict with the clause at DFARS 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, or this clause, including the rights of the United States, the Contractor, and the research institution regarding intellectual property, and regarding any right to carry out follow-on research.

(d) *Submission of updated agreement.* Within 30 days of execution of the modified written agreement described in paragraph (b)(1) of this clause, the Contractor shall submit a copy of that updated written agreement and the updated written representation described in paragraph (b)(2) of this clause to the Contracting Officer for review and attachment to this contract.

(End of clause)

[FR Doc. 2024–29226 Filed 12–17–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

[Docket DARS–2024–0023]

RIN 0750–AL80

Defense Federal Acquisition Regulation Supplement: Task Order and Delivery Order Contracting for Architectural and Engineering Services (DFARS Case 2023–D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2023 that provides directions for awarding architectural and engineering service task orders and delivery orders under multiple-award contracts.

DATES: Effective December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 703–901–3176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 89 FR 60853 on July 29, 2024, to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263), which amends 10 U.S.C. 3406. Section 802 added a requirement at 10 U.S.C. 3406(h)(1) for DoD contracting officers to use qualification-based selections when awarding task orders and delivery orders for architectural and engineering (AE) services in accordance with Federal Acquisition Regulation (FAR) subpart 36.6 and 40 U.S.C. chapter 11 (The Brooks Architect Engineer Act). Section 802 also added, at 10 U.S.C. 3406(h)(2), direction that prevents contracting officers from routinely requesting additional information regarding qualifications when awarding task orders or delivery orders under a multiple-award contract. Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A

discussion of the comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: A respondent expressed support for timely implementation of the final rule.

Response: DoD acknowledges support for the rule.

2. Concern Regarding the Text of the Rule

Comment: A respondent expressed concern that the rule text did not mirror the statutory language.

Response: The rule implements the statutory language using the drafting conventions of the FAR and its supplements, including the DFARS.

III. Applicability to Contracts At or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

DoD does not expect the final rule to have a significant impact on the public because the rule maintains the status quo regarding procedures for awarding task orders or delivery orders for AE services under multiple-award contracts. The FAR currently provides those procedures at subpart 36.6. This DFARS final rule points to those procedures.

The final rule also adds language to prevent contracting officers from requesting unnecessary information regarding qualifications. Therefore, this final rule may reduce the resubmission of qualification information when competing for AE services under multiple-award contracts. Contracting officers will request additional information only when necessary to determine the most qualified offeror for a task order or delivery order.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This rule amends the DFARS to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263), which amends 10 U.S.C. 3406. Section 802 requires DoD contracting officers to use qualification-based selections when awarding task orders and delivery orders for architectural and engineering (AE) services (10 U.S.C. 3406(h)(1)), a requirement that is already in Federal Acquisition Regulation (FAR) 16.500(d), 16.505(a)(9), and 36.600. Section 802 also prevents contracting officers from routinely requesting additional information regarding qualifications when awarding task orders or delivery orders under a multiple-award contract (10 U.S.C. 3406(h)(2)).

The objective of the rule is to ensure DoD contracting officers follow the new direction provided by 10 U.S.C. 3406(h)(2) when awarding task orders

and delivery orders for AE services in accordance with current regulations and 10 U.S.C. 3406(h)(1).

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This final rule will apply to small entities performing AE services under multiple-award contracts, which includes indefinite-delivery, indefinite-quantity contracts. The final rule is expected to reduce the burden on small entities by preventing contracting officers, when awarding task orders or delivery orders, from requiring the submittal of qualification information that was previously submitted and evaluated for the award of the basic multiple-award contract. The contracting officer may now request qualification information that is necessary to determine the most qualified offer for the particular task order or delivery order.

Data obtained from the Federal Procurement Data System for FY 2020, 2021, and 2022 indicates that DoD awards an average of 4,600 task orders and delivery orders for AE services annually. Of the estimated 4,600 orders, an average of approximately 2,600 awards are made annually to an estimated 453 unique small entities. For each task order or delivery order award, DoD estimates that 3 multiple-award contract awardees will submit an offer in response to a request for proposals. As a result, it is estimated that approximately 1,359 small entities will benefit from any reduction in burden provided by the final rule.

The final rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

VIII. Paperwork Reduction Act

This final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 216

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System amends 48 CFR part 216 as follows:

PART 216—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 216 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Add section 216.500 to subpart 216.5 to read as follows:

216.500 Scope of subpart.

(d)(i) When awarding task orders or delivery orders for architect-engineer services under a multiple-award contract, follow the procedures for the selection of contractors and placement of orders at FAR 36.6 to implement 10 U.S.C. 3406(h)(1).

(ii) Contracting officers shall not request additional information related to contractor qualifications, unless it is necessary to determine the most highly qualified contractor for the particular task order or delivery order (10 U.S.C. 3406(h)(2)).

[FR Doc. 2024–29227 Filed 12–17–24; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

[Docket DARS–2024–0001]

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule; technical amendment.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to make needed editorial changes.

DATES: Effective December 18, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, telephone 703–717–8226.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS to make needed

editorial changes to update a reference to a DoD Directive at DFARS 225.802–71.

List of Subjects in 48 CFR Part 225

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System amends 48 CFR part 225 as follows:

PART 225—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

225.802–71 [Amended]

■ 2. Amend section 225.802–71 by removing “DoD Directive 2040.3” and adding “DoD Instruction 2040.03” in its place.

[FR Doc. 2024–29228 Filed 12–17–24; 8:45 am]

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Part V

Department of Homeland Security

8 CFR Part 208

Application of Certain Mandatory Bars in Fear Screenings; Final Rule

DEPARTMENT OF HOMELAND SECURITY**8 CFR Part 208**

[CIS No. 2776–24; DHS Docket No. USCIS–2024–0005]

RIN 1615–AC91

Application of Certain Mandatory Bars in Fear Screenings**AGENCY:** U.S. Citizenship and Immigration Services, DHS.**ACTION:** Final rule.

SUMMARY: The Department of Homeland Security (DHS or Department) is amending its regulations to allow asylum officers (AOs) to consider the potential applicability of certain bars to asylum and statutory withholding of removal during credible fear and reasonable fear screenings, including credible fear screenings where the Circumvention of Lawful Pathways or Securing the Border rules apply. The rule is intended to enhance operational flexibility and help DHS more swiftly remove certain noncitizens who are barred from asylum and statutory withholding of removal.

DATES: This final rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Daniel Delgado, Acting Deputy Assistant Secretary for Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447–3459 (not a toll-free call).

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Background
- II. Legal Authority
- III. Provisions of the Final Rule
- IV. Response to Public Comments on the Proposed Rule
 - A. Summary of Comments on the Proposed Rule
 - B. General Feedback on the Proposed Rule
 - C. Legal Authority and Background
 - 1. General Support for the Proposed Rule
 - 2. DHS's Justification, Background, and Statements on the Need for the Rule
 - 3. Other/General Comments on Legal Authority and Background
 - D. Proposed Application of Mandatory Bars
 - 1. Noncitizens in Credible Fear Screenings (8 CFR 208.30)
 - 2. Noncitizens Subject to Circumvention of Lawful Pathways Presumption of Ineligibility, Statutory Withholding Screen (8 CFR 208.33)
 - 3. Inclusion of Specific Bars (e.g., Particularly Serious Crimes Bar, Security Bar)
 - 4. Exclusion of Specific Bars (e.g., "Firm Resettlement Bar," INA Secs. 208(a)(2),

- (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2), (b)(2)(A)(vi))
- 5. Exclusion of CAT Screenings (Withholding of Removal) (8 CFR 208.30(e)(3), 208.33(b)(2)(i))
- 6. Other/General Comments on the Application of Bars
- 7. Screening Procedures, AO Determinations, Immigration Judge Review of Negative Fear Determinations (e.g., Discretionary vs. Requirement, Guidance, Cases Where Bars Are Outcome-Determinative)
- 8. Burden of Proof
- 9. Other General/Mixed Feedback and Suggested Alternatives
- E. Other Issues Relating to the Rule
 - 1. Coordination With DOJ in the Rulemaking
 - 2. Security Bars and Processing Rulemaking
 - 3. Out of Scope Comments
- F. Statutory and Regulatory Requirements
 - 1. Administrative Procedure Act
 - 2. Regulatory Impact Analysis Impacts and Benefits (E.O. 12866 and E.O. 13563)
 - 3. Paperwork Reduction Act (e.g., Comments on Forms and Burden Estimates)
 - 4. Other/General Comments on Statutory and Regulatory Requirements (e.g., Unfunded Mandates Reform Act, Federalism, Civil Justice Reform, Family Assessment, Indian Tribal Governments, Protection of Children from Environmental Health and Safety Risks, National Environmental Policy Act)
- 5. Out of Scope
- V. Statutory and Regulatory Requirements
 - A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)
 - B. Regulatory Flexibility Act (RFA)
 - C. Unfunded Mandates Reform Act of 1995 (UMRA)
 - D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)
 - E. Executive Order 13132 (Federalism)
 - F. Executive Order 12988 (Civil Justice Reform)
 - G. Family Assessment
 - H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
 - I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)
 - J. National Environmental Policy Act (NEPA)
 - K. Paperwork Reduction Act (PRA)

I. Background**A. Mandatory Bars NPRM**

On May 13, 2024, DHS issued a notice of proposed rulemaking (NPRM) that proposed to allow AOs to consider the potential applicability of certain bars to asylum and statutory withholding of removal during certain credible and reasonable fear screenings. Application of Certain Mandatory Bars in Fear Screenings, 89 FR 41347 (May 13, 2024).

Following careful consideration of public comments received, the Department has not made substantive modifications to the regulatory text proposed in the NPRM, 89 FR 41347 (May 13, 2024), but has made clarifying amendments. The rationale and the reasoning provided in the proposed rule preamble remain valid, except where a new or supplemental rationale is reflected in this Final Rule.

B. Securing the Border

After DHS issued the NPRM, on June 3, 2024, the President signed Presidential Proclamation 10773, *Securing the Border*, under sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), finding that because the border security and immigration systems of the United States were unduly strained, the entry into the United States of certain categories of noncitizens was detrimental to the interests of the United States, and suspending and limiting the entry of such noncitizens. 89 FR 48487, 48487–91 (June 7, 2024) ("June 3 Proclamation"). The June 3 Proclamation directed DHS and DOJ to promptly consider issuing any regulations "as may be necessary to address the circumstances at the southern border, including any additional limitations and conditions on asylum eligibility that they determine are warranted, subject to any exceptions that they determine are warranted." 89 FR at 48491 (sec. 3(d)).

DHS and DOJ subsequently published an Interim Final Rule (IFR) on June 7, 2024, during the comment period of this rule, to implement the policies and objectives of the June 3 Proclamation. 89 FR 48710 (June 7, 2024) (*Securing the Border IFR*). The *Securing the Border IFR* effectuated three key changes to the process for those noncitizens who are encountered at the southern border during the emergency border circumstances giving rise to the suspension and limitation on entry under the June 3 Proclamation: (1) adding a limitation on asylum eligibility; (2) rather than asking specific questions of every noncitizen encountered and processed for expedited removal, providing general notice regarding the process for seeking asylum and related protection and referring a noncitizen for a credible fear interview only if the noncitizen manifests a fear of return, expresses an intention to apply for asylum or protection, or expresses a fear of persecution or torture or a fear of return to his or her country or the country of removal; and (3) for those found not to have a credible fear of persecution for

asylum purposes because of the IFR's limitation on asylum eligibility, screening for statutory withholding of removal and CAT protection under a "reasonable probability" standard. *Id.* at 48718. In the credible fear screening context, if there is not a significant possibility that the noncitizen could demonstrate that the limitation on asylum eligibility does not apply to them or could demonstrate by a preponderance of the evidence that they are eligible for an exception to the limitation (*i.e.*, there is not a significant possibility that the noncitizen could establish eligibility for asylum), the AO will enter a negative credible fear determination with respect to the noncitizen's asylum claim. 8 CFR 208.35(b)(1). The AO then screens the noncitizen for statutory withholding of removal and protection under CAT by determining whether there is a reasonable probability the noncitizen would face persecution or torture in the country (or countries) of removal. 8 CFR 208.35(b)(2). The reasonable probability standard is defined as "substantially more than a 'reasonable possibility' but somewhat less than more likely than not." 8 CFR 208.35(b)(2)(i).

On September 27, 2024, the President issued a proclamation amending the June 3 Proclamation. 89 FR 80351 (Oct. 2, 2024) (September 27 Proclamation). The September 27 Proclamation amended the calculations for when the suspension and limitation on entry established in the June 3 Proclamation would be discontinued, continued, or reactivated. *Id.* On October 7, 2024, the Departments published a final rule responding to public comments on the IFR and implementing changes that parallel those made in the September 27 Proclamation. Securing the Border Final Rule, 89 FR 81156 (Oct. 7, 2024) (Securing the Border final rule).¹

II. Legal Authority

The Secretary of Homeland Security's (Secretary) authority for this rule is found in various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, as amended. The INA charges the Secretary "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," except insofar as those laws assign functions to the President or other agencies. INA sec.

103(a)(1), 8 U.S.C. 1103(a)(1). The INA also authorizes the Secretary to establish regulations and take other actions "necessary for carrying out" the Secretary's authority to administer and enforce the immigration laws. INA secs. 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *see also* 6 U.S.C. 202 (authorities of the Secretary), 271(a)(3) (conferring authority on U.S. Citizenship and Immigration Services (USCIS) Director to establish "policies for performing [immigration adjudication] functions").

Under the INA, DHS has authority to adjudicate asylum applications and to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (d)(1), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (d)(1), (d)(5)(B); INA sec. 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* 6 U.S.C. 271(b) (providing for the transfer of the Commissioner of Immigration and Naturalization's functions relating to adjudication of asylum and refugee applications to the Director of the Bureau of Citizenship and Immigration Services, now USCIS); 6 U.S.C. 557 (providing that references to any officer from whom functions are transferred under the HSA are to be understood as referring to the Secretary of Homeland Security). Within DHS, the Secretary has delegated some of those authorities to the Director of USCIS. USCIS AOs conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen's² asylum application should be granted, all of which are subject to review by a supervisory AO. *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.14(b), 208.30(b), (e)(6)(i), (e)(8).

The INA also authorizes the Secretary and Attorney General to publish regulatory amendments governing their respective roles regarding inspection and admission, detention and removal, withholding of removal, and deferral of removal. *See* INA secs. 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The United States is a party to the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("Refugee

Protocol"), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention"). Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning ("refouler") "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.*

Congress has implemented U.S. non-refoulement obligations under the 1967 Protocol through the INA, as amended by the Refugee Act of 1980, Public Law 96–212, 94 Stat. 102, extending the form of protection from removal now known as statutory withholding of removal. *See* INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3) (formerly 8 U.S.C. 1253(h) (1952)); *see also* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174–77 (1993) (describing the history of the statutory withholding provision and the Refugee Act amendments). The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened because of one of the protected grounds listed in Article 33 of the Refugee Convention. *See* INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3), 8 CFR 208.16, 1208.16; *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429–30 (1987) (discussing the statutory precursor to section 241(b)(3) of the INA—former section 243(h), 8 U.S.C. 1253(h) (1952)); *INS v. Stevic*, 467 U.S. 407, 414–22 (1984) (same). The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* INA sec. 103(a)(1) and (3), (g)(1) and (2), 8 U.S.C. 1103(a)(1) and (3), (g)(1) and (2).

DHS and DOJ also have authority to implement U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT). The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) provides the Secretary with the authority to "prescribe regulations to implement the obligations of the United

¹ This rule refers generally to the "Securing the Border rule" when it is not necessary to specify between the Securing the Border IFR or Securing the Border final rule.

² For purposes of this preamble, DHS uses the term "noncitizen" to be synonymous with the term "alien" as it is used in the INA. *See* INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton v. Barr*, 590 U.S. 222, 226 n.2 (2020).

States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisions contained in the United States Senate resolution of ratification of the Convention.” Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have implemented U.S. obligations under Article 3 of the CAT in their respective immigration regulations, consistent with FARRA. *See, e.g.*, 8 CFR 208.16(c) through 208.18, 1208.16(c) through 1208.18; 64 FR 8478 (Feb. 19, 1999) (“Regulations Concerning the Convention Against Torture”), as corrected by 64 FR 13881 (Mar. 23, 1999).

Overall, this rule is authorized because Congress has conferred upon the Secretary express rulemaking power to create certain procedures for screening for and adjudicating asylum claims. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1).

III. Provisions of the Final Rule and Revisions From the NPRM

The rule amends provisions at 8 CFR 208.30(e), 208.31, and 208.33(b) that effectuate the following changes to the credible fear and reasonable fear screening procedures:

- The rule provides AOs the discretion to consider mandatory bars to asylum under INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v) or to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) (mandatory bars) in credible fear screenings if the AO finds the noncitizen is able to establish a credible fear of persecution but not a credible fear of torture.

- The rule provides that when the mandatory bars are considered, the AO will find a noncitizen to have a credible fear of persecution if there is a significant possibility that the noncitizen can establish eligibility for asylum or withholding of removal, including the AO’s determination that no bar applies or will be applied by the AO in that case.

- The rule allows AOs to enter a negative credible fear finding with regard to the noncitizen’s eligibility for asylum or withholding of removal under INA sec. 208, 8 U.S.C. 1158, INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3), or 8 CFR 208.16(c) if the AO determines there is not a significant possibility the noncitizen would be able to establish by a preponderance of the evidence that the mandatory bars do not apply.

- The rule provides AOs the discretion to consider mandatory bars when conducting credible fear screenings under the additional procedures in 8 CFR 208.33(b)(2).

- The rule provides that DHS will issue a Form I–862, Notice to Appear, if an AO conducting a credible fear screening under the additional procedures in 8 CFR 208.33(b)(2) determines that the noncitizen established a reasonable possibility of persecution with respect to the identified country or countries of removal and, to the extent bars were considered, that there is a reasonable possibility that none of the mandatory bars apply, or if the noncitizen established a reasonable possibility of torture.

- The rule provides that an AO will enter a negative credible fear determination when conducting a credible fear screening under the additional procedures in 8 CFR 208.33(b)(2) if the AO determines that the noncitizen failed to show a reasonable possibility that a mandatory bar does not apply and was unable to demonstrate a reasonable possibility of torture.

- The rule provides AOs the discretion to consider mandatory bars to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), in reasonable fear screenings.

- The rule provides that, if an AO considers the mandatory bars to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), a noncitizen will be found to have a reasonable fear of persecution if there is a reasonable possibility that the noncitizen would be persecuted on account of their race, religion, nationality, membership in a particular social group or political opinion, and the noncitizen has established a reasonable possibility that no bar applies.³

This Final Rule makes the following clarifying edits to the regulatory text proposed in the NPRM:

- The rule adds the phrase “in a proceeding on the merits” to 8 CFR

³ As described in the NPRM, this rule makes a non-substantive change to 8 CFR 208.31(g) and replaces the last sentence of 8 CFR 208.31(g) and paragraphs (g)(1)–(2). 89 FR at 41355 n.39. Because those provisions describe the procedures for immigration judge review of an AO’s reasonable fear finding and are duplicative with the corresponding provision governing immigration court procedures at 8 CFR 1208.31(g), they are not needed in the DHS regulations in chapter I of title 8 of the CFR. Accordingly, this rule replaces those provisions in 8 CFR 208.31(g) with a short statement that informs the reader that the immigration judge review procedures are set forth at 8 CFR 1208.31(g).

208.30(e)(5)(ii)(A) and (B) to clarify how AOs will apply in credible fear screenings the “significant possibility” standard with respect to mandatory bars to asylum and statutory withholding of removal, that is, by determining whether there is a significant possibility that, in a proceeding on the merits, the noncitizen would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

- The rule removes the phrase “persecution or” from the last sentence of 8 CFR 208.31(c) to clarify that the sentence concerns “reasonable fear of torture” only, as “reasonable fear of persecution” is defined earlier in the paragraph.

IV. Response to Public Comments on the Proposed Rule

A. Summary of Comments on the Proposed Rule

In response to the proposed rule, DHS received 4,293 comments during the 30-day public comment period.

Approximately 3,864 of the comments were letters submitted through mass mailing campaigns, and 297 comments were unique submissions. Primarily, individuals and anonymous entities submitted comments, as did multiple advocacy groups and legal services providers. Other commenters included attorneys, religious and community organizations, elected officials, and research and educational institutions, among others.

Comments received during the 30-day comment period are organized by topic below. DHS reviewed the public comments received in response to the proposed rule and addresses relevant comments in this Final Rule, grouped by subject area. DHS does not address comments seeking changes in U.S. laws, regulations, or agency policies that are unrelated to the changes made by this rule. This Final Rule does not resolve issues that are outside the scope of this rulemaking. A brief summary of comments DHS deemed to be out of scope or unrelated to this rulemaking, making a substantive response unnecessary, is provided at the end of the section. Comments may be reviewed at <https://www.regulations.gov>, docket number USCIS–2024–0005.

Following careful consideration of public comments received, DHS in this Final Rule has not made substantive modifications to the regulatory text proposed in the NPRM but has made clarifying edits as described in Part III above. The rationale for the proposed rule and the reasoning provided in the background section of that rule remain valid with respect to the regulatory

amendments made by this Final Rule, except where a new or supplemental rationale is reflected in this Final Rule.

B. General Feedback on the Proposed Rule

1. General Support for the Proposed Rule

a. Positive or Minimal Impacts on Noncitizens and Their Support Systems

Comment: A commenter said that the proposed rule would not increase the risk of erroneous denials, stating that most of the people requesting asylum are economic migrants.

Response: DHS appreciates the commenter's support for the rule and agrees that the rule will not increase the risk of erroneous determinations. DHS believes the rule will result in AOs issuing negative fear determinations in certain cases where there is evidence that a mandatory bar applies to a noncitizen, there is a lack of evidence that the bar should not be applied (e.g., due to an exception to the bar or the application of an exemption to the bar, such as an exemption applied pursuant to INA sec. 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i)) and the noncitizen is not otherwise able to establish a positive fear of torture at the applicable standard. The rule will provide the Department greater flexibility to quickly screen out noncitizens with non-meritorious protection claims and swiftly remove noncitizens who present a national security or public safety concern. The Department does not otherwise rely on the commenter's assertion—that most people requesting asylum are economic migrants—as a justification for the rule.

b. Positive Impacts on Immigration System and Government Operations and Resources

Comment: Some commenters expressed support for the proposed rule and were concerned about abuse of the asylum system. These commenters expressed concern about fraudulent asylum claims and high levels of unlawful entry. These commenters also believe that noncitizens are exploiting the immigration processes and that application of the mandatory bars at the screening stage will eliminate removal delays. One commenter stated that AOs are capable of assessing mandatory bars at the credible fear stage and that AOs are well-trained in asylum law. One comment supported the proposed rule, agreeing that it will help avoid unnecessary detention of noncitizens and enhance public safety.

Response: DHS appreciates the commenters' support for the rule. DHS

believes it is appropriate to authorize additional procedures by which to deliver swift decisions on non-meritorious claims and consequences for irregular migration,⁴ rather than allowing ineligible individuals to further tax limited resources. DHS agrees that AOs are highly capable of assessing mandatory bars at the credible fear screening stage, as well as the reasonable fear screening stage, based on their specialized training in asylum law, including in applying mandatory bars.⁵

DHS agrees with the commenter that the rule will help avoid unnecessary detention and enhance public safety by prioritizing the speedy removal of noncitizens who may pose security threats. Noncitizens who may have otherwise remained in detention throughout the immigration court process for a full adjudication on the merits of their claim, despite the existence of easily verifiable evidence showing that they would be subject to a mandatory bar, will be quickly removed, thereby conserving the government's detention capacity.

2. General Opposition to the Proposed Rule

a. Conflicts With Humanitarian Values

Comment: Numerous commenters expressed concerns that the rule conflicts with humanitarian values. These commenters asserted that U.S. immigration policy should embody the values of compassion and humanitarianism and affirm the right to asylum and that the rule does not do so. These commenters stated that the rule would violate the international and universal right to safety and asylum. These commenters also stated that the rule is immoral and contrary to U.S. values, as they believe it would return asylum seekers to countries without meaningful protection and where they would still be in harm's way. These commenters believe the rule would contradict the United States' long-standing history of welcoming immigrants and supporting the international asylum system. Several commenters believe the proposed rule would have negative impacts on asylum seekers who are at risk of persecution in

their home countries and have experienced hardships to reach the border. Another commenter stated that the proposed rule undermines the current asylum system and could send noncitizens with legitimate asylum claims back to danger. A few commenters said that the right to seek asylum is crucial to the safety and justice of all people, and that the immigration system should be more welcoming instead of limiting asylum access. Other commenters remarked that the asylum system needs to be reformed to make it fair and just because denying asylum could endanger those who are seeking safety. Another commenter stated that people do not willingly leave their homes and family to seek asylum. Some commenters believe that U.S. policies have created the conditions in other countries that force individuals to flee from their homes. Some commenters believe that deterrence policies and detention of noncitizens seeking asylum is immoral and that the rule is based on racism and xenophobia. One commenter believes the rule would serve more as a barrier to asylum than as a measure to protect U.S. national security.

Response: DHS disagrees with these commenters' claims concerning the rule. This rule focuses on enhancing DHS's ability to swiftly remove noncitizens who are ineligible for asylum and statutory withholding of removal and are enforcement priorities: those who present a threat to national security or public safety, while maintaining DHS's authority to create and implement safe, orderly, and humane migration pathways. As explained in the NPRM, the population to which this rule will apply is likely to be relatively small, as informed by the number of cases identified as potentially implicating mandatory bars that are flagged by USCIS during screenings.⁶ The U.S. government has implemented, and will continue to implement, a number of measures designed to enhance and expand lawful pathways and processes for noncitizens seeking to enter the United States, including to seek asylum. Examples of lawful pathways include: the Uniting for Ukraine process, which allows Ukrainian nationals to receive humanitarian parole into the United States, enabling them to travel by air to the United States and be resettled;⁷ the multilateral Safe Mobility initiative, currently operating in Colombia, Costa Rica, Ecuador, and Guatemala, which

⁴ In this preamble, "irregular migration" refers to the movement of people into another country without authorization.

⁵ See, e.g., USCIS, "RAIO Directorate—Officer Training: Mandatory Bars" (May 9, 2013); USCIS, "RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Nexus and the Protected Grounds" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Well-Founded Fear" (Apr. 24, 2024).

⁶ 89 FR 41347, 41351–52 (May 13, 2024).

⁷ See U.S. Citizenship and Immigration Services, Uniting for Ukraine, <https://www.uscis.gov/ukraine> (last visited Sept. 25, 2024).

provides access to information and education about other lawful pathways to the United States and partner countries, local integration, and, for eligible individuals, expedited refugee processing to the United States;⁸ the new processes for up to 30,000 Cuban, Haitian, Nicaraguan, and Venezuelan (CHNV) nationals per month to apply for advance authorization to seek parole into the United States, enabling them to travel by air to the United States;⁹ and country-specific family reunification parole processes for certain nationals of Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, and Honduras who have U.S. citizen relatives in the United States.¹⁰ DHS and its interagency partners have also increased H-2B nonimmigrant visa availability¹¹ and refugee processing for countries within the Western Hemisphere.¹² Noncitizens who do not avail themselves of these pathways can schedule an appointment through the Customs and Border Protection (CBP) One app, a scheduling tool used by noncitizens to present themselves at a southwest land border port of entry (POE).¹³ The use of the CBP One app for scheduling has contributed to U.S. Customs and Border Protection's efforts to expand its southwest border POE migrant processing capacity well beyond the 2010–2016 daily POE

average,¹⁴ resulting in increased access for noncitizens to POEs.

b. Due Process Concerns

Comment: Many commenters expressed general due process concerns. Commenters stated that individual due process protections are critical and that, under the proposed rule, DHS would undermine or abandon due process in order to expedite the asylum process. Commenters stated that to alleviate due process concerns, the Department should refrain from implementing the rule.

Response: The Department disagrees with these commenters' claims concerning due process. This rule does not affect the provisions that address who DHS may refer for a credible fear screening or reasonable fear screening. See INA sec. 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), 8 CFR 235.3(b)(4), 8 CFR 235.15(b)(4), 208.30(b), and 208.31(b). This rule does not impinge noncitizens' statutory right to representation in the credible and reasonable fear processes. See, e.g., 8 CFR 208.30(d)(4), 8 CFR 208.31(c), 8 CFR 235.15(b)(4)(i)(B). Additionally, noncitizens in credible fear may continue to consult with persons of their choosing. 8 CFR 208.30(d)(4); 8 CFR 235.15(b)(4)(i)(B). Further, the rule does not alter the preexisting rights or opportunities for noncitizens in credible or reasonable fear proceedings to seek immigration judge review of negative credible fear or reasonable fear determinations. See 8 CFR 208.30(g)(1), 208.31(g), 208.33(b)(2), 208.35(b)(2) 1003.42, 1208.31(g), 1208.33(b). Accordingly, the rule preserves noncitizens' process rights as provided in the INA. See *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2022) (reaffirming that noncitizens who arrive at U.S. ports of entry or are encountered shortly after unlawfully crossing the U.S. border and are placed in expedited removal proceedings, including those in the credible fear screening process, have "only those rights regarding admission that Congress has provided by statute").

Comment: Many commenters expressed concerns regarding access to legal counsel under the proposed rule. Commenters voiced concerns that the rule would inhibit access to legal counsel. Commenters noted that the credible fear process occurs shortly after individuals reach the United States, and they lack access to an attorney or have experienced trauma. Commenters also

noted that individuals in the asylum process need sufficient time to find legal counsel and that as a result of the proposed rule, individuals would not be able to pass the initial credible fear screening and would be removed before even being able to secure legal representation. Some commenters pointed to the low representation rates of detained asylum seekers stemming from the reliance on telephone access from remote detention facilities to obtain counsel and the rapid timelines associated with screening determinations. Commenters believe that attempts to provide legal representation to detained individuals in screenings have been compromised or obstructed. A commenter said that it is hard to establish a credible fear of persecution and some noncitizens are not prepared to address the nuances asked of them in screenings; thus, they need lawyers to help them understand the law. Several commenters remarked on the particular need for access to counsel if AOs were to consider mandatory bars because challenging the applicability of a bar would be difficult without an attorney. A commenter stated that every noncitizen whose case is flagged with a possible mandatory bar should be notified of their right to counsel and allowed time to secure an attorney, and contrasted the reported difficulty of securing an attorney during the expedited removal process with the relative ease of doing so in section 240 removal proceedings.

Response: The Department disagrees with the commenters' claims that this rule inhibits access to counsel. As an initial matter, because this rule does not alter procedures governing consultation or representation, commenters' concerns regarding those issues are outside the scope of this rulemaking. Procedures regarding consultation and representation are governed by other DHS regulations, guidance, and policies. See 8 CFR 235.3(b)(4)(ii); 208.30(d)(4), 8 CFR 208.31(c).

This rule does not amend the pre-existing rights of noncitizens regarding their rights to representation during fear screenings. Specifically, during credible fear screenings, the INA provides that a noncitizen "may consult with a person or persons of the [noncitizen]'s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General," provided that "[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process." INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv). This statutory right to consult does not attach until a noncitizen becomes eligible for a

⁸ U.S. Dep't of State, Safe Mobility Initiative, <https://www.state.gov/refugeeadmissions/safe-mobility-initiative> (last visited Aug. 23, 2024); The White House, Fact Sheet: Biden-Harris Administration on World Refugee Day Celebrates a Rebuilt U.S. Refugee Admissions Program, June 20, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/20/fact-sheet-biden-harris-administration-on-world-refugee-day-celebrates-a-rebuilt-u-s-refugee-admissions-program/> (last visited Aug. 29, 2024).

⁹ See U.S. Citizenship and Immigration Services, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, <https://www.uscis.gov/CHNV> (last visited Sept. 25, 2024).

¹⁰ See generally U.S. Citizenship and Immigration Services, Family Reunification Parole Processes, <https://www.uscis.gov/FRP> (last visited Aug. 23, 2024).

¹¹ See, e.g., 88 FR 80394 (Nov. 17, 2023) (authorizing up to 64,716 additional H-2B nonimmigrant visas for Fiscal year 2024).

¹² See Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2024, Presidential Determination No. 2023–13 (Sept. 29, 2023) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during Fiscal Year (FY) 2024); Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2025, Presidential Determination No. 2024–13 (Sept. 30, 2024) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during FY 2025).

¹³ See CBP, "CBP One™ Mobile Application," <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last visited Aug. 14, 2024).

¹⁴ See CBP STAT Division, "U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average" (internal data report, retrieved Apr. 13, 2023).

credible fear interview, and it does not guarantee an absolute right to retain counsel. *See id.* The credible fear review regulations further provide that a noncitizen “may consult with a person or persons of the [noncitizen’s] choosing prior to the interview or any review thereof,” “[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process,” and that the person(s) with whom the noncitizen consulted “may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview.” 8 CFR 208.30(d)(4). During the reasonable fear screening process, individuals may be represented by an attorney or an accredited representative at no cost to the government.

Individuals who may be subject to a mandatory bar will have the opportunity to show that the bar does not apply during the screening interview. Credible fear and reasonable fear screening determinations are based on non-adversarial interviews that occur in an expedited manner, such that the scope of representation is necessarily limited when compared to a lengthy adversarial hearing before EOIR. In addition to substantive training on applying mandatory bars, AOs receive training and have practical experience conducting non-adversarial interviews, eliciting testimony, working with interpreters, cross-cultural communication, and working with vulnerable populations.¹⁵ AOs regularly assess the mandatory bars in affirmative asylum adjudications and asylum merits interviews (AMIs); therefore, it is not unusual for AOs to consider these issues. Accordingly, AOs are well-suited in a screening interview to develop the record regarding a potential mandatory bar and to ensure the noncitizen has an opportunity to provide evidence as to why a given bar does not apply at the appropriate standard of proof. Moreover, all credible fear and reasonable fear determinations are reviewed by a supervisory AO for procedural and substantive accuracy and completeness before becoming

final.¹⁶ DHS also believes that the non-adversarial nature of credible fear and reasonable fear screenings, in contrast with adversarial section 240 removal proceedings, sufficiently mitigates the commenters’ concerns about the more compressed timeframe noncitizens have to secure an attorney during the expedited removal process, and challenges of accessing counsel in detention.

Finally, DHS disagrees that the consideration of mandatory bars is categorically more complex than the consideration of the full array of issues that are currently presented in screening cases on a routine basis. For example, determining whether a noncitizen’s testimony is credible, whether harm experienced or feared was or would be inflicted on account of a protected ground, or whether torture feared would be inflicted with the consent or acquiescence of a person acting in an official capacity are all potentially complex issues that AOs regularly consider and analyze in fear screenings. As such, and in view of AOs’ training and experience previously described, the Department does not agree that a noncitizen’s ability to obtain counsel for such an interview presents new or greater concerns than those presented by a screening interview where mandatory bars are not considered.

Comment: A commenter expressed concern that AOs would rely on evidence such as Interpol Red Notices issued by authoritarian regimes as a basis for considering the applicability of bars.

Response: The Department has implemented measures to combat the impact of abusive or unwarranted INTERPOL notices separate and apart from this rule. For example, DHS has issued internal guidance on the appropriate handling of INTERPOL notices that are suspected of having been issued by a country for the purpose of persecuting an individual or otherwise appear to be prohibited or noncompliant.

Comment: A few commenters expressed concern regarding the ability to collect and present evidence during credible fear screenings. The commenters stated that the inability to compile evidence would adversely impact noncitizens, as they would not be able to gather evidence disputing the application of a bar. Commenters stated that consideration of the bars to asylum and statutory withholding of removal in

credible fear or reasonable fear interviews does not afford an asylum seeker the opportunity to present the extensive evidence needed to rebut a finding that one of the asylum bars applies. Commenters stated that the expedited removal process does not afford sufficient opportunity for noncitizens to gather the evidence needed to demonstrate a bar does not apply to them and that the rule would require noncitizens to understand highly complex bars to eligibility that newly arriving people cannot be expected to understand. Commenters asserted that often, the evidence these bars apply comes from unverified or difficult-to-verify sources. Several commenters opposed the proposed rule on the basis that detained noncitizens in expedited removal proceedings would have difficulty discussing or adequately defending themselves against the application of mandatory bars because of the effect of trauma resulting from past harm or their journey to the United States, hunger, and linguistic or cultural barriers.

Response: The Department disagrees that this rule would negatively impact noncitizens in this manner. AOs have a duty to elicit all relevant and useful information on a fear claim. *See, e.g.,* 8 CFR 208.30(d). Credible testimony alone may be the basis of a positive fear determination without the need for any corroborative documentary evidence. Where an AO exercises discretion to consider a mandatory bar in a fear screening, the AO will provide the noncitizen with an opportunity to present evidence that the bar does not apply, and credible testimony alone may be sufficient evidence to make that showing. As noted above, AOs have training and experience in the substantive application of mandatory bars and in non-adversarial interviewing and eliciting testimony and are therefore well-positioned to develop and evaluate the record in such cases, including weighing the reliability and probative value of available evidence.¹⁷ Further, all credible fear and reasonable fear determinations undergo supervisory review prior to service.

Noncitizens undergoing fear screenings where a bar is considered would be able to demonstrate that the bar does not apply at the relevant standard. For example, in credible fear under 8 CFR 208.30, a noncitizen must

¹⁵ See USCIS, RAO Directorate—Officer Training: Mandatory Bars (May 9, 2013); USCIS, RAO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing—Working with an Interpreter (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma (Apr. 24, 2024).

¹⁶ See 8 CFR 208.30(e)(8); *see also* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int’l Operations Directorate, USCIS, Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures (Sept. 26, 2024).

¹⁷ See USCIS, RAO Directorate—Officer Training: Mandatory Bars (May 9, 2013); USCIS, RAO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024).

demonstrate that there is a significant possibility that they could establish that the bar does not apply by a preponderance of evidence at a future proceeding. Similarly, noncitizens would need to establish a reasonable possibility that the bar does not apply in credible fear screenings under 8 CFR 208.33, or in reasonable fear screenings under 8 CFR 208.31, and noncitizens need to establish a reasonable probability that the bar does not apply in credible fear screenings conducted under 8 CFR 208.35. The screening standards themselves ensure a fair process in that the noncitizen need only meet the significant possibility, reasonable possibility, or reasonable probability standard in order to pass through the screening process. These standards, which are either lower or the same as the standards that apply in full adjudications of asylum and statutory withholding of removal requests, do not require the presentation of the same extent of evidence that would be needed in a full merits hearing or interview. Furthermore, this rule does not create a complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility. Rather, AOs will only consider a bar in those cases where there is easily verifiable (as opposed to unverified or difficult-to-verify) evidence available to the AO that, in their discretion, warrants an inquiry into a bar, and the AO can consider that bar efficiently at the screening stage. AOs are trained to elicit all relevant testimony in a non-adversarial manner¹⁸ to ensure noncitizens have a fair opportunity to provide any evidence necessary to evaluate their claim, which under this rule may include the applicability of any bars or the availability of any exceptions or exemptions.

DHS rejects the notion that it is categorically more difficult for a noncitizen to discuss issues surrounding mandatory bars than it is to discuss other issues that are already the subject of screening interviews. AOs are trained to work with noncitizens who are experiencing the effects of trauma and to communicate across cultural and linguistic barriers.¹⁹ AOs routinely interview noncitizens in protection

screening interviews on matters that many find challenging to discuss, including torture, sexual assault, familial violence, and the deaths of family members.

The permissive nature of the rule is also well-tailored to a situation where the noncitizen is unable to testify in depth due to the effects of trauma, or a situation where the noncitizen may be better able to provide evidence that a mandatory bar does not apply to them in a full hearing. As explained in the proposed rule, AOs should only apply a mandatory bar in a screening interview where there is “easily verifiable information” that the bar may apply, and even then, to only do so if the inquiry can be done efficiently. 89 FR at 41354. Should the AO determine that the issue would be better considered at a later stage, they retain the discretion under this proposed rule to decline to consider mandatory bars during the screening determination.

Comment: Many commenters expressed concerns regarding the application of mandatory bars by AOs and officer discretion, emphasizing that the application of the bars is complex, and asserting that immigration judges—not AOs—should evaluate the complex legal issues associated with the application of the mandatory bars. Several commenters noted that bars to asylum and statutory withholding of removal can involve complex factual and legal inquiries, with some pointing out that DHS itself, in a prior rulemaking removing bars from consideration in credible fear screenings, concluded that such a “fact-intensive inquiry requiring complex legal analysis [] would be more appropriate in a full adjudication before an asylum officer or in section 240 proceedings with the availability of judicial review than in credible fear screenings.” 87 FR 18078, 18093 (Mar. 29, 2022) (“Asylum Processing IFR”). Commenters argued that DHS’s representation that AOs would consider bars only in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar and where the AO is confident that they can consider that bar efficiently is insufficient given the complexity of this area of the law.

Commenters stated that the bars could be applied incorrectly, arbitrarily, or unfairly, endangering individuals. Commenters also stated that the application of bars may be based on evidence from foreign entities, which U.S. immigration officials cannot independently verify and which may be inaccurate. Commenters stated that noncitizens in credible and reasonable

fear processes should be subject to the same rules and that individuals are entitled to a transparent, humane process. Commenters also stated that AOs could be more likely to issue negative determinations of credible fear as a result of the proposed rule, especially if they do not listen to a noncitizen fully or fairly.

A few commenters discussed officer bias or misconduct during the screening process. Commenters stated that, according to a complaint filed with the DHS Office for Civil Rights and Civil Liberties, AOs scheduled credible fear interviews without notifying the attorney of the interview; incorrectly applied standards when evaluating claims; used adversarial interview techniques on individuals; subjected noncitizens to interviews in languages in which they are not fluent; and failed to provide noncitizens with appropriate language interpreters. Commenters stated that there would be no mechanisms for upholding accountability under the proposed rule. Other commenters stated that the proposed rule would yield an asylum process that is less consistent and transparent, in part because of the discretion with which AOs would ask questions, and the lack of consistency and transparency would thwart efforts to monitor the process.

A commenter asserted that the rule would confuse the role of AOs during the screening process with that of a final adjudicator. According to the commenter, although the proposed rule may purport to avoid adverse outcomes by making the application of the bars at the fear screening stage discretionary instead of mandatory, the distinction would be negligible.

Response: The Department disagrees with the claim that only immigration judges, not both immigration judges and AOs, should evaluate or apply the mandatory bars. DHS also rejects the notion that the consideration of mandatory bars is categorically more complex than the consideration of the full array of issues that AOs address on a routine basis. AOs regularly assess the mandatory bars in affirmative asylum adjudications and asylum merits interviews (AMIs); therefore, it is not unusual for AOs to consider these issues.²⁰

The Department also rejects the assertion that the rule should not be implemented due to potential officer bias or misconduct in the interview and

¹⁸ See USCIS, “RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony” (Dec. 20, 2019).

¹⁹ See USCIS, “RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview” (Apr. 24, 2024); USCIS, “RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma” (Apr. 24, 2024).

²⁰ As noted in the NPRM, see 89 FR at 41353 n.30, DHS has long applied in the expedited removal process the “safe-third-country” bar to eligibility to apply for asylum at INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). See 8 CFR 208.30(e)(6).

lack of accountability through the process. AOs are capable of conducting thorough screening interviews, applying the mandatory bars when applicable, and maintaining fairness throughout the process, as is required by their role.²¹ AOs are well trained in asylum law, and all credible fear and reasonable fear determinations are reviewed by a supervisory asylum officer (SAO) for accuracy and legal sufficiency.²² As explained above, AOs receive training in and have experience in non-adversarial interviewing and eliciting testimony, in addition to substantive training on applying mandatory bars and experience applying mandatory bars in full asylum adjudications.²³

The Department also rejects the claim that this new process will confuse the role of the AO with a final adjudicator. At the start of the screening interview, the AO will introduce themselves and explain the interview process so as to avoid confusion about roles or procedures. Noncitizens are also provided with an information sheet on the credible or reasonable fear process that explains the purpose and nature of the screening interview, including possible outcomes and what to expect following the interview. In addition, making a determination regarding a mandatory bar, when considered, does not make an AO any more or less of a final adjudicator than making a determination regarding substantive eligibility, as is currently done and is unaffected by this rule.

Furthermore, the Department disagrees with the claims that, as a

result of the complexity of analyzing the mandatory bars, AOs may apply the bars incorrectly or unfairly. Considering the training and experience AOs possess, they are well-suited to exercise discretion to apply mandatory bars in the screening context and, where evidence related to a mandatory bar is too complex to be fully explored in the screening context, to exercise their discretion not to apply the bar in the screening determination. AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or any available exception or exemption is limited.

DHS acknowledges that properly analyzing bars to asylum and statutory withholding of removal can involve complicated, extensive factfinding and legal analysis. Furthermore, some aspects of this area of law remain unsettled, and different courts have come to different conclusions on certain legal questions related to these bars. USCIS Asylum Officers must follow precedent Board of Immigration Appeals (BIA) and Attorney General decisions, except when they have been modified or overruled by subsequent decisions of the BIA or the Attorney General, or there is a conflicting published opinion on the issue by the U.S. Supreme Court or by the U.S. Court of Appeals with jurisdiction over the matter.²⁴ It is not the case that the considerations relating to legal analysis hold true in every case in which a mandatory bar arises. For example, a noncitizen who claims to fear persecution by the government of Colombia on account of political opinion, but who credibly testifies to being a current member of the Revolutionary Armed Forces of Colombia—People's Army, would clearly be barred from both asylum and withholding of removal pursuant to INA sec. 208(b)(2)(A)(v), 8 U.S.C. 1158(b)(2)(A)(v) and INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), as a current member of a designated foreign terrorist organization,²⁵ regardless of whether the noncitizen could demonstrate they are a refugee or would be persecuted on account of a protected ground if returned to Colombia. DHS disagrees that AOs should be

categorically foreclosed from determining there is no significant possibility or reasonable possibility such an individual could establish eligibility for these forms of relief or protection in a full merits hearing. This rule allows, but does not require, an AO encountering such a scenario to consider the applicable bar in a fear screening and to enter a negative determination with regard to the noncitizen's eligibility for asylum or statutory withholding of removal, preventing the noncitizen from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible and allowing DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases.

Comment: Many commenters expressed concerns with AOs considering mandatory bars during the fear screening stage, instead of immigration judges during section 240 removal proceedings. Commenters stated that applying mandatory bars at the credible fear screening stage would preclude individuals from a full hearing that would provide them the opportunity to prepare their cases, present witnesses and evidence, and allow a court to determine the true nature of foreign convictions, which are often a part of the persecution that the noncitizen experienced in their home country for voicing dissent against an authoritarian government. Commenters stated these decisions should be made by immigration judges and that individuals should be able to appear before an immigration judge or have a fair hearing, be it at the onset of seeking status in the United States or when trying to overturn an order of removal. Commenters asserted that eliminating hearings at an earlier stage would deny noncitizens who have strong or pressing cases and that the proposed rule would increase negative determinations in credible fear and expedited removals.

Several commenters additionally discussed the accuracy of negative credible fear determinations, stating that negative credible fear determinations are often dismissed or reversed after review by an immigration judge. A commenter referenced multiple examples when courts have questioned the reliability and value afforded to credible fear interviews, reasoning that rulings or removal orders have been overturned in part because of unreliable information elicited during the interviews. According to the commenter, the proposed rule would restrict asylum by placing even greater value on screenings that are already

²¹ See USCIS, "RAIO Directorate—Officer Training: Mandatory Bars" (May 9, 2013); USCIS, "RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview" (Apr. 24, 2024).

²² See 8 CFR 208.30(e)(8); see also Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

²³ See USCIS, "RAIO Directorate—Officer Training: Mandatory Bars" (May 9, 2013); USCIS, "RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma" (Apr. 24, 2024).

²⁴ See 8 CFR 103.10(b), 1003.1(g); see also USCIS, "RAIO Directorate—Officer Training: Reading and Using Case Law" 14 (April 24, 2024).

²⁵ See INA secs. 212(a)(3)(B)(i)(V), 237(a)(4)(B), 8 U.S.C. 1182(a)(3)(B)(i)(V), 1227(a)(4)(B); see also 86 FR 68294 (Dec. 1, 2021).

unreliable, and the bars would be applied without the safeguards afforded by section 240 removal proceedings. The commenter further stated that both the Biden and Trump administrations have distanced credible fear interviews from the low screening standard framed by Congress.

Response: The Department disagrees with the claim that the mandatory bars should only be considered during section 240 removal proceedings before an immigration judge. As discussed above, AOs receive training in and have experience in non-adversarial interviewing and eliciting testimony, in addition to substantive training on applying mandatory bars and experience applying mandatory bars in full asylum adjudications.²⁶

In addition, the Department disagrees that applying the bars earlier would preclude noncitizens from fully presenting their case compared to if the bars were only applied in a subsequent section 240 removal proceeding. Where evidence related to a mandatory bar is too complex to be fully explored in the screening context or where there is additional evidence that the noncitizen may not be subject to the bar because of an exception or exemption, AOs may exercise their discretion not to apply the mandatory bar in the screening determination. In those cases, if the noncitizen establishes a fear of persecution or torture at the applicable standard, the AO will issue a positive determination so that the bar may be further explored by the immigration judge. Where there is evidence available to the AO that triggers an inquiry into an applicable mandatory bar, and the AO determines that they can address that bar efficiently at the credible fear or reasonable fear interview, then the AO will give the noncitizen the opportunity to establish, at the relevant standard, that the bar would not apply. The Department believes this discretion will ensure that application of the mandatory bars in fear screenings only occurs in cases where USCIS can effectively and accurately apply the bar without creating inefficiencies or frustrating the streamlined nature of the

screening process. This rule will allow AOs to, in their discretion, consider bars in the issuance of negative fear determinations only in certain cases where there is sufficient, easily verifiable evidence that a bar applies to a noncitizen, there is a lack of evidence that no bar applies or shall be applied, and the noncitizen is not otherwise able to establish a positive fear of torture at the applicable standard.

Finally, the Department disagrees with comments that question the accuracy and reliability of the screening interviews and determinations and the claim that this rule will restrict asylum. AOs are trained to conduct thorough, fair, and non-adversarial interviews, and AOs play an integral role in the credible fear and reasonable fear screening process. Regarding immigration judge review of AOs' credible fear or reasonable fear determinations, DHS notes that immigration judges have the authority to conduct de novo review of negative credible fear and reasonable fear determinations. 8 CFR 1003.42; 8 CFR 1208.31(g). Otherwise, the procedures for immigration judge decisions vacating screening determinations are outside the scope of this rulemaking.

Comment: Several commenters objected to the proposed rule on the basis that the rule would curtail the avenues for review of application of the mandatory bars. While the noncitizen would be able to seek review of an AO's negative determination by an immigration judge, they would not be able to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA) or the Federal Court system. Commenters also stated the rule forecloses judicial review.

Commenters wrote that the rule's provisions for immigration judge review provide insufficient protections against erroneous negative screening determinations and raise due process concerns. One commenter indicated immigration judges, who frequently do not cite any law in their fear review denials, do not have time to devote to in-depth analysis with an additional layer of complexity added to hearings. A commenter stated that AOs' credible fear determinations would be reversed more frequently if immigration judge review included basic due process protections, such as access to counsel. Another stated noncitizens might not know that immigration judge review of negative fear determination is available unless an AO tells them.

Response: Negative screening determinations of all types are subject to review by an immigration judge. See 8 CFR 208.30(g)(1), 208.31(g),

208.33(b)(2), 208.35(b)(2). Should an immigration judge make a negative credible fear determination, no appeal of that determination is available. See 8 CFR 1003.42(f)(2), 8 CFR 1208.31(g)(1). Nothing in the proposed rule alters these procedures, although the rule would allow AOs to base a negative determination on the application of a mandatory bar.

The comments that the rule forecloses review of negative determinations are incorrect, as the regulations establish procedures for referring negative determinations for review by an immigration judge. Noncitizens are provided written notification of their right to request an immigration judge's review of the AO's credible fear determination. 8 CFR 235.3(b)(4)(i)(C). Where a noncitizen is issued a negative credible fear determination, they are served by asylum office staff with one of the following forms: Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (where the negative credible fear determination is issued pursuant to 208.30); Form I-869B, Record of Negative Credible Fear and Reasonable Possibility Finding and Request for Review by Immigration Judge for Noncitizens Subject to the Condition on Asylum Eligibility Pursuant to 8 CFR 208.33(a); or Form I-869SB, Record of Negative Credible Fear and Reasonable Probability Finding and Request for Review by Immigration Judge for Noncitizens Subject to the Limitation on Asylum Eligibility Pursuant to 8 CFR 208.35(a). In all negative determinations, the form is read to the noncitizen aloud at service of the decision in a language they understand (via an interpreter if necessary) and includes an explanation of the noncitizen's right to request immigration judge review of the negative determination, pursuant to 8 CFR 208.30(g)(1), 208.33(b)(2)(iii), or 208.35(b)(2)(iii).²⁷ The noncitizen selects on the Form I-869, Form I-869B, or Form I-869SB, whether they request immigration judge review of the negative determination and signs the form, which also includes the signature of the interpreter, where applicable (or where the interpretation was via a USCIS telephonic contract interpreter, the interpreter ID number is recorded).²⁸

²⁷ See Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

²⁸ See Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division*

²⁶ See USCIS, "RAIO Directorate—Officer Training: Mandatory Bars" (May 9, 2013); USCIS, "RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma" (Apr. 24, 2024).

An immigration officer who refers a noncitizen subject to expedited removal to an AO for a credible fear interview will provide the noncitizen with a written disclosure describing, among other things, the right to request a review by an immigration judge of the AO's credible fear determination. 8 CFR 235.3(b)(4)(i).

Where a noncitizen is issued a negative reasonable fear determination, they are served by asylum office staff with a Form I-898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, which is read to them aloud in a language they understand (via an interpreter if necessary) and includes an explanation of the noncitizen's right to request immigration judge review of the negative determination, pursuant to 8 CFR 208.31(f)–(g). The noncitizen selects on the Form I-898 whether they request immigration judge review and signs the form, which also includes the signature of the interpreter, where applicable (or where the interpretation was via a USCIS telephonic contract interpreter, the interpreter ID number is recorded).²⁹

DHS disagrees with the commenters stating that the rule's provisions for immigration judge review are inadequate to ensure that sufficient procedural safeguards are provided or protect against erroneous screening determinations. Immigration judges are familiar with applying bars to asylum and statutory withholding of removal, as well as the applicable standards of proof involved in both fear screenings and full merits adjudications of asylum, statutory withholding of removal, and protection under the CAT.³⁰ As discussed above, multiple provisions in title 8 of the Code of Federal Regulations provide notice of the right to access counsel.³¹

Furthermore, review of negative credible fear determinations is limited under INA sec. 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C), to the review by an immigration judge previously described, so DHS has no authority to create additional mechanisms for a noncitizen to appeal a credible fear determination made during the expedited removal process pursuant to INA sec. 235(b), 8

U.S.C. 1225(b).³² DHS acknowledges that, before this rule, mandatory bars were only applied during a full adjudication of the noncitizen's application for asylum or withholding of removal, and any such decision on a bar was subject to review by both the BIA and the relevant Federal court. See 8 CFR 1003.1(b)(3), INA sec. 242, 8 U.S.C. 1252. Under this rule, however, noncitizens who receive negative credible fear determinations solely because of the applicability of a bar and who have those determinations affirmed by an immigration judge will be removed. However, as discussed elsewhere in this preamble, the Department considers the safeguards in place sufficient to ensure against erroneous removals, and the benefits of allowing DHS and EOIR resources that would have been expended on potentially years-long immigration court processes involving noncitizens pursuing relief for which they are ineligible to be conserved for potentially meritorious cases outweigh the loss to this small population of noncitizens of these additional avenues for appeal or review.

As mentioned above, DHS rejects the suggestion in these comments that determinations based on mandatory bars are categorically more complex as a factual or legal matter than other issues routinely decided in screening interviews and subject to these same review provisions.

Comment: Commenters stated that noncitizens would be denied protections at the border and could be unjustly removed; lack of transparency would leave no way to assess whether the process would lead to erroneous removals; and an expedited removal process would rush individuals through credible fear interviews that unfairly require individuals to disclose personal information about fear or trauma to officials and without the presence of an attorney. In line with the above remarks, a commenter encouraged DHS to retain current due process protections to prevent the erroneous return of people to countries where their lives would be threatened.

Response: The Department acknowledges the concern relating to the possibility for erroneous removals but assesses the possibility to be rare. AOs are trained in asylum law and are well-suited to apply mandatory bars in the screening context in their discretion and, where evidence related to a mandatory bar is limited or unavailable, or analysis would be too complex to be fully explored in the screening context,

to exercise their discretion not to apply the bar in the screening determination. AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the mandatory bar or available exceptions or exemptions is limited. Retaining this discretion will safeguard against erroneous applications of the mandatory bars. In addition to substantive training on analyzing mandatory bars, AOs are trained to conduct non-adversarial interviews, to elicit testimony, and to work with interpreters.³³ The Department also rejects the assertion that noncitizens will be unfairly required to disclose trauma and will not have access to counsel. AOs are trained to work with noncitizens who are experiencing the effects of trauma and to communicate across cultural and linguistic barriers.³⁴ AOs routinely interview noncitizens during protection screening interviews involving sensitive matters that many may find challenging to discuss, including torture, sexual assault, familial violence, and the deaths of family members. Additionally, noncitizens in the credible and reasonable fear processes may be represented by an attorney at no cost to the government. 8 CFR 208.30(d)(4), 8 CFR 208.31(c). Finally, noncitizens in credible fear may consult with persons of their choosing. 8 CFR 208.30(d)(4).

By their nature, the application of the mandatory bars may result in the possible removal of noncitizens to countries where they fear harm. This is consistent with both domestic law and international standards identified in section II of this preamble. DHS also notes that nothing in the rule would affect protections available to noncitizens under regulations implementing U.S. obligations under Article 3 of the CAT.

Comment: Commenters asserted that language access issues in general, and particularly for speakers of rare or indigenous languages, impede

Training, Staffing, Capacity, and Credible Fear Procedures (Sept. 26, 2024).

²⁹ See USCIS, "Reasonable Fear Procedures Manual," Section III, <https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf>.

³⁰ See 8 CFR 1208.13(c); 1208.16(b); 1208.16(c); 1208.16(d)(2); 1208.30(c)(2); 1208.30(g)(2); 1208.31(c); and 1208.31(g).

³¹ See, e.g., 8 CFR 1240.10(a)(1)–(2), 1240.11(c)(1)(iii), 1240.17(f)(1), 1240.32(a), 1240.48(a).

³² INA sec. 242(a)(2)(A), 8 U.S.C. 1252(a)(2)(A).

³³ See USCIS, "RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma" (Apr. 24, 2024).

³⁴ See USCIS, "RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma" (Apr. 24, 2024).

noncitizens' ability to demonstrate a bar does not apply to them.

Response: 8 CFR 208.30(d)(5) requires AOs to provide for the assistance of an interpreter in credible fear interviews where the noncitizen is unable to effectively proceed in English and the AO is unable to proceed competently in a language the noncitizen speaks and understands. 8 CFR 208.31(c) imposes the same requirement for reasonable fear interviews. Furthermore, USCIS has developed a language access plan to ensure that limited English proficient individuals have meaningful access to the agency's services and information.³⁵ USCIS has also issued guidance to AOs on providing language access in credible fear interviews.³⁶ This guidance provides for situations where the AO is unable to communicate with the noncitizen because their preferred language is not serviced by an asylum interpreter contract and, if applicable, the noncitizen does not agree to proceed with the credible fear interview in another language for which the AO confirms understanding. In such a situation, the Asylum Office issues a Form I-862, Notice to Appear (NTA), and refers the noncitizen to removal proceedings without making a credible fear determination in such situations. DHS is confident these measures are sufficient to ensure limited English proficient noncitizens, including speakers of rare and indigenous languages, are able to effectively understand the screening process and participate in credible fear and reasonable interviews, including addressing the applicability of any bars. Furthermore, DHS notes that limitations in communicating in English or with an interpreter in a language other than the noncitizen's preferred language would weigh against an AO exercising discretion to consider the bars, since they could limit testimony and impede efficiency.

c. Impacts on Specific Vulnerable Populations

Comment: Some commenters expressed opposition to the proposed rule, stating that it would increase the odds that people would have to return to countries where their political beliefs, sexual orientation or gender identity are under threat. A commenter urged the

Department to not make the process more difficult for women who are fleeing from the abuse of a partner. Another commenter said that the proposed rule could make it more difficult for those seeking to flee authoritarian governments and countries where they face marginalization and persecution. A commenter stated that their clients include indigent, black, brown, indigenous, and LGBTQI+ (lesbian, gay, bisexual, transgender, queer, and intersex) noncitizens who often have no other avenue to seek safety than to come to the United States. The commenter stated that the rule depends on the discretion of AOs to decide when to apply mandatory bars to asylum eligibility during screenings, which would disproportionately penalize some noncitizens based on their race, nationality, religion, LGBTQI+ identity, or disability status because those who have been criminalized for these statuses could be barred from asylum.

Response: The Department disagrees with the commenters' claims regarding the Final Rule's impact on particularly vulnerable individuals. Under this rule, AOs will have the flexibility in screenings to apply mandatory bars that relate to an individual's participation in the persecution of others, or national security, criminal, or other public safety concerns. The Department does not believe that this rule would penalize any of the vulnerable populations commenters identified. AOs are trained to elicit testimony in a non-adversarial and sensitive manner and to work with vulnerable populations.³⁷ AOs are also trained to apply the mandatory bars and analyze available evidence, including the circumstances surrounding arrests and criminal records outside the United States, which may, in certain instances, demonstrate a pretextual or discriminatory intent by a foreign government.³⁸ Indeed, AOs regularly analyze mandatory bars, including criminal bars, in asylum adjudications and are experienced in evaluating context related to arrests, criminal charges, and foreign convictions, which, in some circumstances, may be evidence that an individual has suffered

persecution, rather than evidence of a mandatory bar.³⁹ Accordingly, considering the training and experience AOs possess, they are well-suited to apply mandatory bars in the screening context in their discretion and, where evidence related to a mandatory bar is too limited or unavailable, or the analysis of the bar would be too complex to be fully explored in the screening context, to exercise their discretion not to apply the bar in the screening determination.

AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or available exceptions or exemptions is limited. By preserving AO discretion in the application of the mandatory bars, the rule will protect vulnerable noncitizens who may have complicated evidentiary and legal issues involving a mandatory bar.

d. Other/General Negative Impacts on Noncitizens and Their Support Systems

Comment: Many commenters expressed concerns about the hardships noncitizens face in their home countries, on the journey to the United States, and throughout the immigration process. A commenter stated that the proposed rule does not serve long-term migrants who are waiting on a resolution for their cases, or new migrants who deserve to be treated with fairness. A commenter believes that the number of migrants attempting to enter the United States is the "result of global political and climate crises," and that solutions should be targeted towards those issues. Further, the commenter stated that the proposed rule would increase the suffering of noncitizens, while not addressing the underlying problems that drive migration. Another commenter discussed the need to ensure that noncitizens with similar claims would not experience different outcomes based on the constraints of government resources. A nonprofit organization opposed the rule because it would impose additional burdens on their resources. Finally, several commenters expressed the importance of access to asylum for vulnerable noncitizens.

Response: The Department acknowledges the commenters' concerns for noncitizens who may be fleeing harm in their home countries or otherwise face hardships. To that end, the U.S. government has implemented,

³⁵ See USCIS "Language Access Plan," <https://www.dhs.gov/sites/default/files/publications/uscisc-updated-language-access-plan-2020.pdf> (last visited Aug. 5, 2024).

³⁶ USCIS, Memorandum from Acting Asylum Division Chief Ashley Caudill-Mirillo to Asylum Division Staff: Language Access in Credible Fear Screenings (July 6, 2022), <https://www.uscis.gov/sites/default/files/document/memos/Language-Access-in-Credible-Fear-Screenings.pdf>.

³⁷ See USCIS, "RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony" (Apr. 24, 2024).

³⁸ See USCIS, "RAIO Directorate—Officer Training: Mandatory Bars" (May 9, 2013); USCIS, "RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution" (Apr. 24, 2024).

³⁹ See *id.*

a number of measures designed to enhance and expand lawful pathways and processes for noncitizens seeking to enter the United States, including to seek asylum or other protection. Examples of lawful pathways include: the Uniting for Ukraine process, which allows Ukrainian nationals to receive humanitarian parole into the United States, enabling them to travel by air to the United States; the Safe Mobility initiative;⁴⁰ the new CHNV processes;⁴¹ and country-specific family reunification parole processes.⁴² DHS and its interagency partners have also increased H-2B nonimmigrant visa availability⁴³ and refugee processing for Western Hemisphere countries.⁴⁴ Noncitizens who are not eligible for these pathways can schedule an appointment to present themselves at a southwest land border port of entry through the CBP One app.⁴⁵ The Department agrees with the comment that we must address the underlying drivers of migration. For example, the *U.S. Strategy for Addressing the Root Causes of Migration in Central America*, directed by the President in Executive Order 14010, 86 FR 8267 (Feb. 5, 2021), focuses on a coordinated, place-based approach to improve the underlying causes that push Central Americans to migrate, and it takes into account, as appropriate, the views of bilateral, multilateral, and private sector partners, as well as civil society.⁴⁶ The strategy

includes addressing economic, governance, and security challenges through five pillars: (1) addressing economic insecurity and inequality; (2) combating corruption and strengthening democratic governance; (3) promoting human rights and labor rights; (4) countering and preventing violence; and (5) combating sexual and gender-based violence.⁴⁷ In March 2024, the White House announced that the Administration is on track to meet its commitment in the root causes strategy to provide \$4 billion to the region over four years.⁴⁸

The Department disagrees with the comment that the rule will increase suffering of noncitizens and negatively impact both new and long-term noncitizens waiting on case resolutions. Instead, the Department believes the rule will increase efficiencies for noncitizens and decrease the time noncitizens must wait for a final decision on their protection claim, including those who may be in detention. Noncitizens who are subject to a bar but would nevertheless receive a positive fear determination absent this rule may, under this rule, be more swiftly removed instead of being detained throughout their removal proceedings, and therefore spend less time in detention. The Department is committed to conducting screening interviews with fairness, and AOs are trained to review each case on its own merits, even when there are similarities between claims.

DHS acknowledges the comment regarding burden on nonprofit resources and has included a description of impacts of the Final Rule in Section V.B. of this preamble. This rule does not directly regulate any organizations, and consistent with longstanding case law, a regulatory flexibility analysis is not required when a rule has only indirect effects on small entities, rather than directly regulating those entities. *See, e.g., Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985).

e. Negative or Minimal Impacts on Immigration System and Government Operations and Resources

Comment: Many commenters expressed concerns that considering mandatory bars during the fear

screening stage would introduce complexities, inconsistencies, and inefficiencies in the fear screening process, and the asylum system needs fair and comprehensive reform. One commenter stated that the proposed rule would make the asylum process more complicated for noncitizens and AOs, while also putting noncitizens in danger. One commenter expressed concerns that applying bars during fear interviews could slow down the fear screening process and become arduous for AOs to consider. One commenter expressed concerns that AOs may not be able to make these decisions with clarity, empathy, or fairness, while also potentially causing officers psychological distress.

In line with the above remarks, a commenter stated that the proposed rule would not increase efficiency because a small number of people would be impacted, and that given this small numeric impact, the Department should weigh the adverse fairness implications that the proposed rule would impose on the few cases where the mandatory bars are applied. In addition, they wrote that AOs face pressure to make findings with limited resources, which would leave doubt that the rule would increase efficiency. The same commenter further stated that the consideration of the bars, a step not systematically taken in the credible fear process, requires extensive factual development and legal analysis that would lengthen credible fear and reasonable fear interviews, thereby undermining the purported efficiency goals of the proposed rule. Citing an interview with a representative for USCIS AOs, the commenter raised concerns with the proposed rule's impact on the agency's limited time and resources for conducting fear interviews. The commenter warned that if the proposed rule were finalized, the application of complex mandatory bars at the screening stage would drain more time and resources from already strained AOs.

Response: The Department disagrees with the commenters' concerns that consideration of the mandatory bars would be inefficient due to time and resource constraints and that AOs would have difficulty making decisions with clarity and fairness. As noted by commenters, the Department expects only a small percentage of screening cases to be impacted by the mandatory bars; therefore, the length of interviews would not increase across all credible and reasonable fear interviews. The Department also believes that while a small number of people would be impacted by this rule, those individuals would be enforcement priorities because

⁴⁰ U.S. Dep't of State, Safe Mobility Initiative, <https://www.state.gov/refugeeadmissions/safe-mobility-initiative> (last visited Aug. 23, 2024); The White House, Fact Sheet: Biden-Harris Administration on World Refugee Day Celebrates a Rebuilt U.S. Refugee Admissions Program, June 20, 2024, <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/20/fact-sheet-biden-harris-administration-on-world-refugee-day-celebrates-a-rebuilt-u-s-refugee-admissions-program/> (last visited Aug. 29, 2024).

⁴¹ *See* U.S. Citizenship and Immigration Services, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, <https://www.uscis.gov/CHNV> (last visited Sept. 25, 2024).

⁴² *See* U.S. Citizenship and Immigration Services, Family Reunification Parole Processes, <https://www.uscis.gov/FRP> (last visited Aug. 23, 2024).

⁴³ 88 FR 80394 (Nov. 17, 2023).

⁴⁴ *See* Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2024, Presidential Determination No. 2023–13 (Sept. 29, 2023) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during Fiscal Year (FY) 2024); Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2025, Presidential Determination No. 2024–13 (Sept. 30, 2024) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during FY 2025).

⁴⁵ *See* CBP, “CBP One™ Mobile Application,” <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last visited Aug. 14, 2024).

⁴⁶ Nat'l Sec. Council, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* at

4 (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

⁴⁷ The White House, Fact Sheet: Update on the *U.S. Strategy for Addressing the Root Causes of Migration in Central America* (Mar. 25, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/25/fact-sheet-update-on-the-u-s-strategy-for-addressing-the-root-causes-of-migration-in-central-america-3/>.

⁴⁸ *Id.*

of national security and public safety concerns.⁴⁹ Safeguarding national security is one of the Department's highest priorities, and this rule will allow the Department to efficiently identify and remove noncitizens who are found subject to one of the outlined mandatory bars without subjecting them to lengthy proceedings. AOs interview noncitizens with complex cases on a regular basis and are trained in interviewing noncitizens in credible fear and reasonable fear screenings, as well as in interviewing affirmative asylum applicants.⁵⁰ AOs are capable of conducting thorough screening interviews, applying the mandatory bars when applicable, and maintaining fairness throughout the process, as is required by their roles.

Comment: Commenters suggested that DHS look elsewhere to improve the immigration system, such as employing and training more immigration officers, or focusing on adjudicating pending cases in the backlog instead of imposing additional burdens on officers who are performing fear screenings. One commenter stated that backlogs at USCIS and the Executive Office for Immigration Review (EOIR) would make the successful implementation of this rule difficult, and it is unclear where the resources would come from to execute the proposed rule fairly. A few other commenters stated that resources should be spent creating accessible pathways to citizenship and policies that reduce poverty and violence in the countries from which noncitizens are fleeing.

Response: The Department continues to expand its workforce to meet different priorities and believes that resources can be, and are being, allocated to both reducing the backlog and increasing efficiencies in the credible and reasonable fear processes.⁵¹ While the Department

appreciates the resource allocation suggestions made by some commenters and would direct those commenters to E.O. 14010,⁵² which aims to address root causes of migration and create a strategy for managing migration, and E.O. 14012,⁵³ which aims to identify and eliminate barriers to immigration access and improve the naturalization process, the Department also notes that these suggestions are outside the scope of this rule. Finally, the comment suggesting increased immigration judge hiring and training is outside the scope of this rule.

Comment: Several commenters expressed concern that the proposed rule could exacerbate the existing inequities in asylum processing, which they stated served neither noncitizens nor the U.S. government's need to manage the border. One commenter stated that the mandatory bars are very complex and that in a screening interview where the noncitizen is unlikely to have legal representation, applying those bars will lead to inconsistent and erroneous outcomes. Commenters indicated the rule leaves excessive discretion to AOs to determine whether to consider bars to asylum and withholding of removal in credible fear and reasonable fear screenings, which would lead to inconsistent results and undermine the efficiency of screenings. Commenters predicted the discretion the rule accords to AOs to consider bars in fear screenings will lead to discrimination and inequity, including profiling on the basis of race, religion, or nationality.

Response: The Department disagrees with the comment that the rule will exacerbate inequities in the asylum system and does not serve border management needs. The commenters did not explain what they were referring to as existing inequities in asylum processing. The Department has outlined its commitment to increase access and equity in the immigration process in the DHS Equity Action Plan.⁵⁴ The Department also disagrees that the rule does not serve noncitizens or the U.S. government's border management needs. The rule will allow DHS to quickly screen out certain non-meritorious claims and remove those noncitizens who pose a national security or public safety threat more expeditiously. This serves both

government and noncitizen needs, as it safeguards national security while allowing the Department to use resources more efficiently. Applying the mandatory bars earlier in the process means that the Department can more effectively use its resources to adjudicate other cases in a more expedient manner.

The Department disagrees that application of the mandatory bars during the screening process will lead to erroneous and inconsistent decisions. AOs are trained to analyze and apply the mandatory bars in affirmative asylum cases; therefore, they are well-suited to exercise discretion to apply mandatory bars in the screening context. If evidence related to a mandatory bar is too complex to be fully explored in the screening context, the rule will allow AOs to exercise their discretion not to apply the bar in the screening determination. In those cases, AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or any available exception or exemption is limited.

DHS disagrees that providing discretion to AOs to consider bars in fear screenings will lead to inconsistent or inequitable results. AOs already receive standardized training on how to apply the bars to asylum in full adjudications. The five bars to statutory withholding of removal that could be considered under this rule generally correspond to five of the six mandatory bars to asylum. *See* INA secs. 208(b)(2)(A)(i)–(v), 241(b)(3)(B)(i)–(iv) and (b)(3)(B), 8 U.S.C. 1158(b)(2)(A)(i)–(v), 1231(b)(2)(B)(i)–(iv) and (b)(3)(B). Therefore, AOs understand the types of evidence that would indicate the potential applicability of these bars to both forms of relief. AOs are also trained, in cases where there is evidence a bar may apply, to note the possible applicability of the bar in the credible fear or reasonable fear determination.⁵⁵ Such training helps to ensure consistent application of AO discretion in determining whether to consider bars in fear screenings.

DHS also disagrees that providing AOs discretion to consider bars will

⁴⁹ Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law 3–4* (Sept. 30, 2021).

⁵⁰ *See* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

⁵¹ *See, e.g.,* DHS, "Statement from Secretary Mayorkas on the Recognition of DHS Advancement on Partnership for Public Service List of 'Best Places to Work'" (May 20, 2024) ("Secretary Mayorkas helped to secure the first increase in Border Patrol staffing in over a decade with 300 additional Agents added in Fiscal Year 2023, and another 1,400 added in Fiscal Year 2024."), <https://www.dhs.gov/news/2024/05/20/statement-secretary-mayorkas-recognition-dhs-advancement-partnership-public-service> (last visited Aug. 15, 2024); USCIS, "Talking Points, Asylum National Engagement; March 6, 2024," <https://www.uscis.gov/sites/default/files/document/>

outreach-engagements/Asylum-National-Engagement-talking-points-3-6-24.pdf (last visited Aug. 15, 2024).

⁵² E.O. 14010, 86 FR 8267 (Feb. 5, 2021).

⁵³ E.O. 14012, 86 FR 8277 (Feb. 5, 2021).

⁵⁴ *See* DHS, "DHS Equity Action Plan," <https://www.dhs.gov/publication/equity> (last visited Aug. 15, 2024).

⁵⁵ *See* USCIS, *RAIO Directorate—Officer Training: Credible Fear of Persecution and Torture Determinations* (May 9, 2024); USCIS, *RAIO Directorate—Officer Training: Reasonable Fear of Persecution and Torture Determinations* (Feb. 13, 2017); *see also* Credible Fear Procedures Manual (CFPM), Section III.E.7; Reasonable Fear Procedures Manual (RFPM), Section III.F.

undermine the efficiency of screenings. It is precisely this concern for efficiency that, in part, motivates the Department's decision not to require AOs to consider bars in every screening conducted, but rather permit them to do so in those cases where there is easily verifiable evidence available to the AO that, in their discretion, warrants an inquiry into a bar, and the AO can consider that bar efficiently.

DHS further disagrees that providing AOs this discretion will lead to discrimination and profiling on the basis of race, religion, or nationality. Such discrimination is not only unlawful and against USCIS policy,⁵⁶ but contrary to the fundamental purpose of fear screenings, which exist to ensure the United States does not return eligible noncitizens to torture or to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Furthermore, AOs are trained to be neutral decisionmakers,⁵⁷ to conduct interviews in a non-adversarial manner, to not let personal biases interfere with their work, and to treat each individual who appears before them with courtesy, professionalism, and respect.⁵⁸

Comment: One commenter opposed the rule for doing too little to address the high level of border crossings, and address the asylum and immigration court pending caseload, describing it as too narrow in scope and containing numerous loopholes that would do little to stem what they described as the tide of asylum fraud that plagues the system.

Response: The rule is not intended to address high levels of border crossings, or primarily, to address backlogs in the immigration system. Neither is it intended to address fraud in the asylum system. While the Department does expect the rule to conserve some government resources that may be used on other cases, it does not expect that the rule will substantially decrease the pending caseload at the immigration courts or at USCIS.

f. Negative Impacts on the U.S. Economy and Workforce, U.S. Citizens, Public Health and Safety

Comment: Several commenters expressed opposition to the proposed rule, stating that it would raise

additional barriers to gaining asylum during a time when noncitizens could help strengthen the United States and increase government tax revenue. A commenter noted that immigrants help the economy. Another commenter added that there could be concerns with accommodating large numbers of noncitizens, but the pros outweigh the cons. Several commenters stated that the U.S. population and workforce is projected to decline, so the United States should be accepting noncitizens to help fill gaps in the workforce. Some commenters stated that noncitizens are often eager to rebuild their lives and contribute to their communities. Other commenters noted that noncitizens are resourceful, which is why we should welcome them. A commenter stated that because of the many hazards that noncitizens have faced, they will become strong model citizens.

Response: The Department agrees that immigrants contribute significantly to the U.S. economy and workforce. This rule does not curtail access to the immigration system for individuals who are eligible for protection or relief from removal. By allowing AOs to apply certain mandatory bars in screenings, the Department is working to ensure that individuals who will not ultimately be eligible for protection or relief from removal are not unnecessarily consuming U.S. Government resources during their pursuit of non-meritorious protection claims.

g. Other Opposition to the Rule

Comment: Several commenters remarked that this is the incorrect approach to dealing with the asylum system. Further, a commenter said that the current immigration policy is costly and traumatizing, especially to those who are vulnerable. Another commenter remarked that those seeking asylum should not be criminalized, since noncitizens seeking asylum are fleeing oppressive environments. A commenter urged the Department to withdraw the proposed rule in its entirety to instead adopt humane solutions to the humanitarian and operational challenges at the border. They offered several alternatives, such as increasing capacity at ports of entry; engaging civil society entities to provide respite services; improving communication and cooperation between civil society, State and local governments, and Federal agencies; ending detention and monitoring of asylum seekers; and providing legal representation and social services to asylum seekers. A few commenters expressed disappointment towards the Biden administration

because of the restrictiveness of the proposed rule.

Response: The Department disagrees with the commenters' claims and declines to adopt their suggestions, which are beyond the scope of this rulemaking in any event. With this rule, the Department is considering the application of mandatory bars at an earlier stage in the process. Concerning legal representation, the Department notes that during the credible and reasonable fear processes, noncitizens may be represented by an attorney at no cost to the government. Additionally, noncitizens in credible fear may consult with persons of their choosing. 8 CFR 208.30(d)(4). Noncitizens who are referred to USCIS for a credible fear or reasonable fear interview are provided with an information sheet related to the applicable screening interview process (e.g., M-444, Information About Credible Fear Interview; M-488, Information About Reasonable Fear Interview; Information About Credible Fear Interview Sheet (for credible fear cases referred to USCIS under the Securing the Border rule)), in addition to a list of free or low-cost legal service providers. Certain suggestions, including those to increase processing capacity at ports of entry, strengthening communication and cooperation between civil society, State and local governments, and Federal agencies, ending the detention and monitoring of asylum seekers, and providing legal and social services to newly arrived asylum seekers, are outside the scope of this rule.

Comment: One commenter opposed the proposed rule stating that a future "more overtly hostile anti-immigrant administration" could abuse the discretion that the rule allows AOs, such as if a future administration sought to expand the use of expedited removal across the country.

Response: The Department emphasizes that the NPRM and this rule allow AOs to exercise discretion to consider a mandatory bar during a fear screening interview. The discretion the rule provides is not unbounded. AOs should only expend resources considering mandatory bars where there is easily verifiable evidence that a bar may apply and where they determine that they can address the issue efficiently in the context of a screening interview.

Under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), DHS may remove certain noncitizens without a hearing before an immigration judge through expedited removal proceedings. The INA also grants the Secretary authority to apply expedited removal procedures

⁵⁶ See 42 U.S.C. 1983; see also USCIS, "USCIS Policy Manual," Vol. 1, Part A, Ch.9, Section (D)(1), <https://www.uscis.gov/policy-manual>.

⁵⁷ See USCIS, "RAIO Directorate—Training Module: Decision Making" (Apr. 4, 2024).

⁵⁸ See USCIS, RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024) and USCIS, RAIO Directorate—Training Module: Core Values and Guiding Principles for RAIO Employees (Apr. 24, 2024).

(by designation) to “any or all” noncitizens referred to in the statute as “certain other aliens.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). A noncitizen is within the class of “certain other aliens” if the noncitizen “has not been admitted or paroled into the United States, and . . . has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” INA 235(b)(1)(A)(iii)(II), 8 U.S.C. 1225(b)(1)(A)(iii)(II). Such designation “shall be in the sole and unreviewable discretion” of the Secretary and “may be modified at any time.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii).

In case of a hypothetical future policy choice to expand the use of expedited removal to additional contexts, DHS emphasizes that noncitizens found under this rule to lack a credible fear or reasonable fear of persecution due to the application of a mandatory bar would ultimately be ineligible for the underlying relief in a merits hearing if they were instead placed into immigration court proceedings directly through service of a Notice to Appear.

Moreover, the concerns about future administrations abusing their discretion by, for example, expanding expedited removal’s use across the country, are misplaced. The application of expedited removal is not geographically limited by statute. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1). Currently, the regulations implementing expedited removal allow for its use if a noncitizen has failed to establish they have been continuously present in the United States for at least two years prior to their date of inadmissibility, but there is no limit as to its nationwide use. 8 CFR 235.3(b)(ii).

Comment: One commenter faulted the proposed rule for allegedly seeking to deter asylum seekers from entering the United States.

Response: DHS rejects this characterization. The rule is not designed to deter noncitizens from seeking asylum. The rule simply is intended to provide flexibility to AOs to apply the covered mandatory bars where there is easily verifiable evidence so that, when possible, noncitizens who would otherwise ultimately be found ineligible for relief or protection after a lengthy immigration process may instead have their cases handled more efficiently. In addition, this flexibility allows DHS to more expeditiously remove some noncitizens who pose a

threat to the safety or security of the United States. As noted above, DHS has established numerous new pathways to facilitate the lawful entry of noncitizens into the United States, which enables noncitizens to more easily seek asylum or other immigration benefits in appropriate cases.

Comment: One commenter criticized the rule as a reinstatement of the “Asylum Ban” and characterized it as going against President Biden’s campaign promises.

Response: This rule is not equivalent to an “asylum” ban or any other sort of categorical ban. As discussed elsewhere in this preamble, this rule is intended to simply provide AOs with the discretionary authority to consider certain statutory bars to asylum and withholding of removal during fear screenings when doing so could increase efficiency. Individuals subject to these bars are already ineligible for asylum or withholding of removal as relevant, but, without the rule, the bars are only fully applied at a later stage in a noncitizen’s immigration proceedings.

C. Legal Authority and Background

1. DHS Legal Authority

Comment: Many commenters asserted that the proposed rule is in contravention of international and domestic law regarding refugee protection and non-refoulement. In support of this assertion, several commenters cited the 2003 Office of the U.N. High Commissioner for Refugees (UNHCR) Guidelines, which direct that exclusion clauses only be considered during regular refugee determinations proceedings and not during expedited proceedings. A commenter stated that the proposed provisions in the rule will create barriers to asylum and withholding of removal for asylum seekers and violates the 1967 Protocol Relating to the Status of Refugees.

Response: DHS disagrees with the assertion that the proposed rule is in contravention of applicable law. The INA provides mandatory bars to applying for asylum at section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2); to asylum eligibility at section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A); and to eligibility for withholding of removal at section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B) (referred to collectively as “mandatory bars”). Further, as explained above, Congress has conferred upon the Secretary express rulemaking power to create certain procedures for screening for and adjudicating asylum claims. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (b)(2)(C),

(d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1).

There are no bars to deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT. Prior to being granted asylum or statutory withholding of removal in the United States, noncitizens are required to show that the mandatory bars do not apply to them.

The relevant statutory provisions are silent as to the consideration of the mandatory bars during screening interviews. All relevant domestic legal provisions on this topic have taken the form of regulatory action. The former Immigration and Naturalization Service issued a rule in 2000 precluding, in response to comments, consideration of the asylum bars at the credible fear stage.⁵⁹ Additional regulatory action on this subject was taken in 2020 and 2022. *See* 85 FR 80274, 80278 (Dec. 11, 2020) (“Global Asylum Rule”); 87 FR at 18221–22. In none of these actions that precluded consideration of bars has the government concluded that considering mandatory bars at the screening stage would violate statutory provisions or other legal requirements. Instead, the basis of these rules, when it has been articulated, has focused primarily on efficiency of eliciting testimony related to and analyzing the mandatory bars at the screening stage. *See* 87 FR 18078, 18093 (Mar. 29, 2022). This rule is based on a judgment by DHS that, under certain limited circumstances, the consideration of the mandatory bars at the screening stage represents an appropriate expenditure of resources.

DHS notes that while international guidelines represent helpful interpretative guidance, they are not binding authority on DHS. As such, the 2003 UNHCR guidance⁶⁰ does not carry the force of law. The guidance raised by the commenters states that

it is essential that rigorous procedural safeguards are built into the exclusion determination procedures. Exclusion decisions should in principle be dealt with

⁵⁹ *See* 65 FR 76121, 76129 (Dec. 6, 2000) (“Asylum Procedures”) (codifying the statement in 8 CFR 208.30 that a noncitizen who appears to be subject to one or more of the mandatory bars would nevertheless be referred to section 240 removal proceedings for full consideration of their claim and explaining that this change was done in response to comments suggesting such a referral “regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act”).

⁶⁰ UNHCR, “Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (Sept. 4, 2003), <https://www.unhcr.org/us/media/guidelines-international-protection-no-5-application-exclusion-clauses-article-1f-1951>.

in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.⁶¹

We note that the guidance speaks generally (“in principle”) and is not a categorical prohibition against considering exclusion provisions in a screening interview. DHS screening procedures do contain “rigorous procedural safeguards,” including 100% supervisory review of all decisions⁶² and the right to review of any negative decision by an immigration judge.⁶³ Additionally, noncitizens in screening interviews have the right to consult with an individual of their choosing, including counsel, at no cost to the government, the right to have a consultant or counsel attend the interview, the right to provide evidence in their native language or a language that they are comfortable with, and the right to a non-adversarial interview with an AO. 8 CFR 208.30(d); 208.31(c).

Furthermore, the rule instructs that the AO should only consider any possible mandatory bar when the noncitizen does not establish a fear of torture and when there is easily verifiable evidence indicating that the noncitizen could be subject to a mandatory bar and, where the noncitizen is unable to establish at the relevant standard that the bar would not apply. As the standards of proof for screening interviews are lower than those applicable at the merits stage, the AO would only enter a negative fear determination if the noncitizen were unable to demonstrate at the applicable screening standard that a mandatory bar does not apply. Furthermore, if there are significant factual or legal issues that would necessitate further development at a later stage, AOs may exercise discretion to not apply the mandatory bar at the screening stage.

DHS disagrees that the rule will create barriers to asylum and withholding of removal for noncitizens with potentially meritorious claims. In the current fear screening process, AOs already identify possible mandatory bars. The rule simply permits an AO to apply the bars at the screening stage when there is evidence that a bar may apply, the AO determines that the bar can be addressed efficiently at the interview,

and the noncitizen is unable to demonstrate at the applicable standard of proof that the bar does not apply or that the noncitizen qualifies for an exception or exemption to the bar. Further, any noncitizen who is subject to one of the mandatory bars that this rule permits AOs to consider at the screening stage would already be ineligible for asylum or withholding of removal, as relevant.

Comment: Several commenters stated that DHS lacks the statutory authority to enact the proposed rule as the expedited removal statute does not mention mandatory bars to asylum and instructs the agency to find a credible fear whenever an asylum seeker demonstrates a “significant possibility” that they “could” be eligible for asylum.

Response: DHS disagrees with the assertion that it lacks the authority to enact the proposed rule. The legal authorities for this rule are described in section II of this preamble.

As mentioned earlier, the consideration of mandatory bars in screening interviews has been the subject of several prior rulemaking actions. Under INA sec. 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the term “credible fear of persecution” means that there is a “significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen]’s claim and such other facts as are known to the [asylum] officer, that the [noncitizen] could establish eligibility for asylum under” INA sec. 208, 8 U.S.C. 1158. Section 208(b)(2)(A)(i)–(vi) of the INA contains the mandatory bars to asylum and states that the eligibility conditions for granting asylum at section 208(b)(1) of the INA, 8 U.S.C. 1158(b)(1), “shall not apply” to a noncitizen if one of the mandatory bars is determined to apply. As such, if the noncitizen is subject to one of the mandatory bars, they are not eligible for asylum. It follows that when considering whether a noncitizen has a significant possibility of establishing eligibility for asylum, an AO may consider factors that would render the noncitizen ineligible for asylum.

Comment: Many commenters stated that consideration of the mandatory bars at the screening stage is inconsistent with congressional intent that the “significant possibility” standard be a low threshold to avoid the risk that people would erroneously be screened out and remarked that making decisions on mandatory bars is too complex to be done fairly under the circumstances during screening interviews.

Response: Nothing in this rule modifies the standard of proof for any of the screening interviews that would

be affected by the rule. DHS believes that the rule is consistent with Congress’ intent for expedited removal proceedings. In the Asylum Processing NPRM, DHS and DOJ explained that Congress created a “low screening standard” for expedited removal proceedings and stated that it may be inconsistent with Congress’ intent for the Departments to “creat[e] a complicated screening process that requires full evidence gathering and determinations to be made on possible bars to eligibility.” 86 FR 46906, 46914 (Aug. 20, 2021).⁶⁴ This rule, however, does not create any such process because AOs have the discretion, but are not required, to consider a mandatory bar in those cases where there is easily verifiable evidence that a bar may apply. If the AO determines that they can consider that bar efficiently at the screening stage, the AO could then, in their discretion, make a further inquiry into the mandatory bar. DHS does not believe Congress’ intent that the expedited removal process be swift requires reading the statute to forbid the application of mandatory bars during fear screenings in all cases, particularly where, as here, DHS will apply those bars in a manner that would not increase the length of the expedited removal process except in those cases in which there is evidence indicating that a mandatory bar may apply. Accordingly, this rule is consistent with Congress’s intent for expedited removal proceedings and DHS and DOJ’s prior statements regarding that intent.

DHS rejects the assertion that the mandatory bars present issues that are inherently more complex than other issues that are regularly considered in screening interviews. While the Department acknowledges that certain issues in the consideration of mandatory bars can present complex factual and legal issues, it also believes that other issues routinely considered by AOs as part of a credible fear or reasonable fear determination, including, for example, the viability of certain particular social groups, whether certain types of harm rise to the level of persecution, complex issues surrounding the motivation of the persecutor, whether the noncitizen has provided credible testimony, and whether certain types of feared harm would constitute torture if carried out, also involve complex legal and factual determinations.

⁶⁴ See also 87 FR at 18135 (“The Departments agree with these commenters that a complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility is incompatible with the function of the credible fear interview”).

⁶¹ *Id.*

⁶² USCIS “Credible Fear Procedures Manual,” Section III.I, <https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf>; USCIS, “Reasonable Fear Procedures Manual,” Section III.F.3, <https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf>.

⁶³ 8 CFR 208.30(g) and 208.31(g).

Furthermore, because the rule allows for permissive consideration of the mandatory bars, it is well-tailored to address cases that present particularly complex legal or factual issues. The NPRM explained that AOs should consider mandatory bars only in situations where there is easily verifiable information that the bar may apply, and even then, to only do so if the inquiry can be done efficiently. If applying a mandatory bar would require extensive legal research, or would require extensive fact gathering, it would not be appropriate for the AO to consider that bar as part of a noncitizen's credible fear or reasonable fear interview under this rule.

Comment: Several commenters stated that the proposed rule conflicts with the decision in *Pangea Legal Servs. v. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). Commenters noted that the consideration of mandatory bars during credible fear screening was at issue, and the court blocked that effort.

Response: DHS disagrees with commenters on these points. First, this rule is distinguishable from the Global Asylum Rule, which was at issue in *Pangea Legal Servs.* and which required the mandatory consideration of bars during credible fear screenings. See 85 FR 80274 (Dec. 11, 2020). This rule is different as it affords discretion to consider bars when there is easily verifiable evidence available but does not mandate their consideration in any particular case. Moreover, the district court in *Pangea Legal Servs.* did not opine on the merits of the substance of the Global Asylum Rule, including its provisions regarding the consideration of mandatory bars by AOs. Instead, as noted in the proposed rule, the *Pangea* court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Global Asylum Rule “was done without authority of law” because the court found that the DHS official who approved it, then-Acting Secretary Chad Wolf, was not properly designated as Acting Secretary. 512 F. Supp. 3d at 975.

Comment: Several commenters objected to the proposed rule by pointing to DHS's historical practice, dating back to the 2000 implementing regulations for expedited removal, of not applying mandatory bars in protection screenings. Many commenters pointed to DHS's previous rejection of considering mandatory bars in protection screening interviews in the Asylum Processing IFR, where DHS stated that applying asylum bars in screenings would hurt efficiency by making interviews longer while also undermining due process rights of

asylum seekers. Several commenters objected to the proposed rule as arbitrary, capricious, and/or an abuse of discretion not in accordance with the law due to DHS's failure to properly explain its change in position from the 2022 Asylum Processing IFR despite no change in circumstance or law.

One commenter wrote that while the Department claims the rule is narrow and will impact a small number of people, in fact, the rule amounts to a significant change to asylum processing. The commenter further argued that that while DHS claims that the current credible fear process would remain the same, AOs have never been permitted to apply bars during the screening process since its creation, and accordingly, the rule actually significantly alters the expedited removal screening process created by Congress over 25 years ago.

Response: DHS acknowledges its historical policy choice to not consider the mandatory bars in screening interviews. The Department notes that the practice established by the 2000 regulations was enacted without substantive explanation. See *Asylum Procedures*, 65 FR at 76129 (Dec. 6, 2000) (codifying in 8 CFR 208.30 that a noncitizen who appears to be subject to one or more of the mandatory bars would nevertheless be referred to section 240 removal proceedings for full consideration of their claim and explaining that this change was done in response to comments suggesting such a referral “regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act”).

DHS recognizes that the inclusion of mandatory bars in credible fear screenings has been a focus of several rules since 2020 that have made numerous changes in this area, as explained in the NPRM. The Global Asylum Rule instructed adjudicators for the first time to apply the statutory mandatory bars in INA secs. 208(b)(2)(A) and 241(b)(3), 8 U.S.C. 1158(b)(2)(A) and 1231(b)(3), during credible fear interviews. 85 FR at 80390. Subsequently, in 2022, DHS and DOJ rejected the consideration of all statutory mandatory bars during credible fear screenings and recodified the prior practice of not doing so. 87 FR at 18092–94, 18134–36; see also 86 FR at 46914–15. DHS and DOJ reasoned that applying the mandatory bars during all credible fear screening interviews would make those credible fear screenings less efficient,⁶⁵ which could jeopardize DHS's ability to use

expedited removal,⁶⁶ undermine Congress' intent that the expedited removal process be swift,⁶⁷ and undermine procedural fairness.⁶⁸ The Departments did not, however, conclude that applying the mandatory bars would lead to these potentially negative repercussions in all, or even most, cases. See 87 FR at 18093 (stating that the factual and legal inquiries required to consider the mandatory bars were “*in general and depending on the facts*, most appropriately made in the context of a full merits interview or hearing”) (emphasis added). Although the Departments' policy choices in this area have shifted over time, all these choices have remained consistent with the Department's longstanding statutory authority to manage asylum and related fear screenings, as discussed in Section II.

DHS acknowledges that this rule implements a policy choice that is different from its position in 2022 but believes that this rule is not inconsistent with that earlier position. The 2022 rule rejected the consideration of the mandatory bars in screening interviews due primarily to concerns of inefficiency. The permissive nature of the current rule obviates those prior concerns about inefficient use of resources. The Department believes, just as it did in 2022, that the consideration of mandatory bars in instances where evidence related to a mandatory bar is too limited or is unavailable, or where the analysis of the bar would be too complex to be fully explored in the screening context, would constitute an inefficient use of resources. However, in cases where the evidence is clear, consideration of mandatory bars in a screening interview will help preserve the government's resources by allowing decisions to be made at the earliest possible stage.

DHS disagrees that the rule significantly changes asylum processing or expedited removal. As explained in the NPRM, under this rule, the current credible fear process will remain the same. The only aspect of the determination that will change is that the AO will have the discretion to consider the application of mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal when screening the noncitizen for a credible fear of persecution or to consider the potential

⁶⁶ See 87 FR 18078, 18093 (Mar. 29, 2022) (“Asylum Processing IFR”).

⁶⁷ See 86 FR 46906, 46914 (Aug. 20, 2021) (“Asylum Processing NPRM”); 87 FR 18078, 18094, 18134–35 (“Asylum Processing IFR”).

⁶⁸ 87 FR 18078, 18093–94, 18097 (“Asylum Processing IFR”).

⁶⁵ See 87 FR 18078, 18093, 18134 (Mar. 29, 2022) (“Asylum Processing IFR”); 88 FR 11704, 11744 (Feb. 23, 2023) (“Lawful Pathways NPRM”).

application of the mandatory bars to statutory withholding of removal. Also, as also noted in the NPRM, the Department has experience applying both the Third-Country-Transit Bar and the CLP presumption of ineligibility for asylum. See 89 FR at 41354. Further, since the Securing the Border IFR's publication, the Department has experience applying the Securing the Border rule's limitation on eligibility for asylum during the credible fear stage. See 8 CFR 208.35, 1208.35. Although these limitations on asylum eligibility differ from the mandatory bars that AOs will have discretion to consider under this rule, AOs' demonstrated ability to apply them of asylum ineligibility in credible fear screenings supports the Department's assessment that certain statutory mandatory bars that may be easily verifiable can be effectively applied in screening interviews. Additionally, DHS remains confident that the population to which this rule will apply is likely to be relatively small, as informed by the number of cases with bars flagged by USCIS during screenings conducted during FY 2020–FY 2024. Please refer to Section V.A.2 and Table 4 below. Furthermore, the Department believes that the permissive nature of the rule obviates the due process concerns that were articulated in the 2022 Asylum Processing IFR. Under the current rule, AOs will only consider the mandatory bars where there is easily verifiable evidence that a mandatory bar applies, and AOs will retain the discretion to decline to consider a mandatory bar if they determine that the evidence is not easily verifiable, that they cannot efficiently gather sufficient information to make a determination on a mandatory bar, or if they believe that the evidence is such that the issue would be more fairly considered at a later stage.

This rule will not require the expenditure of resources in most screening interviews. Instead, it will rather serve as an operational flexibility when the AO determines that there is easily verifiable information that a mandatory bar applies and that they can efficiently handle the issue in the context of a screening interview. Thus, DHS does not believe that the current rule is inconsistent with the central concerns that drove USCIS' historical practice and does not represent a reversal of prior judgment. Instead, the rule will allow for consideration of mandatory bars in limited instances where applying the bar at the earliest possible stage would enhance public safety or national security and overall operational efficiency.

Comment: One commenter stated that the proposed rule would permit “AOs to violate the non-refoulement mandate so long as an ‘indicia’ of the five bars is present.”

Response: DHS believes this comment misstates the provisions of the proposed rule. Prior to conducting a more fulsome consideration of a mandatory bar, the AO would determine whether there is easily verifiable information in the record that the mandatory bar applies to the noncitizen. However, under the rule, before the issuance of a negative determination, the AO would need to elicit all relevant testimony to provide the noncitizen an opportunity to demonstrate the relevant likelihood that the bar does not apply, or that an exception or exemption to the bar applies, and determine that the noncitizen failed to so demonstrate at the appropriate standard of proof.⁶⁹ In the credible fear context, for example, the evidence would need to be sufficient to show that there is not a significant possibility that the bar would not apply and that there is not a significant possibility that an exemption or an exception applies, including, for example, that the noncitizen can establish a reasonable possibility of torture. The application of this standard of proof is substantially different from AOs issuing negative screening determinations based on “an indicia [sic]” that one of the bars might apply.

Further, the application of the statutory bars to a noncitizen's claim does not violate the United States' non-refoulement obligations as discussed earlier in this section IV.C.1.

Comment: One commenter opposed the proposed rule on the basis of their belief that current USCIS policy for overcoming mandatory bars requires that the noncitizen show by a preponderance of the evidence that the ground does not apply, if the evidence indicated that a ground for mandatory denial or referral exists. The commenter's stated understanding is that the rule would contradict congressional intent and Federal court ruling that apply a significant possibility standard to credible fear screenings.

Response: Nothing in this proposed rule modifies the standard of proof that applies to any of USCIS' screenings. In the credible fear context, the significant possibility standard of proof would continue to apply to all questions related to asylum, including the

possible application of the mandatory bars. These include, where applicable, whether there is a significant possibility a noncitizen could demonstrate they are not subject to or are excepted from the CLP rule's presumption of ineligibility for asylum (or that they could rebut the presumption), or whether there is a significant possibility they could demonstrate they are not subject to or are excepted from the Securing the Border rule's limitation on asylum eligibility. DHS acknowledges that noncitizens subject to the CLP rule's presumption of ineligibility for asylum or to the Securing the Border rule's limitation on eligibility for asylum would be screened for statutory withholding of removal, including mandatory bars (if considered), and protection under the CAT at the reasonable possibility and reasonable probability standards, respectively.

2. DHS's Justification, Background, and Statements on Need for the Rule

Comment: One commenter objected to the proposed rule for not adequately explaining how AOs would reliably be able to apply the mandatory bars during screening interviews without wasting resources or making unwarranted negative findings.

Response: AOs regularly receive training on screening and adjudication, including the application of mandatory bars. AOs will consider the mandatory bars only in cases where the evidence is easily verifiable that a bar may apply, and where they believe they can efficiently address the issue during the screening interview. Determinations by AOs are subject to review within USCIS, including review by a supervisory asylum officer. See, e.g., 8 CFR 208.30(e)(8). Noncitizens also have the right to request immigration judge review of any negative screening determination.

Comment: Several commenters argued that DHS's reliance on its success in implementing the CLP rule to help justify this proposed rule is misplaced because the application of the CLP rule has resulted in unlawful refoulement of noncitizens.

Response: DHS's experience with the CLP rule is relevant to this rule as it demonstrates that AOs are able to fairly and efficiently apply a rebuttable presumption of asylum ineligibility as part of a screening interview. The CLP rule and complementary measures have been in effect since May 11, 2023, and DHS and DOJ have been able to implement it without interruption. This experience has helped DHS significantly increase its capacity to screen noncitizens encountered at the border

⁶⁹ See 8 CFR 208.30(d) (“The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution or torture.”).

under expedited removal and move them through the process more quickly than before the rule and complementary measures.⁷⁰ Now that it is clear a rebuttable presumption of asylum ineligibility can be applied effectively during the credible fear process, the Department wishes to provide the AOs with discretion to apply certain mandatory statutory bars that may be easily verifiable in screening interviews.

The Department disputes the assertion that noncitizens have been unlawfully removed from the United States due to the application of the CLP rule. Under the CLP rule, noncitizens have several protections against removal, including demonstrating exceptionally compelling circumstances at the time of entry to rebut the presumption of ineligibility for asylum, as well as screening for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the CAT.⁷¹ In addition, as noted above, the United States has implemented its non-refoulement obligations through statutory withholding of removal under INA sec. 241, 8 U.S.C. 1231, not the discretionary asylum provisions in section 208 of the INA, 8 U.S.C. 1158. Accordingly, it is not unlawful, or a violation of the United States' non-refoulement obligations, to remove a noncitizen found ineligible for asylum because they lack a credible fear under CLP and further found not to have demonstrated a reasonable possibility of persecution or torture for the purposes of statutory withholding of removal or protection under the Convention Against Torture regulations.

Comment: Several commenters opposed the justification for the proposed rule stating that if at most 4 percent of the cases would be affected, the proposed rule would not result in a meaningful portion of the EOIR caseload being eliminated. Similarly, several commenters objected to the justification for the proposed rule stating that the extremely limited number of cases it would apply to does not justify the unfairness of expecting newly arrived and often unrepresented noncitizens to

prove that mandatory bars do not apply to them.

Response: The proposed rule is not intended primarily as a backlog reduction tool. The rule expands DHS's ability to more quickly remove noncitizens who are enforcement priorities: those who present national security or public safety threats.

DHS does believe that the rule will conserve interagency government resources. Most significantly, noncitizens who are subject to the mandatory bars often must be detained throughout their removal proceedings. By issuing a decision at the earliest possible stage, Immigration and Customs Enforcement's (ICE's) detention resources are conserved in these cases. In addition, the rule would prevent some non-meritorious cases from adding to the immigration court pending caseload.

The Department acknowledges, however, that this rule will apply only to a small subset of cases, as explained in section V.A.3 of this preamble describing the low percentage of credible fear and reasonable fear cases in which AOs have flagged the possible applicability of mandatory bars and is therefore not likely to result in a significant reduction in EOIR's caseload. See Section V.A.2 and Table 4 below. Nevertheless, in the context of an immigration system that lacks the full resources needed to handle its workload, even small efficiency gains are important and may result in speedier decisions for other noncitizens.

Comment: One commenter took issue with the justification for the proposed rule based on efficiency gains, stating that the proposed rule "will most certainly increase the time spent interviewing and writing up a decision for those asylum officers who choose to consider a bar in any given credible or reasonable fear interview and for their supervisors." The same commenter stated that the proposed rule is silent on scheduling procedures for cases potentially impacted by the proposed rule, and does not acknowledge that the additional time spent considering bars will contribute to the asylum backlog. Another commenter similarly stated that by adding time to screening interviews, the proposed rule does not save resources so much as frontload the expenditure of resources on issues that may end up being relitigated at a later stage.

Response: DHS disagrees with the commenter that the rule will significantly increase the time spent on screening interviews and decision making by USCIS. As the rule allows for permissive consideration of the

mandatory bars, AOs will only expend additional resources interviewing when there is easily verifiable evidence that a mandatory bar may apply and the AO believes they can efficiently address the issue during a screening interview. Under current procedures, AOs are already required to ask questions regarding the mandatory bars in all screenings. DHS expects that, in the majority of cases, no additional new questions will need to be asked under this rule.

DHS does not anticipate the need to change the way it schedules screening interviews as a result of this rule. Scheduling procedures must be able to be quickly modified due to changes in workflow and are not managed through regulations.

The Department recognizes that where AOs exercise discretion to apply a mandatory bar at the screening stage because they believe the bar can efficiently and effectively be addressed in the screening, AOs may need to devote additional time developing the record as to that bar and analyzing the bar in the written determination. At the same time, where the AO bases a negative credible fear of persecution determination on the application of a mandatory bar, they will not have to perform a written credible fear of persecution analysis as to the merits of the persecution claim. Additionally, the Department believes that, in those cases, any possible added time will be offset by the efficiency gain to the broader immigration system as a whole of preventing noncitizens who are subject to a mandatory bar and would not otherwise be able to establish eligibility for protection under CAT from being placed in removal proceedings.

Comment: One commenter objected to the amount of discretion for individual AOs provided by the proposed rule, coupled with the lack of guidance provided by the proposed rule regarding when AOs should consider mandatory bars. The commenter stated that this amount of discretion could lead to impermissible discrimination or profiling based on characteristics of the noncitizen. Another commenter objected to the lack of guidance or examples provided in the proposed rule about when the permissive consideration of bars would be appropriate, stating that AOs would need to "prophesy that such consideration would be fair and efficient before spending the time to delve into all the nuances of the case."

Response: The rule provides discretion for AOs to consider mandatory bars as a tool to maximize operational flexibility. However, AOs'

⁷⁰ For example, as discussed in the Securing the Border IFR, CBP placed, on average, more than 970 individuals encountered at and between POEs each day into expedited removal between May 12, 2023, and March 31, 2024, and USCIS conducted a record number of credible fear interviews (more than 152,000) resulting from such cases. 89 FR at 48724. This is more interviews from SWB encounters at and between POEs during the same time span than in any full fiscal year prior to 2023, and more than twice as many as the annual average from FY 2010 to FY 2019. *Id.*

⁷¹ See 88 FR at 31452; *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

discretion under the rule is not unbounded. All of the determinations made by AOs in a screening interview are subject to supervisory review, and, for negative determinations, to review by immigration judges if requested by the noncitizen.

Decisions on whether the evidence of a mandatory bar present in the case is easily verifiable and can be dealt with efficiently in the context of a screening interview is necessarily fact specific. AOs are trained to consider evidence⁷² in the context of where and from whom the noncitizen claims fear, to assess the reliability of that evidence, and to consider testimonial evidence from the noncitizen. Moreover, AOs are well-versed in evaluating evidence as it relates to applying mandatory bars in the context of the affirmative asylum caseload and in conducting fear determinations generally; accordingly, they are well-positioned to make the discretionary decision whether it would be efficient and effective to apply a mandatory bar in an individual fear screening, given the evidence available in the record.

Comment: Several commenters stated that DHS failed to provide any basis for what they described as a conclusory statement that the juncture at which the bars' applicability is considered would have any bearing on public safety or national security merely because those issues are the subject of the relevant mandatory bars.

Response: Quickly removing noncitizens who may constitute a public safety or security threat is a high priority for the Department. Many of the noncitizens who would ultimately be subject to the mandatory bars that AOs may consider under this rule could, based on the same evidence, be considered public safety or national security threats. By prioritizing decisions and consequences for these noncitizens, the Department hopes to create disincentives to other noncitizens who may constitute public safety or national security threats who may be considering travelling to the United States.

D. Proposed Application of Mandatory Bars

1. Noncitizens in Credible Fear and Reasonable Fear Screenings (8 CFR 208.30 and 8 CFR 208.31)

Comment: One commenter expressed concerns over potential limitations of telephonic credible and reasonable fear interviews, including privacy during the interview and the ability of the AO to

assess non-verbal cues. Some commenters expressed concern that noncitizens in the screening process do not have adequate time to rest and prepare for their interviews.

Response: Concerns about privacy during screening interviews and the limitations of telephonic interviews are outside the scope of this rulemaking, as this rulemaking will not affect the mechanics how DHS conducts credible fear and reasonable fear interviews. AOs already elicit information related to potential mandatory bars during screening interviews, and screening interviews are protected by regulations governing confidentiality. 8 CFR 208.6, 1208.6. For detained noncitizens, DHS provides private spaces so that noncitizens may speak freely to the AO during their interview, although, in some facilities, an officer may be present on site for safety purposes.⁷³ Telephonic credible fear and reasonable fear interviews are the current, longstanding policy,⁷⁴ and while AOs are not able to assess all nonverbal cues telephonically, they are able to assess some, such as tone of voice, inflection, and other auditory nonverbal communications. The Department notes that it, along with DOJ, addressed similar comments related to the conditions in which credible fear interviews are conducted in the Securing the Border Final Rule.⁷⁵

2. Noncitizens Subject to CLP Presumption of Ineligibility, Statutory Withholding of Removal Screening (§ 208.33)

Comment: A few commenters expressed opposition to the proposed rule's inclusion of noncitizens subject to the CLP presumption of eligibility. One such commenter wrote that the provision to assess certain bars when the CLP rule applies could detrimentally affect the most vulnerable, including those fleeing oppressive regimes, adding that people fleeing countries where they face persecution do not have the time or means to navigate the complex and, at times,

inaccessible legal pathways to asylum in the United States. The commenter also stated that empowering AOs to apply the bars would defy basic principles of fairness, increasing barriers for those subject to both the CLP rule and this proposed rule.

Response: The Department rejects the commenters' claims that analysis of the mandatory bars alongside the application of CLP could disproportionately impact certain vulnerable populations and that the rule defies principles of fairness. Commenters did not provide any explanation for why applying mandatory bars in the context of screenings under the CLP rule, which is intended to promote lawful, safe, and orderly pathways to the United States and to benefit particularly vulnerable groups by removing the incentive to make a dangerous irregular migration journey, would disproportionately impact any class of noncitizens. See 88 FR at 31314. Further, as noted elsewhere, this rule does not change substantive eligibility for asylum or for withholding of removal, so the discretionary authority of AOs provided by this rule to consider the covered statutory bars in CLP screening interviews will not affect the ultimate forms of relief available to a noncitizen. The Department will apply the rule fairly and emphasizes that the Department believes that this rule will impact a relatively small number of individuals who are not eligible for protection because they present a national security or public safety threat.

To the extent that commenters' concerns regard the merits of the CLP limitation on asylum eligibility, such concerns are outside the scope of this rule. The Department previously accepted comments on that rule and responded to those in the CLP final rule. 88 FR at 31324–441.

3. Inclusion of Specific Bars (e.g., Particularly Serious Crimes Bar, Security Bar)

Comment: Some commenters expressed concerns over the potential application of the persecutor bar with the limited time available for a screening interview. A commenter wrote that the persecutor bar should not be applied in fear screenings because it involves complex factual inquiries and has unsettled legal questions. Some commenters wrote that key questions of fact and law remained as to whether international treaty obligations required the consideration of duress in determinations involving the persecutor bar, or as to whether the failure to recognize the duress exception unfairly

⁷² USCIS, RAIO Directorate—Officer Training: Evidence (Apr. 24, 2024).

⁷³ Credible Fear Procedures Manual, Section III.D.3 (May 10, 2023); Perryman, Brian R. INS Office of Field Operations, Security and Privacy Provisions for Credible Fear Interviews Under Expedited Removal, Memorandum to Regional Directors, District Directors, Assistant District Directors for Detention and Deportation and Asylum Office Directors (Washington, DC: 1 July 1997).

⁷⁴ See USCIS “Credible Fear Procedures Manual,” Section III.E.1, <https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf>; USCIS, “Reasonable Fear Procedures Manual,” Section III.E.1, <https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf>.

⁷⁵ See 89 FR at 81201–02.

harms bona fide asylum seekers, among other issues. Commenters also stated that AOs would need to make a prompt assessment of whether the duress exception applies, an area of law that is unsettled. The result, the commenter stated, would be erroneous applications of the bar based on poor factual development and rushed legal analysis. These commenters wrote that this analysis should occur at the merits stage, not in the expedited removal setting.

Response: The Department understands the complexities of the persecutor bar,⁷⁶ but it disagrees with the commenters' statements that analysis of the persecutor bar is legally and factually too complex to be analyzed in a screening interview and that the extensive factual development required would lead to erroneous application of the bar. AOs already inquire into the potential applicability of mandatory bars, including the persecutor bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. While many cases implicating the persecutor bar involve complex factual and legal issues, not all do. For example, a noncitizen who admits in credible testimony under oath to having voluntarily forced a woman to abort a pregnancy as part of the noncitizen's work as a health ministry official charged with enforcing the Chinese government's "one child policy" when it was in effect would clearly be barred from asylum and statutory withholding of removal as a persecutor.⁷⁷

Furthermore, the persecutor bar shares multiple elements with the refugee definition at section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A), that officers must analyze in every asylum case, including

whether the harm at issue rises to the level of persecution and whether it was or would be inflicted on account of one of the five protected grounds. The only additional considerations in the persecutor bar analysis involve analyzing the applicant's participation in (rather than experience or fear of) persecution, that is, whether the applicant ordered, incited, assisted, or otherwise participated in the persecution, and analyzing whether the applicant had the requisite knowledge that the persecution was being or would be carried out. While these additional elements may in some cases introduce a level of complexity that would counsel against consideration of the persecutor bar in a screening context, they do not necessarily do so in every case. This significant overlap with the refugee definition analysis, which AOs must routinely conduct in both credible fear screenings and affirmative asylum adjudications, demonstrates that considering the persecutor bar need not involve complex legal or factual issues in every case in which it arises and that in some cases where there is clear evidence it does apply, AOs will be able to address it efficiently in credible fear or reasonable fear screenings.

Where there is evidence available to the AO that triggers an inquiry into an applicable mandatory bar, and the AO can address that bar efficiently at the screening interview, then the noncitizen will be given the opportunity to establish, at the relevant standard, that the bar would not apply. Under this rule, AOs will have the flexibility to apply certain mandatory bars during screenings as it relates to eligibility for asylum and statutory withholding of removal, and the individual will continue to have the opportunity to establish a credible or reasonable fear of torture. Notably, this rule would not require AOs to consider applicability of mandatory bars as part of a fear determination.⁷⁸ Such a requirement would reduce operational flexibility by potentially adding hours to interviews in which there are indicia that a bar might apply, but for which applicability is unclear.⁷⁹ Moreover, this proposed

rule would not disturb the long-standing regulation establishing that in making credible fear determinations, AOs "shall consider whether the [] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." 8 CFR 208.30(e)(4). This rule also preserves the option for noncitizens to be placed in an AMI or in proceedings before an immigration judge when evidence surrounding a possible mandatory bar needs to be further developed, as is currently the practice. Likewise, ICE will retain the ability to detain or otherwise monitor the noncitizen in those cases. See INA sec. 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(1)(ii); 8 CFR 208.9; see also INA sec. 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A); 8 CFR 212.5(d), 235.3(b)(4)(ii). The Department believes this discretion will safeguard against erroneous application of the bar when it is clear that further evidence or interviews are needed. This is why preserving the AO's discretion in analyzing the mandatory bars is integral to the rule.

Comment: Some commenters also stated that the particularly serious crime bar is legally and factually complex and thus is inappropriate for inclusion in screening interviews. Commenters added that, since the bar is different for asylum and statutory withholding of removal, applying this bar in both credible fear and reasonable fear interviews would be confusing for AOs who are assigned to do both types of screenings. A commenter further reasoned that there is no indication that the application of the particularly serious crime bar would have any meaningful impact on screening interview efficiency because the particularly serious crime provision applies in circumstances where an individual has a conviction inside the United States, and most people undergoing a credible fear interview will not have been present in the United States previously and thus are unlikely to have been convicted of such a crime. Instead, the commenter wrote, this bar would likely only apply in the reasonable fear context to narrow subset of individuals. The commenter suggested that, if the Department moves forward with this proposed rule, it should, at minimum, remove the application of this bar from the factors to be considered.

Response: The Department disagrees with commenters' statements that the particularly serious crime bar analysis is

⁷⁶ For example, the possible "duress exception" referenced by commenters has had multiple interpretations over the years from the Board of Immigration Appeals and the Attorney General. See *Negusie v. Holder*, 555 U.S. 511 (2009) ("*Negusie I*") (overruling a prior Board decision finding the plain language of the statute not allowing for a duress defense or exception and declaring the persecutor bar ambiguous as to consideration of duress or coercion); *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018) ("*Negusie II*") (interpreting the persecutor bar for asylum as including a narrow duress defense); *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) ("*Negusie III*") (finding the plain language of the persecutor bar as not allowing for consideration of duress); *Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021) ("*Negusie IV*") (ordering the Board to refer *Negusie*'s case to the Attorney General and staying *Negusie*'s case pending the Attorney General's review). The Attorney General's decision in *Negusie III* remains in effect, and any further review remains pending.

⁷⁷ See *Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006) (holding that "transporting captive women to undergo forced abortions" pursuant to the one-child policy was assistance in persecution).

⁷⁸ The Global Asylum Rule took a different approach than this proposal, requiring that AOs consider multiple mandatory bars. See 85 FR 80274, 80278 (Dec. 11, 2020) ("DHS requires asylum officers to determine . . . whether an alien is subject to one or more of the mandatory bars"). This proposed rule would not require such consideration.

⁷⁹ Because credible fear screenings are conducted at the significant possibility standard, in cases where the application of a bar is not obvious, requiring the AO to consider application of a bar would likely result in significantly extended interviews with no meaningful outcome because

relevant information might not be available to the officer at screening even with a significantly extended interview.

legally and factually too complex to be analyzed in a screening interview and that any factual development required during a screening interview would lead to erroneous application of the bar. AOs already inquire into the potential applicability of mandatory bars, including the particularly serious crime bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. The Department also disagrees with the comment that because the particularly serious crime bar is applied differently in asylum and withholding of removal, it will be confusing for AOs to analyze. As previously stated, AOs are highly capable of assessing mandatory bars at the credible fear screening, based on their specialized training in asylum law. AOs will also retain discretion not to analyze the bars, especially where it is clear that further evidence and fact-gathering is needed. AOs receive continuous training on relevant topics to ensure their ability to conduct thorough interviews and make legally sufficient determinations.

The Department also disagrees with the comment that the rule will lack meaningful impact on interview efficiency because the particularly serious crime bar applies to U.S. convictions and is unlikely to impact many noncitizens. The particularly serious crime bar may apply to both U.S. and foreign convictions, depending on the facts surrounding the noncitizen's conviction, the noncitizens' immigration history, and when a fear claim is made. See 8 CFR 208.13(c); INA secs. 208(b)(2)(A)(ii), 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii). While the Department believes this rule will impact a very small number of noncitizens who will be removed early on in the immigration process, this impact is still meaningful because it will free resources further in the process, specifically with EOIR, ICE, and CBP to process other cases more expeditiously. Inclusion of the particularly serious crime bar in this rule serves a Department priority: to protect the public from noncitizens who pose national security and public safety concerns.

Comment: Some commenters expressed concern with the application of the serious nonpolitical crime bar. Another wrote that the serious nonpolitical crime bar is not defined in the INA and does not require an arrest or conviction and the application of this bar is legally and factually intensive and contingent on the reliability of the available evidence. A commenter stated the reliability of the evidence would be subject to the circumstances of

hundreds of different legal systems from around the world. Some commenters expressed concern that the analysis of the bar is too complex for screening interviews and applying this bar could require extensive factual development and review of evidence by AOs, which would further delay findings or lead to erroneous application of the bar. A commenter is contingent on available and reliable evidence from foreign legal authorities.

Response: While the INA does not define the phrase “serious nonpolitical crime,” there is substantial case law involving the serious nonpolitical crime bar⁸⁰ that provides guidelines for AOs when they encounter potential bar concerns. AOs already inquire into the potential applicability of mandatory bars, including the serious nonpolitical crime bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. The Department appreciates the concerns noted in some of the comments, namely that application of the serious nonpolitical crime bar is legally and factually intensive and that, if improperly applied, noncitizens may be denied due process or returned to places of persecution. The Department is aware that analysis of the bar requires a case-by-case evaluation of the facts and circumstances presented, but as previously stated, AOs retain discretion to analyze the mandatory bars, and may choose not to analyze the bar when it is clear in a given case that additional analysis is needed. The Department is fully committed to providing sufficient procedural safeguards consistent with the purpose of the expedited removal process and believes that where the potential bar analysis requires more fact-gathering and analysis than can be completed during the screening interview, the noncitizen may be placed in the AMI process or section 240 removal proceedings before an immigration judge so that further analysis can occur. Furthermore, not every case involving the serious nonpolitical crime bar is factually and legally complex. For example, if the record contains an authenticated record of conviction of the noncitizen for rape from the government of the United Kingdom, such easily verifiable evidence could be efficiently considered by an AO in the context of a credible fear or reasonable fear screening.

Comment: Commenters also expressed concerns regarding the inclusion of the statutory security bars at INA secs. 208(b)(2)(A)(iv) and

241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv). A commenter expressed concern about expecting AOs to assess whether an individual poses what the commenter called a “true security threat” to the United States during a screening interview. Citing case law, the commenter stated there is unanimous agreement among foreign courts, international law experts, and Congress’ legislative history that this bar was conceived as a narrow exception to non-refoulement obligations. In considering the high threshold for meeting the bar, the commenter said Congress did not intend to allow DHS to improperly subject asylum seekers to this bar and remove “otherwise-eligible asylees who do not present genuine security threats to the United States,” citing *Hernandez v. Sessions*, 884 F.3d 107, 113 (2d Cir. 2018). Echoing other comments on the bars, the commenter additionally stated that the security bar requires a factual and legal analysis that would substantively lengthen the time and resources that AOs need. Furthermore, the commenter wrote, the risk of misapplying this bar would be great.

Response: The Department rejects the concerns about AOs’ ability to assess whether a noncitizen poses a danger to the security of the United States, that bar analysis will increase time and resources needed, and that the risk of misapplication of the bar is great. As previously stated, AOs will retain discretion to consider the bars at the screening interview. AOs already inquire into the potential applicability of mandatory bars, including the danger to the security of the United States bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. Furthermore, while the danger to the security of the United States bar often involves complex factual and legal analysis, not every case in which it arises does. For example, testimony under oath by a noncitizen who admits to being an agent of a hostile foreign government who attempted to irregularly enter the United States for the sole purpose of conducting espionage targeting U.S. military bases would clearly indicate the bar may apply. Faced with such evidence, AOs should not be precluded from considering the applicability of the bar in a screening interview.

Comment: Commenters also expressed concern over the inclusion of the terrorism-related statutory bars at INA secs. 208(b)(2)(A)(v) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(v) and 1231(b)(3)(B)(iv). A commenter stated that the terrorism bars have a history of wrongfully labeling

⁸⁰ See *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012).

individuals as terrorists and barring them from protection in the United States, writing that these provisions have been used against Afghan individuals and have been a vehicle for family separation. The commenter concluded that applying the terrorism bars at the credible fear interview and reasonable fear screening stage neither complies with domestic and international refugee law, nor comports with U.S. national security interests.

Response: The Department disagrees with the comment that applying the terrorism bars in the screening interview neither complies with domestic and international refugee law, nor comports with U.S. national security interests. One of the Department's primary purposes is to maintain national security by securing U.S. borders and protecting the country from national security threats, including terrorism. As previously mentioned, the number of noncitizens impacted by this rule is expected to be modest. The Department believes that identifying and removing noncitizens subject to the bars early in the process increases efficiencies in the immigration system while also maintaining national security. The U.S. government works to protect national security while upholding our humanitarian mandates, in accordance with our domestic and international obligations. In applying the terrorism bars, the Department also considers numerous exceptions or discretionary exemptions to the bars that may apply, including, for example, situational exemptions for insignificant material support, certain limited material support, exemptions for Afghan allies and civil servants, and group-based exemptions.⁸¹ These exemptions are a reflection of the Department's understanding that mandatory bar application is a case-by-case analysis and that noncitizens seeking protection may have faced unique circumstances that may warrant a discretionary exemption from the mandatory bar if threshold requirements are met and an exemption is warranted in the totality of the circumstances. The Department again states that the AO would retain discretion to analyze a mandatory bar at

the screening stage and if further evidence, interviews, or analysis are needed, may opt not to analyze that bar during the screening. Instead, if the noncitizen receives a positive determination, the bar would be fully explored in an AMI or in front of the immigration judge. Finally, the claim that the terrorism bars have wrongfully labelled noncitizens as terrorists, and specifically has been used against Afghan noncitizens and as a vehicle for family separation, is inapposite, as this rule does not substantively amend the contours of who may be subject to this statutory bar.

4. Exclusion of the Bars To Applying for Asylum and of the "Firm Resettlement" Bar, INA Secs. 208(a)(2), (b)(2)(A)(vi)

Comment: A few commenters expressed appreciation that the firm resettlement bar is excluded from this rule. A few commenters expressed concern that the rule excludes consideration of the firm resettlement bar and believe that officers should be required to consider all bars during the screening process. Another commenter expressed concern that the rule excludes consideration of the safe third country exception. A commenter found the decision to not extend the consideration of the firm resettlement bar to protection screenings selective and makes the decision to consider the other bars at this stage "questionable." A commenter suggested DHS should require AOs to consider all bars to asylum and statutory withholding of removal in fear screenings, including the bars to applying for asylum at INA sec. 208(a)(2), 8 U.S.C. 1158(a)(2). The comment stated that it is arbitrary to exclude all the bars from the rule. A commenter expressed concern that analysis of the firm resettlement bar in particular is complex and it will be difficult to properly analyze the bar during the screening process.

Response: DHS declines to include consideration of the bars to applying for asylum—other than the safe third country bar as already provided in 8 CFR 208.30(e)(6) for purposes of implementing the U.S.-Canada Safe Third Country Agreement—and the firm resettlement bar in fear screenings. Doing so would undermine the efficiency of fear screenings and would not be a productive use of Department resources. The overwhelming majority of noncitizens placed into the expedited removal process who are referred for credible fear screenings appear before an AO within days or weeks of arrival in the United States and are therefore not subject to the 1-year filing requirement at INA sec. 208(a)(2)(B), 8

U.S.C. 1158(a)(2)(B). Furthermore, the safe third country bar to applying for asylum at INA sec. 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) currently only applies to certain noncitizens arriving from Canada. The regulation at 8 CFR 208.30(e)(6) already provides procedures for credible fear screening of such noncitizens, so doing so in this rule would be duplicative. The bar to applying for asylum based on the noncitizen having previously applied for and been denied asylum at INA sec. 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C) is subject to an exception for changed circumstances materially affecting eligibility for asylum codified at INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). The necessity of exploring the applicability of this exception during a credible fear interview would undermine the efficiency of the screening, which is designed to quickly identify noncitizens without a legal basis to remain in the United States and ensure those with viable claims are able to pursue them in a full merits hearing or AMI. In addition, these bars do not serve the same public safety purpose as the bars that AOs will have the discretion to consider under this rule.

The Department acknowledges the comments expressing appreciation that the Department did not include the firm resettlement bar in this rule, DHS disagrees with comments that the firm resettlement bar should be included and that AOs should be required to analyze all bars. One of the purposes of this rule is to give AOs discretion, at the earliest stage possible, to consider whether a noncitizen is unlikely to be able to establish eligibility for asylum or statutory withholding of removal because of a mandatory bar that relates to participation in persecution, or national security, criminal, or other public safety concerns. The Department believes that ignoring these serious concerns runs counter to its policy goals. The firm resettlement bar, however, does not fall into one of the categories listed above. Moreover, although firm resettlement constitutes a mandatory bar to asylum eligibility, it is not a bar to eligibility for statutory withholding.

Furthermore, as DHS explained in the NPRM, 89 FR at 41355, the firm resettlement regulations currently in effect, 8 CFR 208.15, 1208.15 (2020), include a burden-shifting framework that requires the Department to bear the initial "burden of presenting prima facie evidence of an offer of firm resettlement" that can be rebutted by the noncitizen. *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011). This framework differs from the analytical

⁸¹ See USCIS, "Terrorism-Related Inadmissibility Grounds—Group-Based Exemptions," <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions> (last visited Aug. 29, 2024); and USCIS, "Terrorism-Related Inadmissibility Grounds—Situational Exemptions," <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions> (last visited Aug. 29, 2024).

framework for the security-related bars that are the subject of this rulemaking. The *Matter of A-G-G* framework and firm resettlement definition could make it difficult for AOs to easily verify whether a noncitizen is subject to the bar. This difficulty would also undermine the efficiency of credible fear screenings, which is contrary to the intent of Congress and the purpose of this rule.

5. Exclusion of CAT Screenings (Withholding of Removal) (§§ 208.30(e)(3), 208.33(b)(2)(i), 208.35(b)(2)(i))

Comment: A commenter expressed concern that noncitizens found ineligible for asylum and withholding of removal because of a mandatory bar will only be eligible for protection under CAT. This commenter believes that CAT protection is an inadequate form of protection. Another commenter expressed concern that the rule would provide AOs too much discretion to consider mandatory bars and requested limiting discretion as related to trafficking victims and those seeking protection under CAT.

Response: This rule does not change the underlying grounds of eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. The rule only amends the credible fear and reasonable fear interview processes to allow AOs to apply certain statutory mandatory bars earlier in the process—at the interview stage rather than at a later full merits adjudication—than would occur without this rule. Accordingly, a noncitizen who is determined to only be eligible for CAT protection would also only be eligible for CAT protection absent this rule. For these reasons, the Department declines to further address commenters' concerns that CAT protection is "inadequate" as they are outside the scope of this rule's changes.

The Department disagrees with the claim that the rule will provide AOs with too much discretion to consider mandatory bars and that discretion should be limited as related to certain noncitizens. As previously stated, AOs will have discretion to analyze the mandatory bars, but where more information or evidence is needed concerning the bar and the determination is positive, the noncitizen would proceed to an AMI or a hearing before an immigration judge. Furthermore, AOs are trained not only in asylum law but also to recognize signs of trafficking and follow

procedures to assist potential trafficking victims.⁸²

6. Other/General Comments on the Application of Bars

Comment: A commenter stated that the rule should not apply to family units in the Family Expedited Removal Management (FERM) program⁸³ because family units often lack legal counsel, may speak uncommon languages, and may not have enough time to gather evidence for their interviews.

Response: DHS currently places certain non-detained family units in the credible fear process in the FERM program. FERM leverages alternatives to detention to process families through expedited removal, including credible fear screenings, in a non-detained setting. FERM is designed to ensure family units in the credible fear process participate in a timely credible fear interview and any requested review by an immigration judge without being detained.⁸⁴ Placement in the FERM program has no impact on the substantive credible fear screening nor changes the applicable legal standards. This rule applies to credible fear screenings in the non-detained FERM program the same as it applies to credible fear screenings that take place in detention. As with any other noncitizen in the credible fear screening process, AOs have the discretion to apply certain mandatory bars pursuant to this rule at the credible fear screening and if applied, noncitizens will have the opportunity to present evidence that the bar does not apply at the appropriate standard depending on the case. The concerns noted in this comment are no different than those mentioned by other commenters about the overall population of noncitizens in the screening process. As previously stated, noncitizens in credible fear may be represented by an attorney at no cost to the government and may consult with persons of their choosing. INA sec. 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv), 8 CFR 235.3(b)(4)(ii); 208.30(d)(4), 8 CFR 208.31(c). The Department also provides government-contracted interpreters if the noncitizen

is unable to proceed with the interview in English. 8 CFR 208.30(d)(5). The Department emphasizes that the rule does not require AOs to consider applicability of the bars in the fear determination, including FERM cases, and that the Department estimates this will impact a relatively small number of individuals who are not eligible for protection.

7. Screening Procedures, AO Determinations, Immigration Judge Review of Negative Fear Determinations

Comment: A few commenters expressed concern with the proposal to make AOs' consideration of the bars at the fear screening stage discretionary. For example, commenters expressed concern that the opacity of the screening interview process and the discretion given to AOs would make it impossible to verify DHS's implied claim that there is an easily identifiable population of individuals who are ineligible for asylum but are nonetheless subject to screening interviews. The commenters indicated this dynamic necessarily means the rule's effects would ultimately be obscure and unaccountable to the public.

Response: DHS disagrees that the processes under which it conducts screening interviews are opaque. Regulations governing credible fear and reasonable fear screenings conducting by DHS are published at 8 CFR 208.30, 208.31, 208.33, 208.35, 235.3, and 235.15. USCIS maintains information about credible fear and reasonable fear screenings on its public website.⁸⁵ Individuals undergoing credible fear screenings receive written disclosures about the process. 8 CFR 235.3(b)(4)(i) and 235.15(b)(4)(i)(B). AOs are required to determine that noncitizens undergoing reasonable fear screenings understand the reasonable fear determination process. 8 CFR 208.31(c). Noncitizens have the right to consult with a person or persons of their choosing before undergoing a credible fear interview, and such person or persons may also be present at the interview. 8 CFR 208.30(d)(4).

⁸² USCIS, RAO Directorate—Officer Training: Detecting Possible Victims of Trafficking (Apr. 24, 2024).

⁸³ DHS—ICE, "ICE announces new process for placing family units in expedited removal," <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal> (May 10, 2023).

⁸⁴ DHS—ICE, "ICE announces new process for placing family units in expedited removal," <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal> (May 10, 2023).

⁸⁵ See USCIS, "Credible Fear Screenings," <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings> (last visited June 24, 2024); USCIS, "Questions and Answers: Credible Fear Screening," <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> (last visited June 24, 2024); USCIS, "Reasonable Fear Screenings," <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/reasonable-fear-screenings> (last visited June 24, 2024); and USCIS, "Questions and Answers: Reasonable Fear Screenings," <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings> (last visited June 24, 2024).

Noncitizens undergoing reasonable fear interviews may be represented by counsel or an accredited representative at the interview. 8 CFR 208.31(c). After an AO conducts a credible fear screening, the officer issues the noncitizen a record of the credible fear determination, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. 8 CFR 208.30(f), (g), 208.33(b)(2)(v), 208.35(b)(2)(v). Noncitizens determined to lack a credible fear of persecution or torture may have such determinations reviewed by an immigration judge. 8 CFR 208.30(g), 208.33(b)(2), 208.35(b)(2), 1003.42, and 1208.30(g). Noncitizens determined to lack a reasonable fear of persecution or torture are informed of the decision in writing and may request review of the decision by an immigration judge. 8 CFR 208.31(f) and (g). Supervisors review all credible fear and reasonable fear determinations for legal sufficiency and compliance with applicable procedures before such determinations are issued.⁸⁶ These measures and others ensure the credible fear and reasonable fear screening processes are transparent and subject to accountability through review, including before an immigration judge at the noncitizen's request.

DHS disagrees with comments asserting that the discretion the rule provides to AOs would make it impossible to verify the implied premise of the rule that there is an easily identifiable population of individuals who are ineligible for asylum but are nonetheless subject to screening interviews and that the effects of the rule would be obscure and unaccountable to the public. As discussed in the NPRM and in this rule, the premise of the rule is that there are certain cases where there is information at the screening stage to show that the noncitizen is both (1) subject to a mandatory bar to asylum and/or withholding of removal and (2)

otherwise unable to meet the requisite screening standard for protection under CAT and it is those cases that the Department seeks to screen out at an earlier stage, rather than having them move forward in the process. 89 FR 41351. The Department has been fully transparent and clear about the potential impact of this rule as limited to cases where application of a mandatory bar to asylum and statutory withholding of removal results in a negative credible fear of persecution determination or application of a mandatory bar to statutory withholding of removal results in a negative reasonable fear of persecution determination, and the noncitizen is otherwise unable to establish a fear of torture at the requisite screening standard, since application of a mandatory bar will only be outcome determinative if the noncitizen is otherwise unable to establish a fear of torture. 89 FR 41351.

In individual cases, the application of a mandatory bar resulting in a negative credible fear or reasonable fear determination will be documented in the record and available for a noncitizen and their representative to review. For example, where an AO issues a negative credible fear determination with respect to asylum and statutory withholding of removal based on the application of a mandatory bar, the AO will provide the noncitizen with a written notice of decision and issue the noncitizen a record of the credible fear determination, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. *See* 8 CFR 208.30(g)(1). In any screening determination where the negative credible fear or reasonable fear of persecution determination is based on the application of a mandatory bar, these materials documenting the determination that are served on the noncitizen and their representative (if applicable) will provide transparency into how application of the mandatory bar resulted in a negative credible fear or reasonable fear of persecution determination, in addition to why the noncitizen also failed to establish a credible fear or reasonable fear of torture.

Comment: Commenters indicated that the rule provides insufficiently clear guidance on how AOs will determine whether a noncitizen is clearly ineligible for relief because of a mandatory bar, whether there is easily verifiable evidence that warrants inquiry into a mandatory bar, or whether the AO can efficiently address the bar in a screening interview. A commenter noted that that DHS did not

include in the regulatory text the limitation that AOs would only consider bars in cases where a noncitizen is clearly ineligible and there is easily verifiable evidence of bar and did not define "clearly ineligible" and "easily verifiable" in the regulatory text. One commenter suggested that the sort of easily verifiable evidence envisioned in the rule is a fiction, pointing specifically to foreign legal records as problematic given the possibility that they are part of a pretextual prosecution. This commenter suggested that there is not a single situation of evidence that might appear to be easily verifiable where the asylum officer should be confident that they can consider that bar efficiently.

Response: The Department notes that under current practice, AOs do not apply mandatory bars to eligibility for asylum and withholding of removal during fear screenings, but in cases where there is evidence a bar may apply, AOs note the possible applicability of the bar in the record. In some such cases, the evidence that a bar applies is clear. For example, a noncitizen undergoing a reasonable fear interview may have been ordered removed from the United States due to a conviction by a final judgment for an aggravated felony under 18 U.S.C. 1956 (money laundering), if the amount of funds exceeds \$10,000 and the noncitizen received a sentence of at least five years' imprisonment. If DHS records confirm the noncitizen's identity matches that of the convicted person, the noncitizen would clearly be barred from statutory withholding of removal due to their conviction for an aggravated felony under INA 101(a)(43)(D), 8 U.S.C. 1101(a)(43)(D), and aggregate term of imprisonment of at least 5 years. *See* INA sec. 241(b)(3)(B)(ii), (iv), 8 U.S.C. 1231(b)(3)(B)(ii), (iv). This rule ends the practice of having the AO set aside the bar in making the reasonable fear determination in such a case and allows the AO to enter a negative determination if the noncitizen is unable to establish a reasonable possibility that the bar does not apply or is unable to establish a reasonable fear of torture.

AOs must complete screenings efficiently and there is no incentive for them to consider bars in the absence of easily verifiable evidence. DHS believes the regulatory text, along with the guidance in this preamble and that of the NPRM, is sufficient to alert the public about how AOs will determine whether to consider mandatory bars in fear screenings without defining the terms "clearly ineligible" and "easily verifiable" in regulatory text. Although

⁸⁶ 89 FR 41347, 41353 (May 13, 2024) ("Rather this rule would create the flexibility for the AO to exercise discretion—with supervisory review of any decision—on the applicability of bars during the screening stage."); *see also* USCIS, "Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions" ("All credible fear and reasonable fear screening determinations were reviewed by either a supervisory asylum officer, occupational series 0930 or one of a small number of supervisory refugee officers, occupational series 1801, serving in the capacity of supervisory asylum officers. The supervisory refugee officers are either former asylum officers or have been trained and have experience consistent with the regulatory and statutory requirements to conduct reviews of these cases."), <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions> (last visited June 17, 2024).

the Department acknowledges that the type of easily verifiable evidence envisioned by this rule may not be available in every case, DHS disagrees with the assertion that such evidence is never present in a case. AOs are trained to evaluate criminal convictions, including the possibility that an arrest or conviction may be the result of a pretextual prosecution.⁸⁷ The rule provides that, where such easily verifiable evidence exists, the AO may consider gathering additional information about the possible application of a mandatory bar, including evidence of any exemption or exception to the bar that the noncitizen may present.

Comment: A commenter suggested that noncitizens be provided with a complete copy of all information relied on by the AO in applying a bar to their claim. Another stated DHS should be required to provide evidence to the person seeking asylum regarding any potential bar in advance of the credible fear interview.

Response: DHS believes the procedures under current regulations provide noncitizens sufficient information about the basis for the screening determination. Following the credible fear interview, noncitizens receive a copy of all the items required by regulation, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. 8 CFR 208.30(f)–(g). In any case where the application of a mandatory bar to asylum or statutory withholding of removal is outcome determinative to the credible fear or reasonable fear determination, the AO will provide a written analysis related to the application of the mandatory bar in the record, which will be served on the noncitizen. If the noncitizen has a properly executed Form G–28 on file, a copy of the relevant documents will be provided to their legal representative.⁸⁸ For negative determinations referred to the IJ for review, USCIS will file copies of outcome determinative documents with the immigration court.⁸⁹

The Department declines to adopt the commenter's suggestion related to sharing information in advance of a credible fear interview. USCIS does not share information that may relate to

mandatory bars with noncitizens in advance of their screening determinations or asylum adjudications. Rather, when evidence related to a mandatory bar is known to USCIS, the noncitizen is given an opportunity to address the evidence during the interview. 8 CFR 208.9(e). When information related to a mandatory bar is present in the record for a credible fear or reasonable fear screening, the AO will ask the noncitizen about the information, and the noncitizen will be given an opportunity to address any concerns and provide evidence that the mandatory bar does not apply.

Comment: A commenter wrote that it is inappropriate to allow AOs to consider bars to statutory withholding of removal because AOs do not make decisions on applications for withholding of removal. Commenters noted the difference in treatment of aggravated felonies in relation to the particularly serious crime bar to withholding of removal under INA sec. 241(b)(3)(B)(ii), 8 U.S.C. 1231(b)(3)(B)(ii) and the particularly serious crime bar to asylum under INA sec. 208(b)(2)(A)(ii), 8 U.S.C. 1158(b)(2)(A)(ii).

Response: DHS acknowledges that in the context of the particularly serious crime bar to withholding of removal, the statute requires that noncitizens convicted of aggravated felonies for which the noncitizen has been sentenced to an aggregate term of imprisonment of at least 5 years be considered to have been convicted of particularly serious crimes, while leaving to the Attorney General's discretion the ability to consider as particularly serious crimes convictions for aggravated felonies for which the noncitizen has been sentenced to an aggregate term of imprisonment of less than 5 years. INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B). The particularly serious crime bar to asylum contains no such discretion, requiring that noncitizens convicted of any aggravated felony, without reference to any sentence imposed, be considered to have committed a particularly serious crime. INA sec. 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i). An AO encountering a noncitizen in a fear screening with a conviction for an aggravated felony for which a sentence of less than 5 years was imposed would likely be unable to efficiently address the particularly serious crime bar to statutory withholding of removal and would therefore not exercise their discretion to consider the bar.

However, DHS disagrees that it is inappropriate as a general matter for AOs to consider bars to statutory withholding of removal in fear

screenings. As noted above, the five bars to statutory withholding of removal that AOs may consider under this rule generally correspond to five of the six mandatory bars to asylum, on which AOs receive training and which they consider in affirmative asylum and asylum merits (AMI) adjudications. See INA secs. 208(b)(2)(A)(i)–(v), 241(b)(3)(B)(i)–(iv) and (b)(3)(B), 8 U.S.C. 1158(b)(2)(A)(i)–(v), 1231(b)(2)(B)(i)–(iv) and (b)(3)(B). Moreover, AOs conducting AMIs also make determinations on eligibility for statutory withholding of removal pursuant to 8 CFR 208.16, including the consideration of bars at 8 CFR 208.16(d)(2). 8 CFR 208.9(b). Therefore, DHS is confident in AOs' ability to exercise their discretion to consider and correctly apply bars to statutory withholding of removal in credible fear and reasonable fear screenings.

Comment: Some commenters recommended requiring AOs to consider bars in fear screenings. One commenter suggested that leaving such consideration to the discretion of AOs where there is easily verifiable evidence of a bar and the AO is confident they can address the bar efficiently, fails to consider the years that otherwise inadmissible noncitizens would spend in the country if referred to removal proceedings and the additional fiscal and time burdens to ICE and EOIR to handle such cases. These burdens, the commenter argued, create strains on public resources and potential danger to officers.

Response: DHS disagrees that requiring AOs to apply bars in fear screenings in all cases would necessarily reduce the burdens on ICE, EOIR, or public resources. Imposing a blanket requirement for AOs to consider bars in fear screenings would result, in many cases, in protracted screening interviews to fully explore the complex factual and legal considerations that often arise in connection with bars to asylum and statutory withholding of removal.⁹⁰ Doing so would reduce the number of fear screenings DHS is able to conduct, resulting in more noncitizens being referred for section 240 removal proceedings without any screening at all. While DHS appreciates the commenter's concern for officer safety, the Department is confident in its ability to protect its personnel, and the commenter provides no evidence to indicate otherwise.

8. Burden and Standard of Proof

Comment: A commenter wrote in support of requiring individuals in the

⁸⁷ See USCIS, "RAIO Directorate—Officer Training: Mandatory Bars to Asylum" (May 9, 2013).

⁸⁸ Credible Fear Procedures Manual (CFPM), Section III.J; Reasonable Fear Procedures Manual (RFPM), Section III.I.

⁸⁹ Credible Fear Procedures Manual (CFPM), Section III.K; Reasonable Fear Procedures Manual (RFPM), Section III.J.

⁹⁰ See 87 FR 18093–94.

asylum process to bear the burden of proof, reasoning that if the individual's claim is real, they could easily provide the evidence. Commenters suggested that the government should bear the burden of proof to demonstrate the applicability of any bars, rather than requiring noncitizens to bear the burden of proof.

Response: The Department agrees to the extent that it is appropriate to require noncitizens to bear the burden of proof to demonstrate they have a credible fear or reasonable fear determination, and notes that this is the current standard and will not change under this regulation. Under INA sec. 291, 8 U.S.C. 1361, the burden of proof is generally on the person requesting an immigration benefit to establish their eligibility for the benefit.⁹¹ Because mandatory bars to asylum and withholding of removal exclude noncitizens from eligibility for those forms of relief or protection, noncitizens must demonstrate that such bars do not apply according to the relevant legal standard. The purpose of fear screenings is to identify noncitizen who may be eligible for particular benefits or forms of relief or protection from removal, and it is consistent with the INA to place the burden of proof on noncitizens to establish a bar considered by the AO in the fear screening does not apply.

DHS believes it is reasonable in fear screenings to require noncitizens to bear the burden of proof to demonstrate at the applicable standard that a mandatory bar, if considered, does not apply to them. This approach is consistent with requiring noncitizens in credible fear and reasonable fear screenings to demonstrate at the applicable standard that they could establish, in a proceeding on the merits, eligibility for asylum or that they would be persecuted on account of a protected ground. The commenters' suggestion would represent a departure from this longstanding framework and introduce a burden-shifting element that could unnecessarily complicate and prolong screening interviews. DHS also notes that requiring noncitizens to bear the burden of proof in credible fear and reasonable fear screenings to demonstrate a bar, if considered, does not apply them, is analogous to the requirement in proceedings on the merits that applicants bear the burden of proof to demonstrate eligibility for any immigration benefit or relief sought under INA sec. 291, 8 U.S.C. 1361.

⁹¹ The same is true in removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. See INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A).

Comment: One commenter, in noting that a noncitizen whom an AO determines may be a threat to national security would be given the opportunity to show that they are not, stated that it is extremely difficult to prove one is not a threat.

Response: AOs conducting fear screenings would only consider a mandatory bar in those cases where there is easily verifiable evidence available to the AO that a mandatory bar may apply, and the AO can consider that bar efficiently at the credible fear stage. The rule would not require noncitizens to prove generally that they are not a threat. Rather, it allows AOs the discretion to consider particular statutory bars to asylum and withholding of removal where evidence that such a bar may apply exists and is easily verifiable. The Department considers it fair and appropriate to provide such discretion to AOs and to remove noncitizens without a legal basis to remain in the United States when screenings determine they would not be able to establish eligibility in a full merits hearing before an immigration judge or AMI before an AO. Furthermore, noncitizens already bear the burden of proof in merits determinations to demonstrate a bar does not apply. The commenter did not explain how allowing AOs to consider mandatory bars in fear screenings is more problematic than this current posture.

Comment: Commenters asserted that the rule requires noncitizens in fear screenings to meet the preponderance of the evidence standard to demonstrate a bar does not apply. Commenters indicated the significant possibility standard should apply uniformly to all aspects of credible fear interviews. A commenter asserted that allowing the consideration of bars to asylum and statutory withholding of removal in the context of other recent rulemakings that provide for different standards of proof for the different forms of relief for which noncitizens are screened in credible fear interviews will create confusion and increase the risk of erroneous fear determinations. One commenter wrote that the differing standards for consideration of exceptions to the mandatory bars—a significant possibility for an exception to an asylum bar and a reasonable possibility for an exception to a statutory withholding of removal bar—will create confusion among noncitizens and AOs and increase the likelihood of erroneous determinations.

Response: The rule does not require noncitizens in fear screenings to meet the preponderance of the evidence

standard to demonstrate a bar does not apply. Rather, in credible fear screenings under 8 CFR 208.30, it requires them to show a significant possibility that they would be able to demonstrate by a preponderance of the evidence (in the context of a full merits hearing) that a mandatory bar to asylum does not apply. 8 CFR 208.30(e)(5)(ii)(A) and (B). Noncitizens screened for statutory withholding of removal under the application of the CLP rule's presumption of ineligibility for asylum must demonstrate that there is a reasonable possibility that no mandatory bar applies, if the AO has considered the applicability of a bar. 8 CFR 208.33(b)(2)(i). Noncitizens subject to the Securing the Border rule's limitation on asylum eligibility must demonstrate a reasonable probability. 8 CFR 208.35(b)(2), 208.33(b)(2)(i). In the reasonable fear context, if the AO considers the applicability of a bar, the noncitizen must demonstrate there is a reasonable possibility that the bar does not apply. 8 CFR 208.31(c). All of these standards are lower than the preponderance of the evidence standard applicable to asylum applications being considered in full merits hearings.

DHS disagrees that screening for mandatory bars under varying standards of proof will create confusion and increase the risk of erroneous screening determinations. As stated above, AOs are trained to properly apply the different standards of proof in screening interviews and full adjudications,⁹² and AOs and have extensive experience applying different standards in the course of a case and across their workloads. The non-adversarial nature of screening interviews, along with the AO's duty to elicit testimony from noncitizens and examine other evidence in the record, including the results of security checks and country conditions, combined with 100-percent supervisory review of screening determinations and the availability of immigration judge review for negative determinations, all ensure the correct standard of proof is applied to the various forms of relief being screened in credible fear and reasonable interviews and minimize the risk of erroneous determinations.

DHS disagrees that shifting standards of proof applied during fear screenings will create prejudicial confusion among noncitizens. AOs are trained to elicit all relevant information from the noncitizen, including eliciting testimony to assist the noncitizen with

⁹² See USCIS, RAIO Directorate—Officer Training: Evidence (Apr. 24, 2024). USCIS will develop additional training on this rule prior to its implementation, including guidance on standards of proof for AOs tasked with implementing the rule.

meeting their burden of proof in a given determination or adjudication.⁹³ The comment appears to contemplate a noncitizen calibrating their response to an inquiry based on the standard of proof, rather than working with the AO to provide all the available evidence on an issue. Given the non-adversarial nature of screening interviews and AOs' duty to elicit the testimony needed to determine whether a noncitizen has met the applicable standard of proof, DHS believes the commenter misapprehends the dynamics of screening interviews.

DHS acknowledges the commenter's suggestion that the significant possibility standard should apply uniformly to all aspects of credible fear interviews. However, this rule does not change the standards applicable in credible fear interviews.

DHS acknowledges that the CLP rule and Securing the Border Interim Final Rule (IFR) and final rule impacted the credible fear review procedures (but not reasonable fear procedures), including, in some cases, the standards of proof applicable to certain noncitizens in credible fear screenings. See 8 CFR 208.33(b), 208.35(b). DHS and DOJ explained in the CLP and Securing the Border rules why the reasonable possibility and reasonable probability standards, respectively, are needed in the context of screening for statutory withholding of removal and CAT protection, even though it might be more straightforward to apply the significant possibility standard across the board. This rule, however, does not make any further changes to these standards of proof, nor were such changes proposed in the NPRM. Instead, it maintains the status quo.

DHS disagrees that providing discretion to AOs to consider bars in fear screenings in the context of the varying standards of proof implemented by these other rules will cause confusion and result in erroneous fear determinations. AOs have been effectively implementing the CLP rule for over a year and have demonstrated their ability to apply the significant possibility and reasonable possibility standards accurately in accordance with DHS regulations. Early indications suggest the same for the Securing the Border IFR and final rule. DHS has no reason to believe that providing AOs the discretion to consider mandatory bars in fear screenings where information makes it clear that a bar may apply, and the AO can analyze the bars efficiently,

will undermine the integrity of these screenings.

Furthermore, this rule does not require noncitizens undergoing fear screenings where bars are considered to demonstrate by a preponderance of the evidence that the bars do not apply. That is the standard of proof to demonstrate eligibility for asylum in a full merits hearing or AMI, not in the credible fear context. The standards of proof applicable to the consideration of bars in fear screenings will remain the same as those for the other eligibility criteria for the forms of relief or protection considered in credible fear and reasonable fear screenings under current regulations.

Comment: A commenter stated that the "reasonable probability" standard implemented under the Securing the Border IFR would create a difficult standard to administer and understand, and that under the IFR, certain noncitizens will be screened under a higher standard than that applied to similarly situated noncitizens under the CLP rule. The commenter wrote that the "reasonable probability" standard does not appear in the INA and is not defined clearly. Commenters noted that DHS's new regulations have created overlapping and inconsistent legal standards and were unsure whether this rule would conform to the IFR standard.

Response: This rule does not propose changes to the substantive screening standards by which AOs make their fear determinations. See generally 89 FR at 41347–61. Instead, this rule amends the regulations to provide AOs discretion to consider mandatory bars at the appropriate standard of proof that applies to the type of screening they are conducting.

Regarding the "reasonable probability" standard specifically, as discussed above in Section I.B, the Securing the Border IFR established that standard at 8 CFR 208.35(b)(2). Specifically, in cases where the AO first finds that the noncitizen is subject to the Securing the Border limitation on asylum eligibility and accordingly does not have a credible fear with respect to the noncitizen's asylum claim, the AO then assesses whether the noncitizen has established a "reasonable probability" of persecution or torture for the purposes of eligibility for withholding of removal or protection under the Convention Against Torture. 8 CFR 208.35(b)(2). When this rule is implemented, the AO may consider the applicability of the covered mandatory bars as part of this "reasonable probability" determination in cases where the Securing the Border rule's limitation on asylum eligibility is found

to apply. Should the Securing the Border rule's limitation on asylum eligibility not apply to a noncitizen in a credible fear screening, either because there is a significant possibility the noncitizen could demonstrate either they are not subject to the limitation or they are eligible for an exception to the limitation, the AO would consider the mandatory bars under this rule at the "significant possibility" standard in line with credible fear determinations made pursuant to 8 CFR 208.30, or, if appropriate, the "reasonable possibility" standard, if the noncitizen is subject to a presumption of asylum ineligibility under 8 CFR 208.33.

In all cases, the AO will only consider mandatory bars under this rule as a matter of discretion and only when there is easily verifiable information that a mandatory bar applies to the noncitizen and when the AO can handle the issue efficiently at the screening stage.

To the extent that commenters' concerns regard the merits of the "reasonable probability" standard in general, such concerns are outside the scope of this rule. Comments regarding the reasonable probability standard are addressed in Section III.C.3 of the Securing the Border final rule preamble. 87 FR at 81245–50.

9. Other General/Mixed Feedback and Suggested Alternatives

Comment: One commenter stated that while they understand the rule's intention to streamline the asylum process and uphold the integrity of the immigration system, they have recommendations for improvements. The commenter suggested increased training for AOs to better understand global issues, exceptions to applicability of the rule for specific vulnerable populations, access to legal counsel in the screening process, increased transparency around the screening process, and periodic review and public reporting on the rule's impact. One commenter expressed concern that noncitizens may face exploitation, and many other commenters suggested increasing capacity and resources, including AOs and immigration judges, so that noncitizens face shorter wait times and receive thorough interviews. One commenter suggested that increased use of Temporary Protected Status, parole processes such as the processes for Cubans, Haitians, Nicaraguans, and Venezuelans, and humanitarian parole could reduce the number of border crossings. One commenter recommended that the Department disincentivize border crossings by expanding its use of

⁹³ See *id.*; see also USCIS, "RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony" (Apr. 24, 2024); USCIS, "RAIO Directorate—Officer Training: Evidence" (Apr. 24, 2024).

expedited removal, rescinding ICE enforcement priorities memos, and raising the legal standards applied in screening cases.

Response: The Department emphasizes that AOs are trained in asylum law, receive regular trainings in specific areas of asylum law, and are experienced in analyzing mandatory bars.⁹⁴

The Department declines the suggestion to create exceptions to applicability of the rule for certain vulnerable populations because all applicants for asylum, regardless of population, are subject to all mandatory bars.

An explanation of access to counsel in the screening process is provided in section 2(b), due process concerns, of this rule.

The Department appreciates the suggestion to increase transparency and provide periodic review and public reporting on the rule's impact. USCIS already provides certain asylum statistics to the public through its website and reports to Congress on a variety of immigration initiatives and statistics. The Department will take this suggestion under consideration.

The Department also continues to use a variety of processes, including parole, to discourage unlawful entries into the United States and safeguard against exploitation of noncitizens.

The Department acknowledges the recommendation to increase capacity and resources by hiring more AOs and immigration judges. The Department continues to expand its workforce to meet the growth in immigration benefit applications and requests, but staffing and hiring of AOs is out of the scope of this rule, as is the staffing and hiring of immigration judges, which is managed by the Department of Justice. This rule is intended to provide DHS additional operational flexibility in screening determinations and, as explained in the NPRM preamble, the Department anticipates that it will also expand its ability to more quickly remove noncitizens who present national security or public safety threats, may provide efficiencies for ICE Office of the

Principal Legal Advisor (OPLA) and ICE Enforcement and Removal Operations (ERO), and may reduce referrals to EOIR in cases in which a negative fear determination can be made at the screening stage for an individual who the Department would otherwise place into potentially lengthy proceedings in immigration court, including possible appeals to the BIA.

Certain suggestions, specifically those to disincentivize unlawful border crossings by expanding the use of expedited removal and removing ICE enforcement priorities, are outside the scope of this rule. This rule encompasses USCIS regulations and procedures and does not amend ICE regulations and procedures.

Finally, regarding the suggestion to increase the legal standards applied in screening cases in order to disincentivize unlawful border crossings, the Department emphasizes that this rule does not affect the standard of proof applicable in screening procedures. Furthermore, the intent of this rule is to increase efficiency and enhance public safety, rather than to function as a broader deterrence measure.

Comment: A commenter stated that to speed removal of high enforcement priorities and reduce the EOIR pending caseload and the burden on OPLA and ERO, DHS failed to consider policies that it can exercise in its discretion to not prosecute non-priority cases at a greater scale.

Response: DHS acknowledges the comment and has provided an estimated reduction in EOIR workload after the implementation of this rule. See section V.A.3.c of this preamble. The regulation will prevent noncitizens from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible, and it will allow DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases. However, the main purpose of this rule is not to reduce EOIR pending caseload or the burden on ICE OPLA and ERO. Instead, as explained in the NPRM and in this preamble, the purpose of this rule is to facilitate efficiency in the expedited removal process by providing AOs additional operational discretion to choose to apply certain mandatory bars during fear screenings. The commenter's suggestions are outside the scope of this rule.

E. Other Issues Relating to the Rule

1. Coordination With DOJ in the Rulemaking

Comment: A commenter suggested that the lack of a corresponding proposed rule by DOJ demonstrates that DHS failed to coordinate with EOIR, undermining DHS's claims that the rule will promote efficiency and consistency and betraying a lack of preparedness to promulgate a final rule. Similarly, another commenter suggested that the lack of a corresponding DOJ rule highlights the irregular nature of this proposed rulemaking.

Response: As an initial matter, the Department emphasizes that it has the authority to pursue this rulemaking independently and without a corresponding rule issued by DOJ. As the rule pertains to the procedures AOs follow, no DOJ rule is necessary to implement the changes described in the rule.

Nevertheless, DHS emphasizes that DOJ was consulted during the development of the NPRM and this rule. As a significant rule, OIRA conducted a review of this rule under Executive Order 12866. 58 FR 51735 (Oct. 4, 1993).⁹⁵ OIRA review includes the coordination of interagency Executive Branch review of significant rules, including review by the Department of Justice.⁹⁶

Finally, as noted in the NPRM, DOJ may issue its own separate rule to clarify the procedures immigration judges will follow when reviewing the findings of AOs in credible fear or reasonable fear review proceedings. 89 FR at 41355 n.37.

Comment: One commenter suggested that the lack of a corresponding rulemaking by the DOJ may cause immigration judges to waste valuable time and resources trying to comprehend whether they are required to apply the rule and if so how to do so. Similarly, another commenter objected that the proposed rule does not contain any discussion of how or why this change will not impact review of a negative credible fear determination or whether that review will now encompass immigration judge review of a mandatory bar determination at this stage. A commenter also stated that the lack of a corresponding rule from the

⁹⁴ See USCIS, RAO Directorate—Officer Training: Mandatory Bars (May 9, 2013); USCIS, RAO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing—Working with an Interpreter (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview (Apr. 24, 2024); USCIS, RAO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma (Apr. 24, 2024).

⁹⁵ See also Office of Information and Regulatory Affairs, OIRA Conclusion of E.O. 12866 Regulatory Review, Rin 1615–AC91, <https://www.reginfo.gov/public/do/eoDetails?rid=524411> (last reviewed Sept. 26, 2024).

⁹⁶ See Office of Information and Regulatory Affairs, Frequently Asked Questions: What is OIRA's Role in the Rulemaking Process?, <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp?oira> (last reviewed Sept. 26, 2024).

DOJ leaves open the question of whether immigration judges have the authority to consider a mandatory bar in the first instance when reviewing negative credible fear screenings where the AO declined to consider a mandatory bar.

Response: The procedures for immigration judge review of AOs' credible fear and reasonable fear decisions are set out at 8 CFR 1003.42, 1208.30, 1208.31, 1208.33, and 1208.35. In general, DHS notes that immigration judges have the authority to review negative credible fear and reasonable fear determinations of AOs de novo, and such review is available for all negative fear determinations. *See, e.g.,* 8 CFR 1003.42(d); 8 CFR 1208.30(g). Should DOJ determine that further clarity is needed, DHS again notes that the DOJ may issue its own rule to clarify the procedures for immigration judge review.

2. Security Bars Rulemaking

Comment: Some commenters wrote that it was not clear whether this rule would result in AOs applying the additional public-health related bars in the Security Bars final rule in fear screenings, should that rule go into effect.

A commenter expressed concern that the proposed rule would interact with the Security Bars final rule when it goes into effect December 31, 2024, by reinforcing or endorsing the applicability of what the commenter characterized as that rule's illegal interpretation of the security bars during credible and reasonable fear screenings. The commenter stated the Security Bars final rule is incompatible with non-refoulement obligations under international law and the INA, citing case law and noting that there is no public health exception to non-refoulement obligations. After recommending redrafting, the commenter encouraged DHS to at least amend the proposed rule to clarify that public health considerations would not be tasked to AOs under the proposed rule, suggesting a statement in both the rule and its preamble that it does not enable decisions of public health issues in the fear screening process under the guise of "security."

Another commenter expressed concern that the proposed rules could interact with the Security Bars final rule by complicating pre-screening procedures that are already highly complex and recommended that the Department rescind the Security Bars rule to avoid causing or worsening inefficiencies in the U.S. immigration system.

A commenter wrote that the proposed rule could become more broadly applicable if the Security Bars final rule goes into effect as scheduled on December 31, 2024, and expressed concern that asylum opportunities would be severely limited as a result. The commenter urged the Department to rescind both the Security Bars final rule along with the proposed rule to provide greater support for noncitizens seeking protection in the United States.

Finally, a commenter expressed concern that the proposed rule would automate the wrongful removal of asylum seekers if this proposed rule were finalized and the Security Bars final rule goes into effect. The commenter provided an example of a noncitizen who may be subject to a statutory bar to asylum due to the public health provision in the Security Bars final rule.

Response: As an initial matter, DHS emphasizes that comments related to the substance, legality, merits, or other specific issues focused on the Security Bars final rule itself are outside the scope of this rulemaking.

On December 23, 2020, DHS and DOJ jointly published the Security Bars final rule to clarify that the Departments may consider emergency public health concerns based on communicable disease (not limited to COVID-19) when determining whether a noncitizen is subject to the existing statutory bars to asylum and withholding of removal at INA secs. 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), for noncitizens for whom "there are reasonable grounds to believe" that they are "a danger to the security of the United States" (commonly known as the "security bars").⁹⁷ Specifically, the Security Bars final rule delineates certain circumstances when, in the context of a public health emergency under Federal law or regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), a noncitizen would be ineligible for asylum under the statutory security bars. *See* 85 FR at 84193 (amending 8 CFR 208.13(c)).

The Security Bars Final Rule is scheduled to become effective on December 31, 2024. 87 FR 79789 (Dec. 28, 2022). However, DHS emphasizes that DHS and DOJ continue to consider further action related to the security bars final rule,⁹⁸ and OIRA received a

rule on this topic on December 3, 2024 for review under Executive Order 12866.

In addition, no public health emergency relevant to the Security Bars final rule currently exists. As a result, there would be no direct, immediate impact on eligibility for asylum or other protection if the Security Bars final rule were to go into effect because there is no existing relevant public health situation that would trigger the bars.

As explained in the NPRM and elsewhere in this preamble, DHS considers it appropriate to provide AOs discretion to consider security- and public safety-related bars to asylum and statutory withholding of removal in fear screenings to facilitate the swift removal of noncitizens who pose security and public safety risks and are clearly ineligible for asylum or withholding of removal. DHS therefore declines to rescind this rule, limit AOs' discretion regarding the statutory security bars, or provide other restrictions related to the statutory security bars, including the pending Security Bars final rule, in credible fear and reasonable fear screenings.

Finally, the Department disagrees with the claim that the rule will "automate" the removal of noncitizens if the Security Bars final rule also goes into effect. Under this rule, AOs consider any mandatory bar on a case-by-case basis with respect to the specific facts presented in a case. The AO will not automatically apply a bar in any case.

3. Other Out of Scope Comments

Comment: Commenters provided feedback and suggestions outside the scope of this rulemaking. Examples of these out-of-scope comments include the following. Commenters:

- suggested if immigration lawyers are opposed to this regulation, they should provide their services for free.
- stated that locals in Ecuador laughed and joked about a headline related to this rulemaking.
- suggested building and staffing something like what was done at Ellis Island.
- suggested creating a resettlement program for asylum seekers, while others suggested creating paths to citizenship for immigrants.
- noted the positive impacts of immigrants on our nation and its economy.
- urged that migrants be treated fairly and with dignity.
- expressed opposition to President Biden's Proclamation on Securing the Border.

⁹⁷ Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020).

⁹⁸ *See, e.g.,* OIRA, Spring 2024 Unified Agenda, Asylum Eligibility and Public Health (RIN 1615-AC57), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1615-AC57>.

- criticized purported shortcomings of the CBP One mobile app.
- expressed concern for the wellbeing of LGBTQI+ persons and torture survivors.
- urged a pathway to citizenship for Deferred Action for Childhood Arrivals students and their families.
- urged Congress to build a more welcoming immigration system and provide increased legal representation for asylum seekers, additional resources for government entities that administer the immigration system, and more accessible pathways to citizenship.
- stated that all criminals should be deported immediately.
- called for hiring and training more immigration judges.

Response: DHS acknowledges these comments but declines to address them, as they are outside the scope of this rulemaking.

F. Statutory and Regulatory Requirements

1. Administrative Procedure Act

Comment: Commenters raised concerns that this rule violated the Administrative Procedure Act's (APA's) requirements, as set forth in 5 U.S.C. 553(b) through (d). Commenters stated that the 30-day comment period was not sufficient and that, at a minimum, the comment period should have been 60 days. Numerous commenters requested that DHS extend the comment period. In support, commenters referenced Executive Orders 12866⁹⁹ and 13563,¹⁰⁰ both of which recommend providing the public a meaningful opportunity to comment with a comment period of not less than 60 days in most cases. Commenters stated that the NPRM's complexity and length, its departure from long-standing agency policy, its interaction with other policy and regulatory issues, and its impact on asylum-seekers and those supporting them demonstrate the 30-day comment period was insufficient.

Other commenters stated that 30 days was an insufficient period to collect information and evidence of the rule's impact or to develop alternatives to the changes made by the rule, particularly because providing comments on the rule requires organizations to divert resources away from assisting migrants.

Commenters disagreed with DHS's statements that a 30-day comment period was reasonable and appropriate because the rule relates to a discrete topic, is relatively short, and has been addressed in multiple recent notice-and-

comment rulemakings. Commenters stated that the proposed rule addresses a complex topic that involves Federal and international law, and that, because the rule did not provide sufficient notice of how AOs would exercise their discretion, the scope of the rule could not be determined. Commenters also stated that the rule interacts with recent regulatory and policy changes in complex ways that could not have been considered during earlier notice-and-comment rulemakings that addressed the same topic. Commenters specifically stated that additional time was needed to analyze the proposed rule in relation to the CLP rule including the ramifications of the proposed rule if the CLP rule is vacated or modified as a result of legal challenges against it, and in relation to the Securing the Border IFR, which was published and became effective during the comment period for this rule.

Commenters also contend that because this rule repeals or reverses existing policy, DHS has a greater burden to justify providing a comment period that is shorter than the 60-day period that was provided for the Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers rule, which rescinded regulations applying mandatory bars during credible fear screenings. 87 FR 18078 (Mar. 29, 2022).

Commenters stated that DHS justified the 30-day comment period, in part, on its stated interest in acting quickly to provide an additional tool and operational flexibility to more promptly remove noncitizens who pose public safety and national security risks. Commenters stated that the desire to act quickly cannot be a justification to shorten the comment period, and some commenters expressed concern that the process would not leave DHS sufficient time to fully consider public comments before issuing a final rule. Further, commenters asserted that DHS did not present evidence of an urgent security threat or other exigent circumstance, did not explain why it did not propose the rule earlier, and did not justify the 30-day period in consideration of its expectation that the affected population will be relatively small.

Finally, commenters stated that the 30-day comment period was not justified in view of the potential consequences of implementing the rule without sufficient consideration of public comments, namely, that an erroneous application of the bars could result in individuals being returned to

countries where they face persecution or torture.

Response: DHS disagrees with commenters' statements that the 30-day comment period was inadequate and that the changes being made are overly complex, do not involve minimal regulatory changes, and do not relate to a discrete change describing when an AO has the discretion to consider certain mandatory bars earlier in the fear screening process than has normally been the case.

The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, a 60-day period is not required. The APA only requires that an agency provide interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(c). For example, the D.C. Circuit has stated that, although a 30-day period is often the "shortest" period that will satisfy the APA, such a period is generally "sufficient for interested persons to meaningfully review a proposed rule and provide informed comment," even when "substantial rule changes are proposed." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Here, the comment period spanned 30 days, from May 13, 2024, through June 12, 2024, which DHS believes was sufficient to allow for meaningful participation, as evidenced by the almost 4,300 public comments received, including numerous detailed comments from interested organizations. Many of the comments expressing opposition to this rule are similar in their nature and raise many of the same issues or concerns. The fact that the commenters raise the same issues and concerns reflects the narrow scope of the rule and a common recognition and understanding of the substance in the rule and the issues raised therein. There were also many instances of commenters providing more than one comment. Commenters who submitted more than one comment generally submitted an initial comment at the beginning of the comment period arguing against the 30-day comment period (during which the Department received a number of substantive comments on the proposed rule itself), and then submitted a subsequent comment later in the comment period commenting on additional issues they have with the proposed rule, but also reiterating many of the same comments and arguments that were previously

⁹⁹ 58 FR 51735 (Oct. 4, 1993).

¹⁰⁰ 76 FR 3821 (Jan. 21, 2011).

made in the initial comment. Submitting multiple comments in this way is an indication that commenters had sufficient time to provide comments and then revisit those comments during the course of the comment period. Additionally, many of the comments are duplicative and indicative of a mass mailing campaign, which demonstrates that the public had sufficient time to coordinate their efforts, collaborate on and draft uniform responses, disseminate such responses among interested individuals and organizations, and for those individuals and organizations to submit those comments in an organized and collective manner via the **Federal Register**. The number of comments received and the content of those comments all indicate that the public was provided the opportunity to, and did in fact, meaningfully engage with this rulemaking.

DHS disagrees with the comments asserting that a 30-day comment period for a rule that reverses the existing policy—under which AOs do not apply mandatory bars during credible fear screenings—requires more justification. The cases cited in support of this assertion do not require that an agency provide a comment period equal to or greater than the period for the initial rule, nor do they impose heightened requirements for an agency's decision to provide a shorter comment period for a rescission; rather, they identify the lack of parity in those rulemakings as a supporting factor for their conclusions that the agencies failed to satisfy the APA requirements for notice and comment.¹⁰¹ The Sixth Circuit examined these decisions and observed that “the feature of the challenged rescissions that ran afoul of the APA in both [cases] was the agency's imposition of content restrictions on the comments that interested parties could submit during the comment window.” *Chamber of Commerce of U.S. v. SEC*, 115 F.4th 740, 756 (6th Cir. 2024) (finding that the 31-day comment period for a proposed rescission of a rule was sufficient under the APA, even though the initial rulemaking offered a 60-day comment period). There is no such content restriction at issue here. As stated above, the APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c). For the reasons described here and in the NPRM, DHS believes that the 30-day comment

period provided the public a meaningful opportunity to participate. *See* 89 FR 41347, 41358 (May 13, 2024).

DHS reiterates that the rule does not involve an overly complex topic that necessitates a comment period beyond 30 days. Fundamentally, the changes do not affect the substantive analysis of those bars, they only move forward the point in time at which certain mandatory bars will be considered and allow AOs to consider those certain mandatory bars during the fear screening process as a threshold issue, making the process more efficient. Additionally, DHS will provide sub-regulatory guidance to asylum officers regarding their exercise of discretion.

The 30-day comment period also afforded adequate time for commenters to consider the combined effects of this rule with other DHS rules and policy changes. Commenters stated that additional time was needed to analyze the proposed rule in relation to the CLP rule, including the ramifications on the proposed rule if the CLP rule is vacated or modified as a result of pending legal challenges. The CLP rule became effective May 11, 2023, now over 15 months ago. 88 FR 31314 (May 16, 2023). DHS described in specific detail how this rule would interact with the CLP rule in section IV.C. of the NPRM. There it was explained that 8 CFR 208.33(b)(2)(i) was being amended to provide AOs with the discretion to consider the applicability of the bars to withholding of removal contained in INA sec. 241(b), 8 U.S.C. 1231(b), when determining whether there is a reasonable possibility that the noncitizen would suffer persecution or torture in the country of removal. If an AO determines that the presumption of asylum ineligibility under the CLP rule applies, and there is evidence of a mandatory bar to withholding of removal and the noncitizen is unable to demonstrate there is a reasonable possibility that the mandatory bar does not apply, the AO may base a negative credible fear of persecution determination on a mandatory bar to statutory withholding of removal pursuant to 8 CFR 208.33 if there is evidence in the record that it would be more efficient to do so. 89 FR 41347, 41357 (May 13, 2024).

DHS also disagrees that the 30-day comment period prohibited commentators from considering the combined impact of this rule and the Securing the Border IFR, which was issued June 6, 2024, during the comment period for this rule and became effective on June 5, 2024. 89 FR 48710 (June 7, 2024). This rule interacts similarly with the Securing the Border

IFR as it does with the CLP rule, which has been in place since May 2023 and which uses the same general framework. As explained in the Securing the Border IFR, the “reasonable probability” standard would apply to determinations involving a noncitizen who is subject to the Securing the Border IFR's limitation on asylum eligibility. 89 FR at 48739 n.186. The Securing the Border IFR places a limitation on asylum eligibility for noncitizens who enter across the southern border in violation of the suspension and limitation on entry created by the June 3 Presidential Proclamation, unless they are excepted under section 3(b) of the Proclamation or eligible for an exception based on exceptionally compelling circumstances. 8 CFR 208.35(a), 1208.35(a). Additionally, noncitizens who cross the southern border and are processed for expedited removal while the limitation is in effect will only be referred for a credible fear screening with an AO if they manifest or express a fear of return to their country or country of removal, a fear of persecution or torture, or an intention to apply for asylum. 8 CFR 235.15(b)(4). Finally, under the Securing the Border FR the United States will continue to adhere to its international obligations and commitments by screening individuals who manifest a fear and do not qualify for an exception to the Securing the Border rule for statutory withholding of removal and CAT protections at a “reasonable probability” of persecution or torture standard—a standard that is higher than the “reasonable possibility” standard currently applied under the CLP rule. 8 CFR 208.35(b)(2). Again, this rule allows an AO the discretion to consider evidence indicating that a mandatory bar applies and to apply that mandatory bar during fear screening.

Although DHS expressed a desire to act as quickly as possible to make this rule's regulatory changes when explaining the 30-day comment period, the desire for quick action was not the sole justification for the 30-day comment period. Rather, in reviewing the nature of the rule and the fact that the rule was narrow in scope, addressed a discrete topic, and made modest changes to the regulatory text, DHS determined that a 30-day comment period would be sufficient for the public to engage with the rule, provide comments, and participate in the rulemaking. Having recognized that a 30-day comment period is sufficient for meaningful public engagement, DHS expressed its desire to finalize the rule quickly to provide AOs with this additional tool to more promptly

¹⁰¹ *See N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012); *California by & through Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019).

remove noncitizens who pose public safety and national security risks, and thus set the comment period at 30 days. To the extent that commenters argue that a desire for swift action cannot be a valid consideration when setting the comment period, DHS disagrees. Although the Department expects that the number of cases when AOs would consider a mandatory bar under this rule to be relatively small, as discussed further below in Section V.A.1, DHS believes it is important to act expeditiously to increase efficiency wherever possible, especially in light of the current strains on processing and capacity at the southern border. *See generally* 89 FR 48710 (June 7, 2024) (DHS and DOJ describing the emergency circumstances necessitating the Securing the Border IFR).

Finally, the length of the comment period, whether 30 days or longer, has no bearing on the amount of time or level of consideration that DHS will give when evaluating, addressing, and responding to public comments before issuing a final rule. DHS has carefully and appropriately considered the comments it received from the public on this rule.

Comment: Commenters stated that DHS failed to consider significant reliance interests engendered by legal service organizations under the existing policy and detrimental impacts that the proposed rule would have on those organizations.

Commenters stated that legal service providers that assist noncitizens during fear screenings have relied on the previous policy—under which screenings did not entail adjudication of legally and factually complex matters, such as the application of mandatory bars—in developing their internal protocols, preparing informational materials, and delivering legal services to clients during credible and reasonable fear screenings. They stated that the changes will require legal services providers to dedicate financial and human resources to train their staff and volunteers and to revise, translate, and publish updated guidance for noncitizens.

A legal services provider commented that it would be adversely impacted as an organization that primarily serves noncitizens whose cases are being processed at an asylum office. The commenter stated that implementing the rule would likely result in more experienced AOs being detailed away from the local asylum office to conduct screening interviews at the southwest border, which would leave fewer, or less skilled, AOs in the local asylum office. Consequently, the commenter stated

that cases would be processed more slowly in asylum offices, exacerbating existing backlogs. The commenter also stated that these changes would disrupt allocation of finite resources for non-profit organizations and that the increased complexity and processing times would increase the difficulty of recruiting pro bono attorneys and constrain its ability to serve potential clients.

Another commenter stated that because its legal services program is primarily designed to assist asylum seekers after they have been placed in full removal proceedings, it has a reliance interest in ensuring that noncitizens with asylum claims are able to pass their fear screenings.

Response: DHS has broad authority to establish and amend regulations and to take other actions “necessary for carrying out” the Secretary’s authority to administer and enforce the immigration laws. *See* INA sec. 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3) (granting the Secretary the authority to establish regulations and take other actions “necessary for carrying out” the Secretary’s authority under the immigration laws); *see also* 6 U.S.C. 202 (authorities of the Secretary); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasizing that agencies “must be given ample latitude to adapt their rules and policies to the demands of changing circumstances” (quotation marks omitted)); *and see* Section II of this preamble.

When an agency changes a policy position, it must provide a reasoned explanation for the change, but “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” so long as it can show “good reasons” for the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 505, 515 (2009). If the established policy has engendered serious reliance interests, the agency’s reasoned explanation must take those interests into account. *Id.*

DHS has considered the commenters’ asserted reliance interests but believes that their concerns do not outweigh DHS’s reasons for implementing these changes. As discussed in the NPRM, *see* 89 FR 41347, 41350 (May 13, 2024), the applicability of mandatory bars during credible fear screenings has been the subject of numerous regulatory actions since 2020, including the Global Asylum rule, the Security Bars rule, and the Asylum Processing IFR. Although the Global Asylum rule did not go into effect because of the preliminary injunction against implementation of the Global Asylum Rule, and the

Security Bars rule has not yet gone into effect because the Departments have delayed its effective date, their promulgation weighs against commenters’ assertions of long-settled reliance interests in the status quo. *See Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). DHS and DOJ published the Asylum Processing IFR rescinding the requirement to apply mandatory bars during credible fear screenings on March 29, 2022, and it became effective on May 31, 2022. *See* 87 FR 18078 (Mar. 29, 2022). During the 2-year period between publication of the Asylum Processing IFR and the publication of the NPRM for this rule, the Departments published and implemented the CLP rule, which made significant changes to credible fear screenings. 88 FR 31314 (May 16, 2023). Although the CLP rule did not alter the practice of not applying mandatory statutory bars at the credible fear stage, it did establish a rebuttable presumption of asylum ineligibility that AOs apply, when applicable, during credible fear screenings. These recent changing circumstances undermine the assertions that legal service providers have engendered significant reliance interests under the current policy. Rather, changing circumstances involving irregular immigration and the efforts DHS has employed to respond to the issue at the southwest land border demonstrate that the processes and procedures surrounding credible fear screenings remain fluid as DHS continues to respond to these challenges; as a result, the opportunity to develop a strong reliance interest in the status quo when it comes to the credible fear screening process is limited.

DHS acknowledges that policy changes often require training and other efforts within organizations, including its own. *See* section IV of this preamble, explaining the training that AOs will receive upon implementation of this rule. Nonetheless, these impacts do not alone preclude an agency from changing its position when it has good reasons to do so. In the NPRM for this rule, DHS described the reasons why the Department had pursued the different regulatory changes affecting the application of mandatory bars during fear screenings. *See* 89 FR 41347, 41353–54 (May 13, 2024). The common thread between these changes has been the Department’s pursuit of greater efficiency in the fear screening process in furtherance of Congress’ intent that the administrative removal processes be swift. *See* 85 FR 36264, 36272; 85 FR 41201, 41210; 87 FR 18078, 18134–36;

and 89 FR 41347, 41351. DHS's position on the application of mandatory bars during credible fear screenings has evolved since implementing the CLP rule, and the NPRM for this rule explained that the Department identified a previously unconsidered alternative that would decrease the costs of applying the mandatory bars while maintaining many of the benefits—namely, conducting a factual and legal inquiry into the bars only in those cases for which doing so is likely to be an efficient and appropriate use of resources. 89 FR 41347, 41354 (May 13, 2024). DHS believes that the anticipated benefits of this rule outweigh the commenters' concerns for the administrative impact on their organizations.

DHS also disagrees that some of the claimed reliance interests are cognizable. The assertion that this rule will increase backlogs or other staffing changes at local asylum offices and, ultimately, impede legal service providers' ability to serve their clients is based on a series of suppositions about the rule's effects on asylum office operations and staffing. Without factual support for the hypothetical chain of events, the Department finds this comment to be unpersuasive.

The comment asserting legal service providers' reliance interest in ensuring that noncitizens with asylum claims are able to pass their fear screenings does not explain how implementation of this rule would upset that claimed interest. As the NPRM states, this rule will allow DHS to quickly screen out certain non-meritorious protection claims by allowing AOs to promptly issue negative fear determinations in cases in which there is easily verifiable evidence indicating that the noncitizen could be subject to a bar; the noncitizen is unable to establish, at the relevant standard, that the bar would not apply; and the noncitizen is not otherwise able to establish a credible or reasonable fear of torture. See 89 FR 41347, 41351 (May 13, 2024). The regulation will prevent noncitizens from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible, and it will allow DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases. *Id.* It is unclear how such an outcome would adversely impact a legal services organization that serves noncitizens in immigration court proceedings or what reliance interest would have been engendered under the status quo.

2. Regulatory Impact Analysis Impacts and Benefits (E.O. 12866 and E.O. 13563)

a. Impacts to Noncitizens (e.g., Individuals in the Credible Fear or Reasonable Fear Process)

Comment: A commenter stated that the proposed provisions in the NPRM will make a marginal reduction in EOIR pending caseload at the cost of the broader impact on asylum seekers. The commenter further added that the process of applying mandatory bars is extremely complex factually and legally and will lead to erroneous negative credible fear and reasonable fear determinations with no legal recourse available to asylum seekers.

Response: The final rule allows AOs the discretion to consider particular statutory bars to asylum and statutory withholding of removal where evidence that such a bar may apply is easily verifiable. The final rule will enable the Department to more swiftly remove individuals who are not eligible for protection in the United States based on national security or public safety concerns, preventing such cases from using valuable government resources to complete their adjudication beyond screening determinations. DHS considers it fair and appropriate to provide such discretion to AOs and to remove noncitizens without a legal basis to remain in the United States when screenings determine they would not be able to establish eligibility in a full merits hearing before an immigration judge or an AMI before an AO. As explained in section IV.B.2.b of this preamble, DHS has assessed that the possibility of erroneous removals is low. In analyzing any evidence that a bar to asylum or statutory withholding of removal may apply, this rule would allow AOs the flexibility to choose to consider a bar based on the individual facts and circumstances and information available to the AO to avoid erroneous negative determinations. Nothing in this rule alters the ability of a noncitizen who is the subject of a negative credible fear or reasonable fear determination to seek review of such determination by an immigration judge.

Comment: A commenter stated that the NPRM will lead to longer detention times and increase likelihood of family separation due to disparities in credible fear determinations among family members and an increase in negative credible fear determinations. Another commenter stated that the rule could lead to family separations and disregards the impact on vulnerable families.

Response: Commenters' concerns regarding the impact of this rule on family separations are highly speculative. The current regulations provide a process for the consideration of family units in expedited removal. Specifically, under 8 CFR 208.30(c), a spouse or child of a principal asylum seeker who arrived in the United States concurrently with the principal asylum seeker is included in that asylum seeker's positive credible fear evaluation and determination, unless the principal asylum seeker or the spouse or child declines such inclusion. The AO must complete background and security checks for each family member and screen each family member for mandatory bars to asylum eligibility. If the family unit is placed into section 240 removal proceedings, the Department serves an NTA on each family member and file an NTA for each family member with EOIR. If the AO finds that the principal noncitizen does not have a credible fear of persecution or torture, then the AO must interview the other family members to determine if any other family member can establish a credible fear. If the AO finds any family unit member positive for credible fear, then the AO does not interview the remaining family members except to screen for mandatory bars. The other family members do not need separate credible fear determinations and may be included in the positive family member's determination in the officer's discretion for purposes of family unity on a case-by-case basis, unless they indicate they wish to receive a separate determination.¹⁰²

In other words, regardless of this rule, any family member subject to a mandatory bar is ineligible for the relevant form of relief or protection. This rule does not change the underlying merits of the family unit members' claims or the ability of other family members to ultimately qualify for asylum or withholding of removal.

b. Impacts on U.S. Economy, Taxpayers, Public Safety

Comment: A commenter described the additional time burden on asylum seekers to gather evidence, on stakeholder organizations involved in providing direct services, such as preparing asylum seekers for credible fear and reasonable fear interviews; and psychological costs imposed on asylum seekers by the NPRM.

¹⁰² USCIS, "Credible Fear Procedures Manual," Section III.E, <https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf> (last accessed July 31, 2024).

Response: DHS acknowledges this comment and has included a description of impacts of the Final Rule under Executive Order 12866 and Executive Order 13563 in Section V.A. of this preamble.

Comment: A commenter stated that the rule will increase the asylum application backlog and detention times because of the time required for an AO to apply mandatory bars while also considering exemptions and waivers, and the time required for an AO to determine at the credible fear and reasonable fear stage if an asylum seeker has committed a particularly serious crime. The commenter argued the law is unclear about whether there is an exception to the persecutor bar for individuals forced to engage in persecution under duress; that asylum seekers face the challenge of lack of access to legal counsel in CBP custody and other detention facilities, and insufficient time to gather evidence; and that a consequence of the rule will be erroneous negative credible fear or reasonable fear determinations, leading to wrongful deportation and separation of families in certain situations.

Response: DHS has described procedures used by AOs to identify possible mandatory bars while screening noncitizens for credible fear claims. Nothing in this rule alters the ability of a noncitizen who is the subject of a negative credible fear or reasonable fear determination to seek review of such determination by an immigration judge. DHS anticipates that cases raising such novel or complex legal questions would not be appropriate for AOs to use their discretion to consider the bar at issue, as it is unlikely the AO could do so efficiently in a screening interview. DHS disagrees that the rule will lead to additional erroneous negative credible fear or reasonable fear determinations, as the rule only allows AOs to enter a negative credible fear determination if the AO determines there is not a significant possibility the noncitizen would be able to establish by a preponderance of the evidence that the mandatory bars to asylum under INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v) or to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) do not apply. Further, as explained in the description of impacts of the Final Rule under Executive Order 12866 and

Executive Order 13563 in Section V.A. of this preamble, noncitizens who receive a negative credible fear or reasonable fear determination because of the application of mandatory bars may spend less time in detention since they are deemed ineligible for relief at the screening stage. This rule would conserve DHS resources to the extent it precludes additional or more extended detention or monitoring of individuals in cases in which an AO has determined at the screening stage that a mandatory bar applies.

c. Benefits and Cost Savings

Comment: A commenter stated that given the relatively small number of cases the rule would affect and the difficulty of analyzing mandatory bars, the risk of mistaken removal far outweighs DHS's claimed expediency.

Response: As previously explained, DHS disagrees that the rule will lead to erroneous determinations. The Department is confident in the ability of AOs to apply the provisions of the rule correctly and in the safeguards in place—including 100-percent supervisory review and the ability of noncitizens to request immigration judge review of negative fear determinations—to ensure fear determinations and any resulting removals are conducted in accordance with the law. DHS has provided a detailed description of impacts of the Final Rule under Executive Order 12866 and Executive Order 13563 in Section V.A. of this preamble.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order 12866 (“Regulatory Planning and Review”), as amended by Executive Order 14094 (“Modernizing Regulatory Review”), and Executive Order 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of

quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

1. Summary of Costs and Benefits of the Final Rule

DHS is amending its regulations governing credible fear and reasonable fear screenings by allowing AOs the discretion to consider of mandatory bars to asylum contained in INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v), or the mandatory bars to statutory withholding of removal in INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), and, consequently, reducing the amount of time that some noncitizens who are subject to those bars remain in the United States. AOs would have the discretion to consider the potential application of certain mandatory bars to asylum and statutory withholding of removal when screening the noncitizen for a credible fear of persecution (including cases where the CLP rule’s presumption of asylum ineligibility applies and no exception or rebuttal is established, as well as credible fear determinations subject to the limitation on asylum eligibility pursuant to the Securing the Border rule where no exception is established) or reasonable fear of persecution.

The final rule changes and streamlines the adjudicatory process for affected asylum or statutory withholding of removal claims arising out of the expedited removal process, as well as reinstatement of removal and certain final administrative removal order processes. By providing USCIS AOs flexibility to apply the public safety and national security statutory bars, the rule could enhance the public safety of the United States with the swift removal of some noncitizens from the country who pose a threat to public safety or national security.

Table 1 provides a detailed summary of estimated quantifiable and unquantifiable impacts of the Final Rule’s provisions.

TABLE 1—SUMMARY OF THE EXPECTED IMPACTS OF THE FINAL RULE

Population impacted	Annual population estimate	Expected impacts
Noncitizens issued credible fear determinations by USCIS.	USCIS credible fear determinations have ranged from 28,000 to 125,000 noncitizens per year in the last 5 fiscal years (see Table 3).	- Noncitizens who receive a positive credible fear determination and are referred to EOIR by USCIS might benefit from less time waiting for an immigration judge's decision on their protection claims. This is a benefit in terms of equity and fairness, for noncitizens. - Noncitizens who receive a negative credible fear determination due to application of mandatory bars may spend less time in detention, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture. - Noncitizens who receive a negative credible fear determination due to application of mandatory bars might lose the opportunity to gather evidence during the period of time between the fear screening and the merits immigration judge hearing. The noncitizen might either contest application of mandatory bars in full merits proceedings, or seek appellate review of the adjudicator's application of the bar during a merits proceeding. - Noncitizens who receive a positive reasonable fear determination and are referred to EOIR by USCIS might benefit from shorter waiting times for an immigration judge's decision on withholding or deferral of removal only.
Noncitizens issued reasonable fear determinations by USCIS.	USCIS reasonable fear determinations have ranged from 3,400 to 8,000 noncitizens per year in the last 5 fiscal years (see Table 3).	- Noncitizens who receive a negative reasonable fear determination due to application of mandatory bars may spend less time in detention, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture. - Noncitizens who receive a negative reasonable fear determination due to application of mandatory bars might lose the opportunity to gather evidence during the period of time between the fear screening and the merits immigration judge hearing. The noncitizen might either contest application of mandatory bars, or seek appellate review of the adjudicator's application of the bar during a merits proceeding.
DHS-USCIS	850 AOs onboard as of Aug. 15, 2024 ¹⁰³ .	In credible/reasonable fear cases where the AO exercises discretion to apply one of the mandatory bars, additional time may be spent developing the record as to the mandatory bar during fear screening interviews and conducting the written analysis related to the mandatory bar for the fear determination. This additional time may be offset to an extent by not having to include a separate analysis on the merits of the persecution claim in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar. SAOs, in turn, may also spend additional time reviewing mandatory bar analyses in fear determinations where AOs exercise discretion to apply a mandatory bar at the screening stage.
EOIR	734 immigration judges at end of FY 2023, as well as support staff and other personnel ¹⁰⁴ .	Potential non-budgetary cost savings if time worked on credible fear cases and reasonable fear cases decreases due to a reduction of referrals of credible fear and reasonable fear cases for full proceedings on the merits before immigration judges.

In addition to the impacts summarized above, and as required by

OMB Circular A–4, Table 2 presents the prepared accounting statement showing

the costs and benefits to individuals affected by this rule.¹⁰⁵

TABLE 2—OMB A–4 ACCOUNTING STATEMENT TIME PERIOD: FY 2019 THROUGH FY 2023

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
BENEFITS				
Monetized Benefits	N/A	N/A	N/A	RIA
Annualized quantified, but unmonetized, benefits.	N/A	N/A	N/A	RIA
Unquantified Benefits	The final rule will enable some asylum seekers to move through the asylum process more quickly than may be the case currently, with potential decreases in adjudication timelines, thus promoting both fairness with potentially less time in confinement for those noncitizens subject to a bar, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture regulations and equity for those noncitizens in removal proceedings who are not subject to a mandatory bar. In this rule the swift removal of these noncitizens may create disincentives for other noncitizens who would be subject to these mandatory bars when considering attempting to enter the United States. The final rule might enhance the public safety of the United States due to swift removal of some noncitizens from the country who pose a threat to public safety or national security.			RIA
COSTS				
Annualized monetized costs	N/A	N/A	N/A	RIA

¹⁰³ Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

¹⁰⁴ EOIR, "Immigration Judge (IJ) Hiring, Data Generated: July 19, 2024" <https://www.justice.gov/eoir/media/1344911/dl?inline> (last accessed Oct. 3, 2024).

¹⁰⁵ OMB, "Circular A–4" (Nov. 9, 2023) <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf>.

TABLE 2—OMB A–4 ACCOUNTING STATEMENT TIME PERIOD: FY 2019 THROUGH FY 2023—Continued

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
Annualized quantified, but unmonetized, costs.	N/A	N/A	There could be potential non-budget related cost savings due to reduction of annual credible fear of persecution referrals and reasonable fear of persecution referrals for full proceedings on the merits by immigration judges, by 2.56 percent (808 credible fear of persecution cases on average per year) and 17.61 percent (174 reasonable fear of persecution cases on average per year) respectively, as this would allow resources at EOIR to be directed to other work..	RIA
Qualitative (unquantified) costs	Noncitizens who receive a negative credible fear or reasonable fear determination might lose the opportunity to gather evidence and contest the application of mandatory bars in full merits hearing or seek appellate review of the immigration judge's decision, as they will be removed quickly under this rule. Where AOs exercise discretion to apply a mandatory bar at the screening stage, AOs will spend additional time eliciting testimony related to and analyzing the mandatory bar in the screening determination, and SAOs will spend additional time reviewing fear determinations containing a mandatory bar analysis. This additional time spent by AOs may be offset to an extent by not having to include a separate persecution analysis in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar.			RIA
TRANSFERS				
Annualized monetized transfers	N/A	N/A	N/A	RIA
Annualized unquantified transfers	N/A	N/A	N/A	RIA
Miscellaneous Analyses/Category	Effects			Source citation
Effects on State, local, or Tribal governments.	None.			RIA
Effects on small businesses	This rule does not directly regulate small entities, but rather individuals.			RIA
Effects on wages	None.			RIA
Effects on growth	None.			RIA

DHS is unable to quantify the impact of this rule with respect to the consideration of the mandatory bars for noncitizens who are a danger to the security of the United States at INA secs. 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), should the Security Bars rule go into effect. 85 FR 84160. Because the Departments have delayed the effective date of that rule and it has never been implemented, the Department is unable to draw on historical data where this public health-related security bar has been flagged in credible fear and reasonable fear screenings. Furthermore, as explained above in Section IV.E.2, the bars to asylum and withholding of removal promulgated under the Security Bars rule would only apply in particular public health-related circumstances. *See* 85 FR at 84193 (amending 8 CFR 208.13(c)).¹⁰⁶ Because those

¹⁰⁶ Specifically, the Security Bars rule would apply to a noncitizen if a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law and they (1) have symptoms indicating that they are afflicted with the disease or (2) have come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, both per guidance issued by the Secretary or the Attorney General, as appropriate. 85 FR at 84193. The rule would also allow the Secretary and the Attorney General jointly, in consultation with the Secretary of Health and

circumstances are not currently in effect, DHS is unable to assess the potential population of noncitizens who would be subject to the provisions of the Security Bars and Processing rule under this rule. Finally, it is impossible to predict the number of cases when an AO would choose to use their discretion afforded by this rule to apply the security bars during a credible fear or reasonable fear screening.

2. Background and Purpose of the Rule

A DHS immigration officer who encounters a noncitizen subject to expedited removal may order the noncitizen to be “removed from the United States without further hearing or review” unless the noncitizen indicates “an intention to apply for asylum” or “a fear of persecution” or torture. INA sec. 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); *see* 8 CFR 235.3(b)(4). If the noncitizen indicates such an intention or fear, the immigration officer must refer the noncitizen for an interview by an AO to determine whether the noncitizen has a “credible fear of persecution.” INA sec. 235(b)(1)(A)(ii), (B)(ii), 8 U.S.C.

Human Services, to apply the bars in other circumstances, such as where a noncitizen “comes” from a place where a communicable disease of public health significance is prevalent or epidemic and traveled within a period determined by the Secretary and Attorney General. *Id.*

1225(b)(1)(A)(ii), (B)(ii). A credible fear is defined by statute as a “significant possibility” that the noncitizen could establish eligibility for asylum. INA sec. 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Under current regulations, a credible fear of persecution is a “significant possibility” that a noncitizen can establish eligibility for asylum under INA sec. 208, 8 U.S.C. 1158 or for statutory withholding of removal under INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3). 8 CFR 208.30(e)(2). A credible fear of torture is a “significant possibility” that a noncitizen can establish that the noncitizen is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 8 CFR 208.17. 8 CFR 208.30(e)(3).¹⁰⁷ Certain noncitizens are prohibited from contesting removability before an immigration judge or from seeking any relief from removal. *See* INA sec. 238(b)(5), 8 U.S.C. 1228(b)(5) and INA sec. 241(a)(5), 8 U.S.C. 1231(a)(5). If such an individual, who is ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b) or whose order of removal is reinstated under INA sec. 241(a)(5), 8

¹⁰⁷ USCIS, “Questions and Answers: Credible fear screenings,” <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>. (last accessed July 31, 2024).

U.S.C.1231(a)(5), expresses a fear of return to the country to which they have been ordered removed, the case must be referred to an AO, who will determine whether the individual has a “reasonable fear” of persecution or torture. 8 CFR 208.31(a) and (b). A reasonable fear of persecution or torture is a reasonable possibility that the noncitizen would be persecuted on account of their race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that they would be tortured in the country of removal. 8 CFR 208.31(c).

Though mandatory bars to asylum and withholding of removal had no impact on a credible fear or reasonable fear of persecution or torture determination before the current rulemaking, pursuant to existing procedures, AOs elicit testimony related to possible mandatory bars in credible fear and reasonable fear interviews.¹⁰⁸ Under existing procedures, when information in the record indicates that a mandatory bar may apply to a noncitizen, the AO identifies the possible bar,¹⁰⁹ and if, after consultation with a supervisory AO, there are reasonable grounds to believe a mandatory bar (other than firm resettlement) applies to a noncitizen, the AO completes a Memo of Adverse Information that is forwarded to ICE to notify ICE of the potential bar.¹¹⁰ Identifying any one of the possible

mandatory bars does not affect the determination of whether a noncitizen has a credible fear or reasonable fear of persecution or torture.¹¹¹ In credible fear cases, regardless of whether the AO flags a mandatory bar to asylum or withholding of removal, where the AO issues a positive credible fear determination, USCIS issues the noncitizen a Form I–862, Notice to Appear (NTA), for section 240 removal proceedings for further consideration of the noncitizen’s claim. 8 CFR 208.30(e)(5). In reasonable fear cases, regardless of whether the AO flags a mandatory bar to withholding of removal, where the AO issues a positive reasonable fear determination, USCIS issues the noncitizen a Form I–863, Notice of Referral to the Immigration Judge, for consideration of the noncitizen’s request for withholding of removal only. 8 CFR 208.31(e).

Table 3 illustrates the total credible fear determinations (positive and negative) issued by USCIS, the total credible fear completions by USCIS (including administrative closures), the total reasonable fear determinations (positive and negative) issued by USCIS, and the total reasonable fear completions by USCIS (including administrative closures) for FY 2019 through FY 2023. From FY 2019 through FY 2023, in the aggregate and excluding administrative closures, the majority of credible fear determinations made by USCIS resulted in positive determinations: 68.76 percent of credible fear determinations issued by USCIS were positive,¹¹² and 31.24

percent were negative.¹¹³ When administrative closures are included in the aggregate for that same period, 62.63 percent of credible fear completions resulted in positive determinations,¹¹⁴ 28.45 percent resulted in negative determinations,¹¹⁵ and 8.92 percent were administratively closed.¹¹⁶ For reasonable fear determinations issued by USCIS from FY 2019 to FY 2023, in the aggregate and excluding administrative closures, 36.52 percent resulted in positive determinations,¹¹⁷ and 63.48 percent resulted in negative determinations.¹¹⁸ For those same years, if administrative closures are included, 25.73 percent of reasonable fear completions by USCIS resulted in positive determinations,¹¹⁹ 44.72 percent resulted in negative determinations,¹²⁰ and 29.55 percent were administratively closed.¹²¹

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¹¹³ 105,608 total negative credible fear determination/338,087 FY 2019–FY 2023 all positive and negative credible fear determinations = 31.24%

¹¹⁴ 232,479 total positive credible fear determination/371,208 FY 2019–FY 2023 total credible fear completions = 62.63%

¹¹⁵ 105,608 total negative credible fear determination/371,208 FY 2019–FY 2023 total credible fear completions = 28.45%

¹¹⁶ (371,208 total credible fear completions—338,087 all positive and negative credible fear determinations)/371,208 FY 2019–FY 2023 total credible fear completions = 8.92%

¹¹⁷ 10,334 total positive reasonable fear determination/28,294 FY 2019–FY 2023 all positive and negative reasonable fear determinations = 36.52%

¹¹⁸ 17,960 total negative reasonable fear determination/28,294 FY 2019–FY 2023 all positive and negative reasonable fear determinations = 63.48%

¹¹⁹ 10,334 total positive reasonable fear determination/40,161 FY 2019–FY 2023 total reasonable fear completions = 25.73%

¹²⁰ 17,960 total negative reasonable fear determination/40,161 FY 2019–FY 2023 total reasonable fear completions = 44.72%

¹²¹ (40,161 total reasonable fear completions—28,294 all positive and negative reasonable fear determinations)/40,161 FY 2019–FY 2023 total reasonable fear completions = 29.55%

¹⁰⁸ See USCIS, *RAIO Directorate—Officer Training: Credible Fear of Persecution and Torture Determinations* (May 9, 2024); USCIS, *RAIO Directorate—Officer Training: Reasonable Fear of Persecution and Torture Determinations* (Feb. 13, 2017); see also Credible Fear Procedures Manual (CFPM), Section III.E.7; Reasonable Fear Procedures Manual (RFPMP), Section III.F.

¹⁰⁹ In credible fear determinations, AOs flag possible bars on the Form I–870, Record of Determination/Credible fear Worksheet, and in the Global case management system; in reasonable fear determinations, AOs flag possible bars in the Global case management system.

¹¹⁰ See CFPM, Section IV.G; see also RFPMP Sections III.F.2. and IV.E.

¹¹¹ USCIS, “Credible Fear Procedures Manual,” Section IV.G, <https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf>; USCIS, “Reasonable Fear Procedures Manual,” Section IV.E, <https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf>.

¹¹² 232,479 total positive credible fear determination/338,087 FY 2019–FY 2023 all positive and negative credible fear determinations = 68.76%

Table 3. Credible Fear and Reasonable Fear Data (FY 2019 through FY 2023)								
Fiscal Year	Credible Fear Data				Reasonable Fear Data			
	Credible Fear Determinations			Total Credible Fear Completions (includes administrative closures)	Reasonable Fear Determinations			Total Reasonable Fear Completions (includes administrative closures)
	Positive Determinations	Negative Determinations	All Positive and Negative Determinations		Positive Determinations	Negative Determinations	All Positive and Negative Determinations	
2019	76,162	16,403	92,565	103,322	3,324	4,645	7,969	12,268
2020	12,879	16,071	28,950	33,543	1,016	3,427	4,443	7,491
2021	29,901	11,682	41,583	43,974	1,073	2,362	3,435	4,496
2022	31,571	18,740	50,311	54,097	1,873	3,052	4,925	6,092
2023	81,966	42,712	124,678	136,272	3,048	4,474	7,522	9,814
5-year Total	232,479	105,608	338,087	371,208	10,334	17,960	28,294	40,161
5-year Average	46,496	21,122	67,617	74,242	2,067	3,592	5,659	8,032

Source: USCIS Refugee, Asylum, and International Operations Directorate (RAIO), Global (queried July 31, 2024).
Notes: Fiscal Year refers to Case Completion Year.

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Table 4 presents instances where AOs flagged a potential bar to asylum or withholding of removal in a screening interview. It illustrates the distribution of possible mandatory bars across credible fear and reasonable fear completions. Without accounting for the “firm resettlement” bar, these mandatory bars protect the public from individuals who have persecuted others, have been convicted of significant crimes, represent a danger to the public, or have engaged in terrorist activity.

Currently, flagging of any of the mandatory bars does not affect the credible or reasonable fear determination. Records show that of 232,479 total positive credible fear determinations and 10,334 total positive reasonable fear determinations for FY 2019 through FY 2023, AOs flagged mandatory bars in 15,982 total positive credible fear determinations (6.87 percent¹²²) and 2,598 total positive reasonable fear determinations (25.14 percent¹²³). In some instances, AOs

may have flagged multiple mandatory bars in one case. Of those determinations, AOs flagged a mandatory bar other than the firm resettlement bar in 7,653 positive credible fear determinations and 2,407 positive reasonable fear determinations. Overall, AOs flagged a mandatory bar, other than the firm resettlement bar, in 3.29 percent¹²⁴ of total positive credible fear determinations and 23.29 percent¹²⁵ of total positive reasonable fear determinations.

TABLE 4—FEAR DETERMINATIONS BY SPECIFIC POSSIBLE MANDATORY BARS
[FY 2019 through FY 2023 total]

5-Year total	Positive credible fear determination	Negative credible fear determination	Positive reasonable fear determination	Negative reasonable fear determination
Total Determinations Flagging Mandatory Bars	15,982	8,923	2,598	5,242
Total Determinations Flagging Mandatory Bars Excl. Firm Resettlement Bar	7,653	4,004	2,407	4,979
Total Determinations *	232,479	105,608	10,334	17,960
Mandatory Bars as % of Total Determinations	6.87%	8.45%	25.14%	29.19%
Possible Mandatory Bars Excl. Firm Resettlement as % of Total Determinations	3.29%	3.79%	23.29%	27.72%

Source: USCIS Refugee, Asylum, and International Operations (“RAIO”) Directorate, Global (queried Sept. 9, 2024).

Note: Fiscal Year refers to Case Completion Year. Cases can have more than one possible bar. * Total Determinations row derived from Table 3: Credible Fear and Reasonable Fear Data (FY 2019 through FY 2023), 5-year totals.

¹²² Calculation: 15,982 total positive credible fear determination with possible mandatory bars/ 232,479 FY 2019–FY2023 total positive credible fear determination = 6.87%

¹²³ Calculation: 2,598 total positive reasonable fear determinations with possible mandatory bars/

10,334 FY 2019–FY2023 total positive reasonable fear determinations = 25.14%

¹²⁴ Calculation: 7,653 total positive credible fear determination with mandatory bar excluding firm resettlement/232,479 FY 2019–FY2023 total positive credible fear determination = 3.29%

¹²⁵ Calculation: 2,407 total positive reasonable fear determinations with mandatory bar excluding firm resettlement/10,334 FY 2019–FY2023 total positive reasonable fear determinations = 23.29%

During removal proceedings, the immigration judge determines whether a mandatory bar applies. ICE OPLA may consider and further develop the information identified by the AO when litigating before EOIR, and EOIR may consider this information along with other relevant factors in the case during

the adjudication in immigration court proceedings.¹²⁶ ICE ERO and EOIR may rely upon the identification of the potential bar in making custodial determinations.¹²⁷ In Table 5, USCIS illustrates the EOIR pending caseload over the last five fiscal years. As of FY 2023, there were approximately 2.47

million pending cases. The EOIR pending caseload is a cumulative effect of multiple factors, such as, though not limited to, pending cases from previous years, new cases filed by DHS, the number of immigration judges onboard to adjudicate cases, and the space available on each judge's docket.¹²⁸

TABLE 5—PENDING CASES, INITIAL RECEIPTS AND TOTAL COMPLETIONS AT EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)
[FY 2019 through FY 2023]

Fiscal year	Pending cases at end of fiscal year ¹	Initial receipts ²	Total completions ³
2019	1,088,606	547,289	277,078
2020	1,261,077	369,705	232,296
2021	1,408,801	244,277	115,941
2022	1,791,493	707,589	314,696
2023	2,469,960	1,206,201	526,203
5-Year Total	8,019,937	3,075,061	1,466,214
5-Year Annual Average	1,603,987	615,012	293,243

Source: EOIR, "Pending Cases, New Cases, and Total Completions, Data Generated: July 19, 2024" <https://www.justice.gov/eoir/media/1344791/dl?inline> last accessed Oct. 3, 2024).

Notes: ¹ Pending cases equals removal, deportation, exclusion, asylum-only, and withholding only.

² Initial receipts equals removal, deportation, exclusions, asylum-only, and withholding only.

³ Total completions equals initial case completions plus subsequent case completions.

The purpose of this rule is to allow for consideration of mandatory bars during the credible fear of persecution screening process for certain noncitizens who are placed into expedited removal under INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1) and have been referred to USCIS for a fear screening pursuant to 8 CFR 208.30, 208.33, 208.35, INA sec. 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), and to allow for the consideration of mandatory bars during the reasonable fear screening process for certain noncitizens who have been ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b), or whose deportation, exclusion, or removal order has been reinstated under INA sec. 241(a)(5), 8 U.S.C. 1231(a)(5) and who are referred to USCIS for a reasonable fear screening pursuant to 8 CFR 208.31. The rule would allow AOs discretion to consider certain mandatory bars during a screening interview and, if an AO exercises that discretion, require AOs to enter a negative fear determination where there is evidence the mandatory bar may apply, the noncitizen is unable to establish at the relevant standard that the bar does not apply, and the

noncitizen is otherwise unable to demonstrate a fear of torture at the applicable standard in a given case. The specific mandatory bars this rule would allow AOs to consider are those relating to public safety and/or national security threats, with the intent of allowing the Department flexibility in some cases to more quickly remove individuals who present such concerns. As the rule is not changing the current treatment of the "firm resettlement" mandatory bar, any fear screening determination will not be affected by information in the record related to a possible firm resettlement bar.¹²⁹

The rule does not apply to unaccompanied children statutorily exempted from placement into expedited removal. It also does not apply to individuals already residing in the United States and whose presence in the United States is outside the coverage of noncitizens designated by the Secretary as subject to expedited removal, provided such individuals have not been ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b), or have not had an order of removal are reinstated under INA sec. 241(a)(5), 8 U.S.C. 1231(a)(5). The rule also does not

apply to stowaways or noncitizens who are physically present in or arriving in the Commonwealth of the Northern Mariana Islands (CNMI). Those classes of noncitizens will continue to be referred to asylum/withholding-only hearings before an immigration judge under 8 CFR 208.2(c).

3. Impacts of the Rule

a. Impacts on the Population Screened for Credible Fear or Reasonable Fear

The final rule will impact certain individuals who undergo credible fear or reasonable fear screenings. These individuals are noncitizens who, where an AO exercises discretion to consider certain mandatory bars to asylum or statutory withholding of removal, are unable to establish at the relevant standard of proof that the bar or bars at issue do not apply to them and are otherwise unable to establish a fear of torture at the applicable standard for the given case. The type of credible fear or reasonable fear screenings where this rule could be outcome-determinative is limited to cases where a noncitizen is not found to have a credible fear or reasonable fear of torture and would

¹²⁶ See *Matter of D-R*, 25 I&N Dec. 445, 458 (BIA 2011) ("In immigration proceedings, the sole test for admission of evidence is whether the evidence is probative and its admission fundamentally fair." (quotation marks omitted)); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986) (same).

¹²⁷ *Matter of R-A-V-P*, 27 I&N Dec. 803, 805 (BIA 2020) ("The immigration judge may also consider the likelihood that relief from removal will be granted in determining whether [a noncitizen] warrants bond.").

¹²⁸ Executive Office for Immigration Review (2024). Current Operation Environment. EOIR

Strategic Plan. Available at <https://www.justice.gov/eoir/strategic-plan/strategic-context/current-operating-environment>. (last accessed Oct. 23, 2024).

¹²⁹ This rule will not change current treatment of the "firm resettlement" bar at INA sec. 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi).

have been found to have a credible fear of persecution or a reasonable fear of persecution but for the application of a bar under this rule. The type of credible or reasonable fear determination where this rule will not be outcome-determinative are cases where a positive credible or reasonable fear of torture is found. Table 6 shows positive credible fear of persecution only cases and

positive reasonable fear of persecution only cases; and a subset of those cases that were identified during the last five fiscal years as having mandatory bars other than the firm resettlement bar. For FY 2019 through FY 2023, USCIS records indicated that of total positive credible fear of persecution determinations, USCIS identified a potential mandatory bar (other than firm

resettlement) in 2.56 percent of total cases with a positive credible fear of persecution determination. From FY 2019 through FY 2023, USCIS identified a potential bar to withholding of removal in 17.61 percent of positive reasonable fear of persecution determinations.

TABLE 6—POSITIVE CREDIBLE FEAR OF PERSECUTION, POSITIVE REASONABLE FEAR OF PERSECUTION, POSSIBLE MANDATORY BAR FLAG EXCLUDING FIRM RESETTLEMENT
[FY 2019 through FY 2023]

Fiscal year	Credible fear of persecution			Reasonable fear of persecution		
	Positive determination		Possible mandatory bar excl. firm resettlement as share of credible fear of persecution cases (%)	Positive determination		Possible mandatory bar excl. firm resettlement as share of reasonable fear of persecution cases (%)
	Possible mandatory bar excluding firm resettlement	Total credible fear of persecution cases		Possible mandatory bar excluding firm resettlement	Total reasonable fear of persecution cases	
2019	898	50,074	1.79	173	1,333	12.98
2020	357	8,887	4.02	56	394	14.21
2021	522	24,512	2.13	82	541	15.16
2022	664	24,277	2.74	239	1,127	21.21
2023	1,600	50,132	3.19	318	1,534	20.73
5-Year Total	4,041	157,882	2.56	868	4,929	17.61
5-Year Annual Average	808	31,576		174	986	

Source: USCIS RAIO Directorate, Global (queried Sept. 9, 2024).
Note: Fiscal Year refers to Case Completion Year.
Note: Table 6 excludes Credible Fear of Torture and Reasonable Fear of Torture cases.

Table 6 does not include positive credible fear of torture and positive reasonable fear of torture determinations. This rule will not impact credible or reasonable fear cases that receive a positive fear of torture determination, since the screening for torture encompasses screening for deferral of removal under CAT, for which there are no bars. Likewise, this rule will not affect negative credible or reasonable fear determinations where the AO did not flag a mandatory bar because in those cases, the application of a mandatory bar would not change the outcome. For the latter two categories, AOs will continue to identify bars where they may be evident in the record, even if they are not outcome determinative in a given case. Based on the information provided in Table 6, the additional annualized population that could receive a negative credible fear of persecution determination in a typical year is 808, and the additional annualized population that could receive a negative reasonable fear of persecution determination is 174 due to this rule. The Department expects that AOs would choose to apply a mandatory bar to an even smaller subset of these flagged cases, because not all flagged cases have sufficient supporting evidence easily available to the AO.

Under the rule, noncitizens subject to the above cited bars will be more quickly removed from the United States, freeing up the Department’s resources to safely, humanely, and effectively enforce and administer the immigration laws. The public safety of the United States may be enhanced as some noncitizens who have engaged in certain criminal activity, persecuted others, or been involved in terrorist activities are quickly removed from the country. The swift removal of these noncitizens may create disincentives for other noncitizens who would be subject to these mandatory bars when considering attempting to enter the United States.

The pending caseload at EOIR (see Table 5) leads to extended wait times for noncitizens who received a positive credible fear determination and were then referred to EOIR by USCIS, which creates uncertainty for a subset of those ultimately determined to merit asylum and other forms of humanitarian protection. This rule might help such noncitizens experience shorter wait times, advancing equity for those noncitizens in removal proceedings who are not subject to a mandatory bar, less detention time for those noncitizens to whom a bar is applied and who otherwise have not been able to

establish potential eligibility for protection under the Convention Against Torture regulations, and fairness.

Noncitizens would primarily bear the costs of the final rule. Noncitizens to whom an AO would apply the above-cited bars in credible fear and reasonable fear screenings would lose the opportunity to contest the application of the mandatory bars in a full section 240 merits hearing before an immigration judge or to seek appellate review of the immigration judge’s decision should the immigration judge determine that a mandatory bar applies and affirm the negative determination. Such noncitizens would experience a shorter period of time between the fear screening before USCIS and removal under the final rule than they currently do. Therefore, they would lose the opportunity to gather additional evidence to show that the mandatory bar in question should not be applied in their case.

b. Impacts to USCIS

AOs will have the discretion to consider certain mandatory bars, while evaluating whether the noncitizen has met the requisite standard of proof with respect to their eligibility for asylum or statutory withholding of removal, as

applicable, when making credible fear determinations and reasonable fear determinations under this rule. Under this rule, noncitizens will still be able to seek review of negative credible fear or reasonable fear determinations before an immigration judge. AOs already identify potential mandatory bars in credible fear or reasonable fear determinations, and under this rule will only consider a bar in those cases where there is easily verifiable evidence available to the AO that a mandatory bar may apply, and the AO can consider that bar efficiently during a screening interview.

In some cases, the final rule will result in AOs spending additional time during fear screenings to inquire into the applicability of mandatory bars, additional time documenting the mandatory bar analysis for the credible or reasonable fear determination, and additional time spent by SAOs to review any mandatory bar analysis. This additional time may be offset to an extent by not having to include a separate persecution analysis in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar. AOs will have discretion whether to consider such bars at the screening stage and could therefore minimize the government costs associated with the final rule in cases where the additional development of the record and analysis would not be outcome determinative or an otherwise effective use of resources.

The benefits of the final rule are expected to include a modest, unquantified reduction of the resources expended to detain noncitizens subject to the above cited mandatory bars for potentially lengthy periods of time while their cases are considered by immigration courts.

c. Impacts to EOIR

Where application of this rule results in a negative credible fear or reasonable fear determination that would have otherwise been a positive credible fear of persecution or reasonable fear of persecution determination, those cases will not be referred to EOIR for removal proceedings. This rule is therefore expected to reduce the number of credible fears of persecution and reasonable fear of persecution cases being referred to EOIR for removal proceedings. Additionally, immigration judges will continue to conduct de novo review of a negative credible fear and reasonable fear determinations when requested by a noncitizen. Preventing certain cases where a mandatory bar applied at the screening stage from

being placed into removal proceedings before EOIR, may create additional capacity for immigration judges to work on their existing caseloads and other high-priority matters.

Accordingly, every such positive credible fear or reasonable fear of persecution determination that would have been referred to EOIR for removal proceedings that, instead, results in a negative determination under this rule will constitute a direct reduction in new cases that EOIR would have to adjudicate. If the negative determination is concurred upon by an immigration judge where a review is requested. Given EOIR's significant pending caseload of approximately 2.47 million cases (*see* Table 5), reducing the number of positive credible fear of persecution cases referred to EOIR by 2.56 percent¹³⁰ and positive reasonable fear of persecution cases referred to EOIR by 17.61 percent¹³¹ (*see* Table 6) as upper bound estimates, will enable EOIR to focus limited resources on existing pending cases and reduce the overall pending caseload.

The estimated reduction in new cases is based on positive credible or reasonable fear of persecution cases referred to EOIR from FY 2019 through FY 2023 and should be considered as an upper bound due to (a) lack of sufficient supporting evidence of application of mandatory bars except for firm resettlement available to AOs during the screening stage and (b) conversion of a subset of fear of persecution cases to fear of torture cases after application of mandatory bars. A reduction in the pending caseload will reduce the overall time required for adjudications because dockets would not have to be set as far into the future. This reduction in turn would better enable EOIR to meet its mission of fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws, including granting relief or protection to noncitizens who are eligible.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121 (March 29, 1996), requires Federal agencies to

¹³⁰ Calculation: 808 5-Year Average of Positive credible fear of persecution cases with a flag of mandatory bar excluding “firm resettlement”/31,576 5-Year Average of Positive credible fear of persecution cases = 2.56 percent.

¹³¹ Calculation: 174 5-Year Average of Positive credible fear of persecution cases with a flag of mandatory bar excluding “firm resettlement”/986 5-Year Average of Positive credible fear of persecution cases = 17.61 percent.

consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.¹³²

DHS has reviewed this rule in accordance with the RFA, Public Law 96–354, 94 Stat. 1164 (1980), as amended (codified at 5 U.S.C. 601–612) and has certified that this rule would not have a significant economic impact on a substantial number of small entities. The rule would not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum or are otherwise placed in immigration proceedings.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, which includes any Federal mandate that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.¹³³ The inflation adjusted value of \$100 million in 1995 is approximately \$200 million in 2023 based on the Consumer Price Index for All Urban Consumers (CPI-U).¹³⁴

¹³² A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

¹³³ *See* Public Law 104–4, 109 Stat. 48; *see also* 2 U.S.C. 1532(a).

¹³⁴ *See* Bureau of Labor Statistics, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month,” <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202312.pdf> (last visited Jan. 17, 2024). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2023); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2023 – Average monthly CPI-U for 1995) ÷ (Average monthly CPI-U for 1995)] × 100 = [(304.702–152.383) ÷ 152.383] = (152.319/152.383) = 0.99958001 × 100 = 99.96 percent = 100 percent (rounded). Calculation of inflation-adjusted value:

Continued

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate.¹³⁵ The term “Federal intergovernmental mandate” means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).¹³⁶ The term “Federal private sector mandate” means, in relevant part, a provision that would impose an enforceable duty upon the private sector except (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).¹³⁷

This rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.¹³⁸ The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of SBREFA by section 804 of SBREFA, Public Law 104–121, 110 Stat. 847, 868, *et seq.* The Office of Information and Regulatory Affairs has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2). DHS has complied with the CRA’s reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132 (Federalism)

Executive Order 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of UMRA. This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of

Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. DHS has determined that this rule meets the applicable standards provided in section 3 of Executive Order 12988.

G. Family Assessment

DHS has reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,¹³⁹ enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.¹⁴⁰ DHS has systematically reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

DHS has determined that this rule will not negatively affect family well-being or the autonomy or integrity of the family as an institution, as it does not change the process for family credible fear screenings.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and

responsibilities between the Federal Government and Indian Tribes.

I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

Executive Order 13045 requires agencies to consider the impacts of environmental health risks or safety risks that may disproportionately affect children. DHS has reviewed this rule and have determined that this rule is not a covered regulatory action under Executive Order 13045. The rule is not considered significant under Section 3(f)(1) of Executive Order 12866 and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. National Environmental Policy Act

DHS and its components analyze final actions to determine whether the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual)¹⁴¹ establish the policies and procedures that DHS and its components use to comply with NEPA.

NEPA implementing procedures allow Federal agencies to establish categories of actions (“categorical exclusions”) that experience has shown do not, individually or cumulatively, have a significant effect on the human environment and, therefore, do not require an environmental assessment (EA) or environmental impact statement (EIS).¹⁴² An agency is not required to prepare an EA or EIS for a proposed action “if the proposed agency action is excluded pursuant to one of the agency’s categorical exclusions.” 42 U.S.C. 4336(a)(2). The Instruction Manual, Appendix A lists the DHS Categorical Exclusions.¹⁴³

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that

\$100 million in 1995 dollars × 2.00 = \$200 million in 2023 dollars.

¹³⁵ See 2 U.S.C. 1502(1), 658(6).

¹³⁶ 2 U.S.C. 658(5).

¹³⁷ 2 U.S.C. 658(7).

¹³⁸ See 2 U.S.C. 1502(1), 658(6).

¹³⁹ See 5 U.S.C. 601 note.

¹⁴⁰ Public Law 105–277, 112 Stat. 2681 (1998).

¹⁴¹ The Instruction Manual contains DHS’s procedures for implementing NEPA and was issued November 6, 2014, available at DHS, “Implementing the National Environmental Policy Act,” <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex> (last visited July 25, 2024).

¹⁴² 40 CFR 1507.3(e)(2)(ii) and 1501.4.

¹⁴³ See Appendix A, Table 1.

create the potential for a significant environmental effect.¹⁴⁴

The rule allows AOs to apply certain bars to asylum and statutory withholding of removal at the fear screening stage. DHS has determined that the promulgation of this rule satisfies all three requirements for a categorical exclusion. First, the rule fits clearly within categorical exclusion A3 of the Instruction Manual, Appendix A, for the promulgation of rules that “interpret or amend an existing regulation without changing its environmental effect.” The rule only changes the point in time at which certain statutory bars are considered but would not change any environmental effect of the bars. Second, this rule is a standalone rule and is not part of any larger action. Third, DHS is not aware of any extraordinary circumstances that would cause a significant environmental impact. Therefore, this rule is categorically excluded, and no further NEPA analysis or documentation is required.

K. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 109 Stat. 163, 44 U.S.C. chapter 35) and its implementing regulations, 5 CFR part 1320.

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as set forth below.

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.30 by revising the first sentence of paragraph (e)(2) and revising paragraph (e)(5) to read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

* * * * *

(e) * * *

(2) An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act, including that the alien is not subject to a mandatory bar, if considered under paragraph (e)(5)(ii) of this section. * * *

* * * * *

(5) Except as provided in paragraph (e)(6) or (7) of this section:

(i) If an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and (b)(2)(A)(vi) of the Act, the Department of Homeland Security shall nonetheless issue a Notice to Appear or retain jurisdiction over the alien’s case for further consideration of the alien’s claim pursuant to paragraph (f) of this section, if the alien is not a stowaway.

(ii) If an alien, who is unable to establish a credible fear of torture, is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to being granted either asylum or withholding of removal, as set forth in section 208(b)(2)(A)(i) through (v) of the Act or section 241(b)(3)(B) of the Act, respectively, the asylum officer may consider the applicability of such bar(s) as part of the asylum officer’s credible fear determination.

(A) The asylum officer shall issue a negative credible fear finding with regard to the alien’s eligibility for asylum or withholding of removal under the Act if the asylum officer determines there is not a significant possibility that, in a proceeding on the merits, the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(B) The asylum officer shall issue a Notice to Appear or retain jurisdiction over the alien’s case for further consideration of the alien’s claim pursuant to paragraph (f) of this section, if the asylum officer finds that there is a significant possibility that, in a proceeding on the merits, the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(iii) In all cases, if the alien is a stowaway and the Department would otherwise initiate proceedings under paragraphs (e)(5)(i) and (ii) of this

section, the Department shall place the alien in proceedings for consideration of the alien’s claim pursuant to § 208.2(c)(3) and shall not retain jurisdiction over the case for further consideration nor issue a Notice to Appear.

* * * * *

■ 3. Amend § 208.31 by revising paragraphs (c) and (g) to read as follows:

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien’s representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant’s country or nationality, or if the applicant is stateless, the applicant’s country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer’s determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution if the alien establishes a reasonable possibility that he or she would be persecuted on account of his

¹⁴⁴ DHS, “Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act (NEPA),” V.B(2)(a)–(c), https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001-508%20Admin%20Rev.pdf.

or her race, religion, nationality, membership in a particular social group or political opinion, unless the alien appears to be subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act and the alien fails to show that there is a reasonable possibility that no mandatory bar applies, if the asylum officer considers such bars. The alien shall be determined to have a reasonable fear of torture if the alien establishes a reasonable possibility that he or she would be tortured in the country of removal.

* * * * *

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. The immigration judge's review shall proceed under the procedures set forth in 8 CFR 1208.31(g).

■ 4. Amend § 208.33 by revising paragraphs (b)(2)(i) through (iii) to read as follows:

§ 208.33 Lawful pathways condition on asylum eligibility.

* * * * *

- (b) * * *
- (2) * * *

(i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act. As part of this reasonable possibility determination, if there is evidence that the alien is subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act, the asylum officer may consider the applicability of such bar(s).

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution with respect to the identified country or countries of

removal and, to the extent bars are considered, that there is a reasonable possibility that no mandatory bar applies, the Department will issue a Form I-862, Notice to Appear. If the alien establishes a reasonable possibility of torture with respect to the identified country or countries of removal, the Department will issue a Form I-862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution with respect to the identified country or countries of removal or, to the extent bars are considered, fails to establish that there is a reasonable possibility that no mandatory bar applies, and fails to establish a reasonable possibility of torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determination.

* * * * *

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.



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Part VI

Department of Transportation

Federal Aviation Administration

14 CFR Part 120

Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States; Final Rule

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 120**

[Docket No.: FAA–2012–1058; Amdt. No. 120–3]

RIN 2120–AK09

**Drug and Alcohol Testing of
Certificated Repair Station Employees
Located Outside of the United States**

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

ACTION: Final rule.

SUMMARY: This final rule requires certificated repair stations located outside the territory of the United States (U.S.) whose employees perform safety-sensitive maintenance functions on certain air carrier aircraft to conduct alcohol and controlled substance testing in a manner acceptable to the Administrator and consistent with the applicable laws of the country in which the repair station is located. The final rule directs the repair station to comply with the requirements of the Drug and Alcohol Testing Program published by the FAA and the Procedures for Transportation Workplace Drug Testing Programs published by the Department of Transportation, as proposed. However, this final rule also allows foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule to obtain the Administrator's recognition of a compatible alternative that contains minimum criteria in lieu of compliance with certain components of the Drug and Alcohol Testing Program.

DATES: This rule is effective January 17, 2025, except for amendatory instructions 3, 8, and 11, which are effective December 20, 2027. The compliance date for this final rule is December 20, 2027.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see “How to Obtain Additional Information” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Nancy Rodriguez Brown, Office of

Aerospace Medicine, Drug Abatement Division, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–8442; email: drugabatement@faa.gov.

SUPPLEMENTARY INFORMATION:

**List of Abbreviations and Acronyms
Frequently Used in This Document**

BASA—Bilateral Aviation Safety Agreement
ICAO—International Civil Aviation Organization

Table of Contents

- I. Executive Summary
- II. Authority for This Rulemaking
- III. Background
 - A. History
 - B. Legislative and Rulemaking Actions
- IV. Discussion of the Final Rule
 - A. Testing Under 14 CFR Part 120 and 49 CFR Part 40
 - B. Recognition of Existing Requirements or Testing Programs
- V. Responses to Comments
 - A. Sovereignty of Other Nations and Existing Programs
 - B. Final Rule Effective and Compliance Date
 - C. Government Resources
 - D. Specific Conflicts With Foreign Laws
 - E. Human Rights Concerns
 - F. Waivers and Exemptions
 - G. Bilateral Aviation Safety Agreements
 - H. Safety Case
 - I. Financial, Technical, and Operational Concerns
 - J. Extending Testing to Part 121 Maintenance Personnel
 - K. EU and International Civil Aviation Organization (ICAO)
 - L. Scope of Safety-Sensitive Functions
 - M. Miscellaneous Comments
- V. Severability
- VI. Regulatory Notices and Analyses
 - A. Summary of Regulatory Impact Analysis
 - B. Regulatory Flexibility Act
 - C. International Trade Impact Assessment
 - D. Unfunded Mandate Assessment
 - E. Paperwork Reduction Act
 - F. International Compatibility
 - G. Environmental Analysis
- VII. Executive Order Determinations
 - A. Executive Order 13132, Federalism
 - B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - C. Executive Order 13609, Promoting International Regulatory Cooperation
- VIII. Additional Information
 - A. Electronic Access and Filing
 - B. Small Business Regulatory Enforcement Fairness Act

I. Executive Summary

This final rule implements section 308(d)(2) of the FAA Reauthorization

Act of 2012 (codified in 49 U.S.C. 44733) by requiring certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform safety-sensitive maintenance functions on part 121 air carrier aircraft are subject to an alcohol and controlled substances testing program determined acceptable to the FAA Administrator and consistent with the applicable laws of the country in which the repair station is located.

The NPRM proposed a foreign repair station subject to the rule (*i.e.*, a foreign repair station that performs safety-sensitive maintenance on part 121 air carrier aircraft) would need to implement an alcohol and drug testing program that meets the requirements of 14 CFR part 120 and 49 CFR part 40, which is adopted as proposed in this final rule. In addition, in response to feedback received during the comment period of the proposed rulemaking, the final rule establishes a process for foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule to obtain a waiver based on the Administrator's recognition of a country or foreign repair station's existing requirements or testing program(s) promulgated under the laws of the country as a compatible alternative that contains minimum elements of 14 CFR part 120.

Affected foreign repair stations that receive a waiver based on recognition by the Administrator will be relieved from comprehensive compliance with subparts E and F of 14 CFR part 120 (in turn, providing relief from 49 CFR part 40) and will not need to seek further waivers or exemptions from 14 CFR part 120 or 49 CFR part 40 under this final rule. All other foreign repair stations subject to the rule will be required to meet 14 CFR part 120 and 49 CFR part 40, subject to any waivers or exemptions that a repair station may obtain. Foreign repair stations subject to the rule must comply not later than December 20, 2027. After this date, part 121 operators will be prohibited from using a foreign repair station employee to perform safety-sensitive maintenance outside the U.S. who is not covered by a waiver based on recognition by the Administrator or an FAA-mandated drug and alcohol testing program.

This rulemaking will affect approximately 977 part 145 repair stations in about 65 foreign countries.¹ Since the rule provides several pathways for compliance, the FAA estimated low and high-cost cases. The low-cost case assumes all countries with certificated repair stations will submit a request for a waiver based on recognition. The total unadjusted unit cost to the industry and the FAA to submit one request is \$2,569. At a seven percent discount rate, the adjusted total cost for all 65 countries to submit this request is \$116,690, \$64,540 annualized, and \$123,459 at a three percent discount rate, \$64,521 annualized. In the high-cost case, costs to foreign repair stations

consist of developing an FAA-mandated drug and alcohol testing program, training, testing of safety-sensitive maintenance employees for drug and alcohol, and annual reporting. The total present value cost to foreign repair stations over five years, at a seven percent discount rate sums to \$49.6 million or \$12.1 million annualized. At a three percent discount rate, the present value total cost to foreign repair stations is \$55.6 million or \$12.1 million annualized.

In the high-cost case, the FAA will incur costs associated with documenting these foreign repair stations and performing oversight and surveillance for those complying with

FAA-mandated drug and alcohol testing requirements under part 120 and 49 CFR part 40. These costs only apply to compliance with the rule and not if a country or repair station has an approved waiver based on recognition.² Total cost to FAA over five years, at seven percent present value, sums to \$6.5 million with an annualized cost of \$1.6 million. At three percent present value, total cost is \$7.4 million with an annualized cost of \$1.6 million.

The table below shows the estimated costs to both part 145 repair stations and FAA over five years. The estimated total cost of the final rule, at seven percent present value, is \$56.1 million and \$63.0 million at 3 percent present value.

TABLE 1—COST TO PART 145 FOREIGN REPAIR STATIONS AND FAA OVER 5 YEARS

[Millions—2022 U.S. dollars]*

Year	Program, training development, & maintenance	Training	Testing (drug and alcohol)	Annual reports	FAA oversight costs	Total cost (7% PV)	Total cost (3% PV)
1	\$0.3	\$7.6	\$0.0	\$2.1	\$0.0	\$9.4	\$9.8
2	0.3	1.0	4.5	6.8	2.1	12.8	13.8
3	0.3	1.0	4.5	6.8	2.1	12.0	13.5
4	0.3	1.0	4.6	6.9	2.1	11.3	13.1
5	0.3	1.0	4.6	6.9	2.1	10.6	12.8
Total	1.6	11.7	18.2	29.4	8.2	56.1	63.0

* These numbers are subject to rounding error.

II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the FAA's authority. The FAA's authority to issue rules on alcohol and drug testing is in 49 U.S.C. 45102, which directs the Administrator to prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct certain alcohol and controlled substances testing.

This final rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (the Act), 49 U.S.C. 44733. Specifically, 49 U.S.C. 44733(d)(2), titled "Alcohol and Controlled Substances Testing Program Requirements," requires the FAA to "promulgate a proposed rule requiring that all part 145 repair station

employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft [be] subject to an alcohol and controlled substances testing program determined acceptable by the [FAA] Administrator and consistent with the applicable laws of the country in which the repair station is located." Additionally, this final rule is promulgated under section 2112 of the FAA Extension, Safety, and Security Act of 2016, (the 2016 Act), which directed publication of a notice of proposed rulemaking in accordance with 49 U.S.C. 44733. The 2016 Act also required that the notice of proposed rulemaking be finalized. Further, section 302(b) of the FAA Reauthorization Act of 2024 (Pub. L. 118–63) requires that within 18 months of enactment of that Act, the Administrator shall issue a final rule carrying out the requirements of section 2112(b) of the FAA Extension, Safety, and Security Act of 2016.

estimates (as of March 2023, the rule would affect approximately 962 part 145 repair stations in about 66 foreign countries), the 2021 numbers are used in the regulatory evaluation and Regulatory Impact Assessment to estimate cost.

² For those foreign governments or repair stations that receive a waiver based on recognition, FAA will rely on the foreign government or repair station

III. Background

A. History

The FAA and the Office of the Secretary of Transportation (OST) have long engaged in a regulatory partnership regarding drug and alcohol testing of persons in the aviation industry. These regulations are promulgated under 14 CFR part 120 and 49 CFR part 40. The preamble to the NPRM provided a full history of the FAA and OST regulations.³

B. Legislative and Rulemaking Actions

1. FAA Modernization and Reform Act of 2012

In 2012, Congress passed the FAA Modernization and Reform Act of 2012 (2012 Act).⁴ Section 308(d)(2) of the 2012 Act, implemented in 49 U.S.C. 44733, requires that the Administrator publish a proposed rule requiring that all part 145 repair station employees responsible for safety-sensitive

to ensure compliance with the recognized programs and notify FAA when the standards or conditions change.

³ Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States, 88 FR 85137, 85139 (Dec. 7, 2023).

⁴ Public Law 112–95 (Feb. 14, 2012).

¹ These estimates are current as of April 2021 and sourced from the National Vital Information Subsystem (NVIS). NVIS is a subsystem of the Flight Standards Automation System, a comprehensive information system used primarily by inspectors to record and disseminate data associated with inspector activity and aviation environment. While there are more current

maintenance functions on part 121 air carrier aircraft outside the U.S. to be subject to an alcohol and controlled⁵ substances testing program determined acceptable by the Administrator and consistent with the applicable laws of the country in which the repair station is located. The FAA considers all maintenance functions performed on part 121 air carrier aircraft to be safety-sensitive under 14 CFR 120.105 and 120.215.

2. Advance Notice of Proposed Rulemaking

In response to the congressional mandate, the FAA published an advance notice of proposed rulemaking (ANPRM) on March 17, 2014.⁶ The comment period for the ANPRM closed July 17, 2014. The FAA received 74 substantive comments of both support and opposition. The FAA discussed and responded to the comments received as part of the NPRM.⁷

3. FAA Extension, Safety, and Security Act of 2016

After the FAA published the ANPRM, Congress enacted the FAA Extension, Safety, and Security Act of 2016 (2016 Act),⁸ which reemphasized Congress's prioritization of drug and alcohol programs for foreign repair station employees in section 2112. Specifically, section 2112 directed the FAA to (1) ensure that an NPRM pursuant to 49 U.S.C. 44733(d)(2) is published within 90 days of the date of the enactment of the 2016 Act and (2) ensure that the rulemaking is finalized within a year of

the NPRM publication.⁹ The NPRM was promulgated in accordance with such direction.

4. FAA Reauthorization Act of 2024

After the FAA published the NPRM, Congress enacted the FAA Reauthorization Act of 2024 (2024 Act),¹⁰ which again reemphasized Congress's prioritization of drug and alcohol programs for foreign repair station employees who perform maintenance on part 121 air carrier aircraft. Specifically, section 302(b) directed the FAA to issue a final rule within 18 months of the date of the enactment of the 2024 Act that carries out the requirements of section 2112(b) of the 2016 Act.

IV. Discussion of the Final Rule

A. Testing Under 14 CFR Part 120 and 49 CFR Part 40

In the NPRM, the FAA proposed to fulfill Congress's mandate by requiring certificated part 145 repair stations located outside the territory of the U.S. whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to obtain and implement a drug and alcohol testing program, consistent with the applicable laws of the country in which the repair station is located.¹¹ Specifically, the FAA proposed to require a part 145 repair station located outside the territory of the U.S. to implement a drug and alcohol testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120, covering employees who perform maintenance functions on part 121 air carrier aircraft. If a part 145 repair station located outside the U.S. could not meet one or all requirements in 49 CFR part 40 (*i.e.*, DOT's requirements), the FAA noted that the part 145 repair station could apply for an exemption using the existing process described in 49 CFR 40.7. Similarly, if a part 145 repair station located outside the U.S. could not meet one or all requirements in 14 CFR part 120 (*i.e.*, the FAA's requirements), the FAA proposed that the repair station may apply for a waiver in accordance with proposed 120.9.

1. Application of 14 CFR Part 120 and 49 CFR Parts 40 Through 145 Certificated Repair Stations Located Outside the Territory of the United States (§§ 120.1, 120.123 and 120.227)

To effectuate this testing framework, the FAA proposed three revisions to 14 CFR 120.1, which are all adopted in this

final rule. Specifically, § 120.1(c) will specify that paragraph (c) applies to those part 145 certificate holders located in the territory of the U.S. who elect to implement a drug and alcohol testing program under 14 CFR part 120. New paragraph (d) will expand the applicability of domestic 14 CFR part 120 to all part 145 certificate holders outside the territory of the U.S. who perform safety-sensitive maintenance functions on part 121 air carrier aircraft, effective on the compliance date of December 20, 2027. Finally, current 14 CFR 120.1(d) is redesignated as paragraph (e).

The FAA proposed adding specific instructions to affected part 145 repair stations outside the territory of the U.S. on how to meet the necessary requirements to implement a drug and alcohol testing program to 14 CFR 120.117 (Drug Testing Program Requirements) and 120.225 (Alcohol Testing Program Requirements), which are adopted by this final rule. First, § 120.117(a)(5) will specify that the requirements in that paragraph, which permit a repair station to elect to implement a testing program, are applicable only to part 145 certificate holders located inside the territory of the U.S. New § 120.117(a)(6) within the table will require a part 145 repair station located outside the territory of the U.S. whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to obtain an OpSpec A449 in their Operations Specifications by contacting the repair station's Principal Maintenance Inspector. In turn, current 14 CFR 120.117(a)(6) is redesignated as paragraph (a)(7).

Similarly, this final rule revises 14 CFR 120.117(c)(1) to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S. New paragraph (c)(2) will require the applicable repair station located outside the territory of the U.S. to (1) obtain an OpSpec A449 in their Operations Specifications by contacting the repair station's Principal Maintenance Inspector, (2) implement the drug testing program no later than three years from the publication date of this final rule,¹² and (3) meet the

⁵ As noted in the NPRM, the legislation specifically used the term "controlled substances." This term is also used in 49 U.S.C. 45102, which originally charged the FAA with prescribing regulations for air carriers and foreign air carriers to conduct certain drug and alcohol testing (*i.e.*, eventual 14 CFR part 120). Title 49 U.S.C. chapter 447 does not include a definition for "controlled substance." However, the FAA finds that given (1) the deference to the FAA Administrator to determine program acceptability in 49 U.S.C. 44733 and (2) the FAA's firmly established drug and alcohol testing regulations based off the original authority in 49 U.S.C. 45102, "controlled substances" should be intended to mean the FAA's current definition of "drug" as based off the definition of "controlled substances" provided by 49 U.S.C. 45101. Specifically, 49 U.S.C. 45101 states that the definition of "controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 specified by the Administrator of the FAA.

⁶ Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States ANPRM, 79 FR 14621 (Mar. 17, 2014). Drug and Alcohol Testing of Certain Maintenance Provider Employees Located Outside of the United States; Extension of Comment Period, 79 FR 24631 (May 1, 2014).

⁷ 88 FR 85137 at 85140.

⁸ Public Law 114–190 (Jul. 15, 2016).

⁹ Section 2112(b) of Public Law 114–190.

¹⁰ Public Law 118–63 (May 16, 2024).

¹¹ 88 FR 85137.

¹² The NPRM proposed that a foreign repair station beginning operations more than one year after the effective date of the regulation implement a drug testing program no later than the date the repair station begins operations. The final rule removes this language because it is superfluous. As revised, 14 CFR 117(c)(2) requires all affected foreign repair stations to implement a drug testing program no later than three years from the publication date of the final rule. Accordingly, an affected foreign repair station that begins operations

requirements of 14 CFR part 120, subpart E. In turn, current 14 CFR 120.117(c)(2) is redesignated as paragraph (c)(3).

This final rule adopts similar amendments to the implementation tables set forth in 14 CFR 120.225(a) and (c). Specifically, in 14 CFR 120.225(a), this final rule: revises the introductory language of paragraph (a)(5) to specify that paragraph is applicable to part 145 certificate holders located inside the territory of the U.S.; adds new paragraph (a)(6) to include the requirements for a part 145 repair station located outside the territory of the U.S. that performs safety-sensitive maintenance functions on part 121 air carrier aircraft; and redesignates current paragraph (a)(6) as paragraph (a)(7). Likewise, in 14 CFR 120.225(c), this final rule: revises paragraph (c)(1) to specify the requirements in that paragraph are applicable only to part 145 certificate holders located inside the territory of the U.S.; adds new paragraph (c)(2) to require the applicable repair station located outside the territory of the U.S. to (1) obtain an OpSpec A449 in its Operations Specifications by contacting the repair station's Principal Maintenance Inspector, (2) implement the alcohol testing program no later than three years from the publication date of this final rule,¹³ and (3) meet the requirements of 14 CFR part 120, subpart E; and redesignates current paragraph (c)(2) as paragraph (c)(3).

Relatedly, this final rule adopts minor grammatical changes to the headings of the table set forth in 14 CFR 120.117(c) and 14 CFR 120.225(c) and introductory text of 120.117(c)(1) and (3) and 120.225(c)(1) and (3) to conform with the heading revisions. This final rule also adopts the correct introductory text in § 120.225(d), which is currently and inadvertently blank in the regulations.

Finally, the FAA notes that, in light of the expanded flexibilities for waivers based on recognition, subsequently discussed in section IV.B of this preamble, this final rule makes technical corrections to the regulatory text in §§ 120.117 and 120.225. These revisions are discussed in that section.

more than three years after the publication date of the final rule must immediately comply with this requirement, regardless of whether they are starting operations as a new part 145 repair station.

¹³ This final rule implements the same non-substantive revisions described in footnote 11 to the alcohol testing program requirements set forth in 14 CFR 120.225(c)(2).

2. Conforming Amendments To Facilitate Drug and Alcohol Procedures Outside the United States (§§ 120.123 and 120.227)

This final rule adopts conforming amendments to 14 CFR 120.123 and 120.227, which currently effectively restrict any drug and alcohol programs from implementation outside of the U.S. Specifically, this final rule adds language at the beginning of 14 CFR 120.123(a), 120.123(a)(1), 120.123(b), 120.227(a), 120.227(a)(1), and 120.227(b) that would except persons under adopted 14 CFR 120.1(d) from applicability of those regulations restricting drug and alcohol testing outside the territory of the U.S.

3. Exemptions and Waivers to Drug and Alcohol Program Requirements (120.5 and 120.9)

As previously discussed in the NPRM, the FAA seeks to avoid situations whereby the regulations of the FAA are inconsistent with laws in other sovereign countries and acknowledges there are many unique scenarios associated with the establishment and implementation of drug and alcohol testing programs outside of the U.S. Therefore, the FAA explained in the NPRM that a part 145 repair station could apply for an exemption from 49 CFR part 40 using exemption processes existing therein. In turn, the FAA proposed to add language to 14 CFR 120.5 to clarify that an employer's drug and alcohol testing conducted pursuant to 14 CFR part 120 must comply with the procedures set forth in 49 CFR part 40, to include any exemptions issued to that employer in accordance with 49 CFR 40.7. To streamline and efficiently address potential international legal conflicts between foreign laws and the FAA's own regulations, the FAA proposed to add waiver authority in new 14 CFR 120.9 to allow repair stations located outside of the U.S. to request waivers from specific provisions of 14 CFR part 120. The FAA maintains that the existing exemption process in 49 CFR part 40 in tandem with the proposed waiver process in new 14 CFR 120.9 would provide sufficient pathways to work with part 145 certificated repair stations outside the territory of the U.S. to ensure these repair stations are not in violation of the laws of the country within which they are situated. Therefore, these provisions are adopted as proposed.

4. Effective and Compliance Date

In the NPRM, the FAA proposed to require the applicable repair station located outside the territory of the U.S.

to obtain an OpSpec A449 and implement a drug and alcohol testing program no later than one year from the effective date of the regulation (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations). The FAA received comments on the compliance date and reevaluated the amount of time that would be necessary to come into compliance with the regulations adopted by this final rule (see section IV.C.3 of this preamble for further discussion on the effective date comments). Commenters raised valuable implementation and operational concerns including time for a foreign repair station to prepare and submit waiver or exemption requests, time for the FAA to hire and train new employees, and time for the FAA and DOT to process a potentially large volume of waiver and/or exemption requests. With the introduction of expanded flexibilities for waivers based on recognition, the FAA expects a foreign government or an individual repair station seeking relief will need more time than proposed to prepare and submit a request.

Based on these comments, the FAA has set the effective date of this rule to January 17, 2025 and will extend the delay for compliance for three years from the date of publication. Accordingly, the compliance date for affected foreign repair stations is December 20, 2027. The FAA has made changes to the regulatory text to ensure requests are received with sufficient time for the FAA to respond to requests for waivers. If a repair station's existing program is not recognized pursuant to 14 CFR 120.10 and it does not have a testing program that meets the requirements of 14 CFR part 120 and 49 CFR part 40 or an approved waiver and/or exemption for these parts, the repair station will be prohibited from performing safety-sensitive maintenance functions on part 121 air carrier aircraft and the part 121 air carrier is prohibited from using the part 145 repair station to perform aircraft maintenance. The FAA encourages those seeking a waiver or an exemption to do so as early as possible. This is especially important during the final year before the compliance date, considering the large number of requests the FAA and DOT expect to receive during that period.

The FAA acknowledges DOT has a separate process for granting exemptions from 49 CFR part 40. Under 49 CFR part 5, DOT requires an exemption request to be submitted at least 60 days before the proposed

effective date of the exemption, unless good cause is shown in that petition. Because FAA and DOT may need to coordinate on requests that involve a waiver and exemption from the same repair station, the FAA recommends foreign repair stations requiring an exemption make their request at least 90 days before the compliance date of this rule, December 20, 2027, or 90 days before a repair station intends to perform safety-sensitive maintenance functions on part 121 air carrier aircraft after the compliance date.

B. Recognition of Existing Requirements or Testing Programs

The FAA acknowledges that the relief in the proposed waiver program was insufficient and expanding the waiver eligibility is appropriate and consistent with the foundational intent of the Congressional mandate, particularly given the overwhelming number of comments the FAA received in response to the NPRM urging the FAA to, first, recognize the sovereignty of foreign nations and their individual legal contexts and, second, work more collaboratively with foreign country governments to achieve the ends of the legislation.¹⁴ To be clear, as previously discussed, this final rule maintains the option for a foreign repair station to implement an alcohol and drug testing program that meets the requirements of 14 CFR part 120 and 49 CFR part 40 as proposed in the NPRM. However, the final rule also expands on the flexibilities in the proposed waiver program in response to these public comments. To avoid potential duplication and unnecessary paperwork due to multiple waiver requests, the FAA is enabling direct engagements with foreign governments that represent the interests of foreign repair stations in their territories by establishing a process in new § 120.10 for foreign governments, on behalf of repair station operators within their territories, to obtain a waiver for those operators based on the Administrator's recognition of existing requirements promulgated under the laws of the country as a compatible alternative subject to minimum criteria. Proposed waiver section 120.9 contained a requirement that a foreign repair station submit "[a] description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver." Based on consideration of that provision and comments received, in § 120.10, the FAA is expanding the opportunity for

foreign governments and foreign repair stations to rely on existing programs as demonstrations of the alternative means used to meet the objectives of part 120, provided certain criteria are met. Foreign governments, and foreign repair stations subject to foreign governance, are in the best position to assess and explain the laws imposed within their borders. The FAA anticipates foreign governments will pursue this waiver option to relieve individual foreign repair stations from the compliance burdens, unnecessary duplication, and potential conflicts between U.S. requirements and foreign laws where the U.S. and the foreign government share an objective of an alcohol- and drug-free workplace when performing safety-sensitive duties. However, if a foreign government chooses not to avail itself of this option, § 120.10 will provide an individual foreign repair station discretion to make its own waiver request based on recognition of an existing testing program that meets the criteria identified in the regulation. If an individual foreign repair station demonstrates its existing program contains the criteria outlined in § 120.10, the Administrator will issue a waiver.

Therefore, the FAA finds this waiver based on recognition will alleviate the burdens associated with the difficulties of identifying conflicts between foreign laws and the regulations. Specifically, this final rule adopts new § 120.10. Waiver based on recognition of a foreign government's existing requirements or an existing testing program of a part 145 repair station outside the territory of the U.S. This section will set forth the general requirements to obtain the waiver, including: the compatibility elements, process and procedures for the request, disposition of the request, effect and validity, and compliance measures.

General. Section 120.10(a) will provide that a foreign government may request a waiver on behalf of repair stations within its territory based on the Administrator's recognition of the country's existing requirements (e.g., an existing testing regime) as a compatible alternative that meets the minimum key elements set out in § 120.10(b) (subsequently explained). In the event a foreign government chooses not to make a request on behalf of the repair stations in its country, § 120.10 also allows individual foreign repair stations to follow this process to similarly request a waiver based on recognition of an existing testing program by demonstrating the program is a compatible alternative that meets the key elements set out in the regulation.

By requiring that a compatible alternative contain the criteria set forth in § 120.10(b), the FAA intends to ensure a foreign government's existing requirements meet the same safety intent¹⁵ of the FAA's regulations regarding drug and alcohol testing for safety-sensitive employees, including those that perform maintenance on part 121 air carrier aircraft. To note, if granted a waiver based on recognition of a compatible alternative, a foreign repair station will be required to comply with the recognized existing testing program.

Compatibility. The criteria a foreign government's existing requirements or testing program must contain to obtain a waiver are set forth in § 120.10(b) and include:

- A testing protocol or established consequences used to detect or deter, or both, employees who are responsible for safety-sensitive maintenance on part 121 air carrier aircraft from misusing alcohol and using drugs.¹⁶
- An education or training program or materials that explain the impact and consequences of misusing alcohol and using drugs while performing safety-sensitive maintenance.
- The method used to rehabilitate and ensure that safety-sensitive maintenance employees who return to work on part 121 air carrier aircraft after a drug or alcohol test violation or consequence no longer misuse alcohol or use drugs.

Similar to the proposed and finalized waiver element in § 120.9 that requires an applicant to provide "a description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver," the FAA finds these criteria acceptable to ensure the proposed compatible alternative meets the same safety intent of the existing rules regarding drug and alcohol testing for safety-sensitive employees in the U.S., including those that perform maintenance on part 121 air carrier aircraft. The FAA acknowledges the laws and requirements of a country will impact how a government or foreign repair station meets these criteria. The following discussion on each element

¹⁵ See 14 CFR 120.3, stating the purpose of part 120 is to establish a program designed to help prevent accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees who perform safety-sensitive functions in aviation.

¹⁶ The FAA recognizes that each country may present a range of drug laws or requirements, and may indicate testing of drugs that differ from those tested for within the U.S. The term "drugs" is intended to broadly address the category of drugs tested for by a foreign government or individual foreign repair station.

¹⁴ These comments are summarized and adjudicated in section V.A of this preamble.

may help a foreign government or an individual repair station demonstrate how its own requirements or testing program meet these elements.

Effective testing protocols or established consequences.

The circumstances under which a foreign repair station conducts testing or applies consequences for prohibited conduct are critical to detecting or deterring, or both, employees from misusing alcohol and using drugs while at work and performing safety-sensitive maintenance on part 121 air carrier aircraft. Testing may include pre-employment, post-accident, reasonable suspicion, or random. Pre-employment drug testing acts as a gatekeeper and critical tool for identifying and keeping drug users out of safety-sensitive positions in the aviation industry. Post-accident drug and alcohol testing assists regulated employers in determining if drugs and/or alcohol are contributing factors to an accident. Employers conduct reasonable cause/suspicion drug and alcohol testing when there is credible evidence and direct observations by a trained supervisor indicating an employee may be using drugs or misusing alcohol while performing safety-sensitive duties. Random drug and alcohol testing contributes as an effective deterrent discouraging safety-sensitive employees from using drugs or alcohol while at work. These methods of testing have made a long-standing positive impact on the FAA's domestic program, but the FAA notes they may not be the only means for detection and deterrence that ensures safety-sensitive maintenance personnel are not using drugs or misusing alcohol. Because laws permitting testing and circumstances may vary from country to country, this nonexhaustive list provides examples of the types of testing that may be recognized as part of a compatible alternative under § 120.10.

If a foreign government or an individual repair station indicates it conducts testing, a request for waiver based on recognition of a compatible alternative must include a description of the testing protocols (see new § 120.10(c)(1), detailing documentation necessary in a recognition package). As an example, the U.S. domestic testing program is standardized to ensure the integrity and identity of the specimen, and scientific accuracy of the test result. The testing must include strict specimen collection procedures to minimize the opportunity an individual would have to tamper with their specimen. Another system safeguard includes a regimented process to document the handling and storage of a

specimen from the time it is collected until the time it is released to the facility that conducts the analysis. A properly documented collection process links donors to their specimen and provides proof of all specimen activity between collection and analysis. The FAA's domestic testing protocols and specimen analysis are established in 49 CFR part 40 and are consistent with the U.S. Department of Health and Human Service's laboratory protocols. The FAA acknowledges that testing protocols identified in a request for waiver based on recognition may depart from the requirements of 49 CFR part 40; however, requestors must thoroughly explain how those testing protocols ensure the integrity and identity of the specimen, and scientific accuracy of any test results.

As noted, while testing is the most efficient method for detection and deterring employees from using drugs and misusing alcohol while performing safety-sensitive maintenance, it may not be the only means. As reiterated by commenters to the NPRM, established consequences for drug use or alcohol misuse can be an effective deterrent when testing is limited by the laws of the foreign country. For example, established consequences may include laws providing for the vigorous detection, prosecution, and punishment (e.g., imprisonment) of drug use or alcohol misuse. Several commenters identified such consequences and their deterrent effects.¹⁷ If a request for waiver based on recognition relies on established consequences, the FAA would anticipate receiving information from a foreign government or a foreign repair station demonstrating either its own testing systems and protocols or its laws and regulations limit or do not permit testing of the repair station's safety-sensitive maintenance employees.

An education or training program or materials.

It is imperative to safety that safety-sensitive maintenance employees understand the personal consequences of drug use and alcohol misuse and the professional consequences of failing to comply with the requirements of their employer's drug and alcohol policies. In the U.S., for drug testing, an employer must conduct initial training for safety-sensitive employees that includes the effects and consequences of drug use on personal health, safety, and work environment, as well as the manifestations and behavioral cues that may indicate drug use and abuse.¹⁸ Similarly, for alcohol testing, each

employer must provide each employee with educational materials that explain the alcohol misuse requirements and the employer's policies and procedures with respect to meeting those requirements.¹⁹ Employee training in the U.S. is a one-time requirement; however, the FAA believes it is a good practice to provide employees with new information when it changes and remind them of the requirements when performing covered functions. While the FAA does not offer its own training materials for employers to use, training and its materials can take many forms (e.g., virtual or in-person instruction, handouts). The FAA expects an acceptable training and education program required under § 120.10(b)(2) would ensure employees and their supervisors understand the safety risk of drug use and alcohol misuse, as well as the consequences of a drug and/or alcohol testing violation. The FAA understands a request for waiver based on recognition may not include the actual training or materials intended for use with safety-sensitive maintenance employees. However, the request must include what topics the training and/or materials will cover.

Method to rehabilitate and ensure that safety-sensitive maintenance employees who return to work on part 121 air carrier aircraft after a drug or alcohol test violation or consequence no longer misuse alcohol or use drugs.

In a country where it is permissible for a safety-sensitive maintenance employee to return to work after using drugs or misusing alcohol, pursuant to § 120.10(b)(3), a request for waiver based on recognition must include a process for treatment and/or education. Further evaluation or testing is critical to ensure the employee does not return to perform maintenance on part 121 air carrier aircraft and continue to use drugs and/or misuse alcohol. The FAA's domestic program allows a safety-sensitive employee to be evaluated by a qualified substance abuse professional (SAP) after failing a drug or alcohol test or refusing a test. Once the employee demonstrates successful compliance with the SAP's treatment and/or education, the employee may return to performing safety-sensitive functions after passing a return-to-duty test conducted by their employer.²⁰ After returning to work, the employer must conduct the unannounced follow-up testing for a minimum of one year or up to five years, depending on the SAP's

¹⁷ See section V.E. of this preamble.

¹⁸ 14 CFR 120.115(c).

¹⁹ 14 CFR 120.223(a).

²⁰ 14 CFR 120.109(e) and 120.217(e).

directions.²¹ The return-to-duty process, including unannounced follow-up testing, functions to reduce the probability of recurrence through monitoring that employee to ensure the behavior does not repeat. If an employee fails another required drug or alcohol test or there is evidence of on-duty use, the safety-sensitive maintenance employee is permanently disqualified from performing maintenance for any employer regulated under 14 CFR part 120.²²

Because of the potential for repeated risk, the request for waiver based on recognition must describe or demonstrate what methods are used to ensure safety-sensitive maintenance employees who return to work on part 121 air carrier aircraft after a drug or alcohol test violation or consequence are monitored to detect or deter, or both, repeat behavior.

Requests for recognition (§ 120.10(c)). This section will require certain information to be included in a request for waiver based on recognition, including the name, title, address, email address, and telephone number of the primary person to be contacted regarding review of the request (§ 120.10(c)(1)(i)); documentation of the foreign government's existing requirements demonstrating that the requirements contain the key elements of part 120 as described in paragraph (b), including, if appropriate, copies of applicable laws, regulations, and other requirements carrying the force of law (§ 120.10(c)(1)(ii)); any appropriate data, records, or supporting explanation for the Administrator to consider in determining whether the foreign government's existing requirements contain those key elements (§ 120.10(c)(1)(iii)); and a statement that the requestor intends to notify the Administrator within 30 days of changing any key elements as described in paragraph (b) that form the basis of the Administrator's recognition and describe those change(s) to the key elements (§ 120.10(c)(1)(iv)). Requests must be submitted to the FAA's Office of Aerospace Medicine, Drug Abatement Division (§ 120.10(c)(2)) at least 90 days before the waiver needs to take effect (§ 120.10(c)(3)). The FAA plans to update the website shortly after publication of the final rule to facilitate submission of information that a foreign government or foreign repair station needs to provide for FAA to consider a waiver based on recognition.

Disposition (§ 120.10(d)). If a foreign government's request complies with

§ 120.10(c) and demonstrates its requirements meet the key elements described in § 120.10(b), the FAA will recognize the country's requirements as a compatible alternative, pursuant to § 120.10(d) and issue a waiver. To note, the FAA may request additional information from the foreign government or the foreign repair station to fully understand and evaluate the alternative testing program or consequence to ensure the information meets the requirements, and under § 120.10(d)(1) will retain authority to make such inquiries. The FAA envisions such a request as a collaborative process with the requestor.

Effect and Validity (§ 120.10(e)). A waiver based on recognition in the form of an FAA-issued letter will be provided to the requestor if the request is accepted. If the requestor is a foreign government, the waiver will apply to all FAA-certificated foreign repair stations that are in the territory of that country and subject to the recognized compatible alternative. The FAA expects the foreign government to distribute the FAA-issued letter to all foreign repair stations in its territory so each is aware of the waiver based on recognition and can maintain a copy. Pursuant to § 120.10(e)(2), the Administrator's waiver based on recognition will remain valid so long as the compatible alternative retains the key elements that formed the basis of the Administrator's decision.

Compliance (§ 120.10(f)). If granted waiver based on recognition of a compatible alternative, a foreign government would ensure that foreign repair stations subject to its authority comply with the recognized existing requirements (*i.e.*, follow the laws in their own country). As previously explained, the FAA will issue a letter indicating the waiver based on recognition to a government or a foreign repair station. Foreign repair stations that have obtained a waiver based on recognition of an existing testing program, or that are covered by a foreign government's recognized compatible alternative pursuant to § 120.10(e)(1), must maintain the FAA-issued letter on file documenting the waiver in accordance with § 120.10(f)(1). The letter serves as documentation the certificated repair station's safety-sensitive maintenance employees are either subject to a testing protocol or established consequences, or both, deemed acceptable to the FAA Administrator and may be provided to a part 121 air carrier as program documentation of compliance. Finally, pursuant to § 120.10(f)(2), the FAA may modify, suspend, or withdraw its waiver

based on recognition by the Administrator when it is no longer valid (*e.g.*, if the recognized existing requirements are changed to remove key elements that were previously acceptable to the Administrator); when a foreign repair station fails to implement a testing program consistent with its recognition (*e.g.*, if a repair station obtains recognition based on certain key elements but then fails to implement those elements in a testing program); or when the FAA determines that a foreign government or foreign repair station has not provided the notification within 30 days of changes to the key elements that form the basis of the Administrator's recognition, as described in § 120.10(c)(1)(iv).

Conforming Amendments. In the applicability section for part 120, § 120.1, the final rule includes a new exception in § 120.1(d), which clarifies that § 120.5 and subparts E and F of 14 CFR part 120 do not apply to part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft that have obtained a waiver based on recognition pursuant to § 120.10.

In the tables in §§ 120.117(a) and (c) and §§ 120.225(a) and (c), the final rule clarifies that the information does not apply to a part 145 repair station that has obtained a waiver based on recognition by the Administrator of existing requirements or a testing protocol or established consequences (or both) pursuant to new § 120.10 as adopted by this final rule. The sections now more clearly explain that a foreign repair station that has not received a waiver based on recognition of existing requirements promulgated under the laws of their country must meet the requirements of 14 CFR part 120 as if it was an employer as defined in the regulation, and in accordance with any applicable waivers as described under § 120.9 or any exemptions granted under 49 CFR 40.7. This final rule does not change the meaning of these sections from what was proposed; however, with the introduction of expanded flexibilities for waivers, the FAA found it necessary to clarify that this language will not apply to foreign repair stations that are covered under a waiver based on recognition by the Administrator issued pursuant to 14 CFR 120.10.

V. Responses to Comments

The NPRM published on December 7, 2023, with the original comment period closing on February 5, 2024. On January 16, 2024, a coalition of 15 organizations requested to extend the comment period

²¹ 49 CFR 40.307(d).

²² 14 CFR 120.111(e) and 120.221(b).

an additional 90 days. In response, the FAA extended the comment period by an additional 60 days to April 5, 2024.²³ This extension provided a total of one hundred twenty (120) days for comment submission.

The FAA received 74 comment submissions in response to the NPRM during the 120-day comment period, including two requests for an extension of the comment period and two out-of-scope comments. Of the 70 remaining comments germane to the rulemaking, 17 generally supported the NPRM, 40 generally opposed the NPRM, and 13 stated no position but provided their comments and concerns or asked questions about the proposal. These comments addressed multiple aspects of the proposal and are further summarized alongside the FAA's responses in the sections that follow. The 17 supporting commenters included two airline mechanics unions (International Brotherhood of Teamsters (Teamsters) and Transportation Trades Department, AFL-CIO (TTD)), a pilots' union (Allied Pilots Association (APA)), a transit employee union (Transport Workers Union of America (TWU)), a trade association (National Drug & Alcohol Screening Association (NDASA)), a Substance Abuse Professional (SAP) Directory service (SAPList), a software provider (Nexus 33 Group LLC), and 10 individuals.

The 40 opposing commenters included thirteen foreign repair stations (Air New Zealand Limited, Chromalloy, Excel Aerospace Pte, HAECO Component Overhaul, Hong Kong Aero Engine Services Limited, IHI Corporation, JAL Engineering Company Limited, MTU Maintenance Zhuhai, Panasonic Avionics Corp-Line, Taikoo Shandong Aircraft Engineering Co., Taikoo Xiamen Aircraft Engineering Co., Taikoo Xiamen Landing Gear Services, and Elbe Flugzeugwerke), five trade associations (Aeronautical Repair Station Association (ARSA), Airlines for America (A4A), Cargo Airline Association (CAA), General Aviation Manufacturers Association (GAMA), and Regional Airline Association (RAA)), four airline manufacturers (AIRBUS Commercial Aircraft, The Boeing Company, Boeing Research and Technology, and GE Aerospace), three foreign trade associations (Airlines for Europe (A4E), Bundesverband der Deutschen Luft- und Raumfahrtindustrie e.V./German Aerospace Industries Association

(BDLI), and International Air Transport Association (IATA)), three foreign airlines (Deutsche Lufthansa AG, EL AL Israel Airlines, and Qantas Airways Limited), two foreign governmental aviation organizations (European Commission Directorate General for Mobility and Transport (DG MOVE) and UK Department for Transport (UK DFT)), one charter airline (Capital City Jet Center), one maintenance provider (MRO Holdings, Inc.), one manufacturer (MOOG Inc.), one U.S. repair station (Fortner Engineering & Manufacturing, Inc.),²⁴ and six individuals.

The 13 commenters that did not state an overt position on the NPRM included seven foreign repair stations (Airfoil Services, Goodrich THY TEKNİK SERVİS MERKEZİ LTD. ŞTİ, Honeywell do Brasil, Seman Peru, Sharp Aviation K Inc.,²⁵ ST Engineering Aerospace Services Company, and Tamagawa Aero Systems), one employment screening services provider (New Era Drug Testing), one SAP service provider (American Substance Abuse Professional, Inc.), and three individuals.

The following sections summarize and respond to comments received on the NPRM.

A. Sovereignty of Other Nations and Existing Programs

Thirty-one commenters, including ARSA, Air New Zealand Limited, Airbus Commercial Aircraft, A4A, A4E, Deutsche Lufthansa AG, EL AL Israel Airlines Ltd., GE Aerospace, GAMA, BDLI, IATA, Qantas Airlines, The Boeing Company, and UK DFT, raised the issue of national sovereignty as a basis for their opposition to the NPRM. These commenters generally disagreed with the NPRM's approach to implementing the statutory mandate. Commenters including A4A, RAA, IATA, ARSA, and EL AL Israel Airlines commented that the proposal's drug and alcohol testing program requirement may conflict or be inconsistent with the laws of other sovereign nations. In their view, the proposal failed to consider these pre-existing, complex, and diverse legal contexts that operate outside the United States. Commenters provided numerous examples of conflicts between various foreign laws and the requirements of 49 CFR part 40 and 14 CFR part 120, which are discussed in

section IV.D of this preamble. These commenters argued that the statutory mandate prohibits the FAA from proposing regulations on persons outside the territory of the U.S. that would facially conflict with the laws of sovereign nations. They also argued that the statute does not permit the FAA to shift the burden of avoiding inconsistencies with foreign laws to the part 145 repair stations that would need to seek waivers or exemptions.

A4A and IATA further encouraged the FAA to directly engage with foreign governments that have different methods of deterring drug and alcohol use and abuse that may accomplish the FAA's objectives by other means, stating the imposition of testing obligations in some countries may run contrary to, or be unnecessary in consideration of, the country's cultural context and its various laws. A4A commented the FAA should establish a process through which a foreign repair station may request that the U.S. government and the respective government of the repair station cooperate and come to an agreement to ensure subject repair stations in those countries be compliant with all illicit drug and alcohol abuse laws, both foreign and domestic. Airbus also commented that U.S. authorities should issue exemptions and waivers at the level of each country without involving each part 145 certificated repair station to minimize the administrative burden and associated costs. Similarly, ARSA suggested the FAA find another country's laws acceptable with no further action if the country has an existing program or has harsh laws or other deterrents for drug and alcohol use. Capital City Jet Center in Canada also stated the FAA should either work to develop a standard or require proof a repair station is covered by their governing country's existing testing program. Given the variations in these laws from country to country, commenters including The Boeing Company generally agreed that a "one-size-fits-all" approach would be impossible to implement and enforce, and that FAA should instead accept local testing regimes and defer to local authorities. To summarize, these commenters urged the FAA to consider accepting a government's determination of compliance and acceptability.

Several commenters, including A4A, ARSA, and IATA, suggested that the proposal would shift the burden of understanding and complying with foreign laws and regulations from the FAA to foreign citizens, which would violate national sovereignty. Specifically, ARSA stated, "the congressional directive was clear: the

²³ Drug and Alcohol Testing of Certificated Repair Station Employees Located Outside of the United States; NPRM extension of comment period, 89 FR 4584 (Jan. 26, 2024).

²⁴ ARSA and Fortner Engineering & Manufacturing, Inc. submitted nearly identical comments with no substantive differences. Because these comments originated with ARSA, the final rule refers to these separate submissions as ARSA's comments.

²⁵ Sharp Aviation K Inc provided two comments on the NPRM.

rule on its face cannot conflict with a sovereign nation's laws. Placing the burden on a certificate holder to prove its laws conflict with the proposed aviation safety regulations is an unacceptable application of legislative plain language." Commenters further argued that the public is unable to assess the legal ramifications of extending 14 CFR part 120 and 49 CFR part 40 beyond the boundaries of the U.S., and that foreign repair station and maintenance facility owners are citizens, not international legal experts capable of competently seeking waivers and exemptions from the regulations. Commenters stated that placing this burden on a certificate holder to prove its laws conflict with the proposal is an unacceptable application of legislative plain language. They would like to see the government make the determination of compliance and acceptability, not the foreign citizen.

Conversely, the Teamsters and APA, who supported the rule as proposed, stated the FAA should not expand the NPRM to allow a foreign repair station to present an existing or equivalent testing program to meet the requirements of the proposed rule. The Teamsters stated DOT's reliance on existing standards to address the use of alcohol and controlled substances for domestic covered employees necessitates an identical application for any further employees entered in the testing program. Another supporting commenter, NDASA, agreed the requirements for foreign repair stations should mirror those drug and alcohol programs in the United States. They further stated already existing testing programs and advances in international testing in the 30 years since the FAA originally proposed testing outside of the U.S. will make this rulemaking easier to implement.

The FAA disagrees that the NPRM's approach fails to consider the legal contexts of foreign nations, resulting in conflict and inconsistency. Section 44733(d)(2) explicitly required the proposed rule requiring an alcohol and controlled substances testing program determined acceptable by the Administrator to be promulgated consistent with the applicable laws of the country in which the repair station is located. The FAA maintains that the proposed rule considered legal contexts of foreign nations because the FAA proposed a pathway under which a foreign repair station could be consistent with both the FAA drug and alcohol testing regulations and the laws of the country. Specifically, the FAA proposed (and this final rule adopts) a pathway that would allow a foreign

repair station to apply for exemptions and waivers under 49 CFR part 40 and 14 CFR part 120, respectively, to facilitate compliance with the consistency requirement. Therefore, the FAA maintains that this rulemaking does not, as commenters suggested, impose rigid requirements without regard to local legal contexts. Nor does the NPRM's approach improperly burden the owners of foreign repair stations with responsibility for understanding and complying with FAA regulations. Affected foreign repair stations must hold an FAA-issued part 145 certificate to be subject to the regulations promulgated in this rule. Accordingly, these foreign repair stations must already understand and comply with the requirements of 14 CFR part 145 concerning aircraft maintenance, repair, and operation organizations. The FAA separately addresses commenters' arguments concerning the burdens of seeking waivers and exemptions below.

However, the FAA acknowledges each country impacted by this rule may have existing testing protocols or consequences under local laws that could meet the safety intent of the FAA's domestic requirements to detect or deter, or both, employees who are responsible for safety-sensitive maintenance functions from misusing alcohol and using drugs.

Further, the FAA acknowledges the discrepancy between legal contexts of a foreign country and FAA regulations, some of which may be so complex that a singular means of compliance may not be adequately covered solely by that proposed in the NPRM. Therefore, as previously discussed, this final rule includes more flexible waivers whereby a foreign government, on behalf of its repair station operators within its territory, may seek a waiver based on recognition of the foreign government's existing requirements or testing program. As explained, the waiver is also available to an individual foreign repair station, which may seek recognition of an existing testing program promulgated under the laws of the country or present consequences under local laws as a compatible alternative that demonstrate it meets the intent of the regulation. Section IV.B of this preamble discussed this waiver option, including the necessary criteria to demonstrate a testing program or consequences that meet the intent of the existing rules regarding drug and alcohol testing for safety-sensitive employees and the procedures to seek such recognition. The FAA finds that this more flexible waiver option comprehensively considers the unique

laws and sovereignty of other countries and responds to commenters' concerns of this nature.

B. Final Rule Effective and Compliance Date

In the NPRM, the FAA proposed to require the applicable repair station located outside the territory of the U.S. to obtain an OpSpec A449 and implement a drug and alcohol testing program no later than one year from the effective date of the regulation (or, if a foreign repair station begins operations more than one year after the effective date of the regulation, implement a drug testing program no later than the date the repair station begins operations). A4A requested the compliance date of this final rule should be held in abeyance for repair stations seeking waivers or exemptions, regardless of whether the FAA adopts the option for a government to make a request on behalf of its repair stations. If a government makes the request on behalf of its repair stations, A4A stated the compliance date of the regulations should be held in abeyance in a country until a final agreement has been made and becomes effective. They argued this would help avoid a scenario where one repair station in a country must comply with the FAA testing requirements where another does not because they are waiting on a decision, avoids requiring a repair station to set up intermittent costly processes that must later be revised to conform to the agreement, and avoids a situation where a repair station may be out of compliance with a local or FAA regulation while waiting on a pending request, which may put the repair station in difficult contractual or insurance policy non-compliance situations. For similar reasons, A4A requested the FAA fully adhere to its statutory limitation through a waiver/exemption process that ensures all inconsistencies are addressed before it imposes its program on foreign repair stations. They stated the one-year delay in compliance date proposed is based on no supporting data the FAA and DOT have the resources or ability to adjudicate hundreds to thousands of requests. CAA also had concerns with the waiver process, stating that the FAA needs to properly address whether the proposed rule's final compliance date will be substantially far enough in the future to accommodate the hundreds of exemption requests, and the agency should not arbitrarily enforce the regulations while exemption applications are pending or delayed at the hands of the agency.

The FAA acknowledges the concern regarding the rule's compliance date

and agrees with commenters that more time is needed to implement the requirements of this rule. With the introduction of waivers based on recognition of the foreign government's existing requirements or testing program, the FAA expects a foreign government or an individual repair station seeking relief will need sufficient time to prepare and submit a request, and the FAA and DOT will need additional time to create a new FAA International Compliance and Enforcement Branch, and to process waiver and exemption requests. The FAA disagrees, however, that compliance with these regulations by a foreign repair station should be held in abeyance if their request for a waiver from 14 CFR part 120 is pending with the FAA, or if their request for an exemption is pending with DOT. The extended three-year compliance date and the requirement to make a request at least 90 days before a waiver is needed will provide sufficient time to make and/or respond to requests made pursuant to §§ 120.9 and 120.10, and no abeyance will be necessary.

As discussed in section IV.A of this preamble, the FAA has set the effective date of this rule to January 17, 2025 and set the compliance date to December 20, 2027. The FAA has made changes to the regulatory text to ensure requests are received with sufficient time to respond to requests for waivers requested pursuant to §§ 120.9 and 120.10.

C. Government Resources

Commenters including A4A, A4E, ARSA, CAA, EL AL Airlines, and IHI expressed concern that the DOT and the FAA do not have the ability to manage the number of waivers and exemptions submitted with their own resources, or to respond to requests in a timely manner. Further, these commenters explained that delays in obtaining waivers and exemptions could increase the costs of implementing a testing program. Specifically, A4A stated their concern the FAA and DOT do not have the expertise and ability to fully adjudicate the impact of foreign laws and inconsistency with the FAA program and would like the FAA to recognize it will give full deference to the determination of foreign authorities regarding the inconsistency of laws for the purpose of compliance with FAA's program.

The FAA acknowledges commenters' concerns regarding the burden on the FAA and DOT because of waiver and exemption requests associated with this rule. In response to concerns regarding burden and for reasons discussed above, the FAA has expanded waiver eligibility

allowing a foreign government, on behalf of the repair stations in its country, or an individual foreign repair station to provide a written request for a waiver based on recognition of an existing testing program promulgated under the laws of the country as a compatible alternative that meets the minimum key elements set out in the regulation. The FAA finds this expansion of the waiver option will sufficiently recognize deference to foreign governments, their sovereignty, and their existing laws and requirements as an acceptable means of ensuring an alcohol and drug-free workplace. The FAA expects the expanded waiver options to reduce the burden on foreign citizens and on FAA and DOT by reducing the number of waivers and exemptions received.

D. Specific Conflicts With Foreign Laws

Commenters including ARSA, Air New Zealand Limited, Airbus Commercial Aircraft, A4A, A4E, Deutsche Lufthansa AG, EL AL Israel Airlines Ltd., GE Aerospace, GAMA, BDLI, IATA, Qantas Airlines, The Boeing Company, DG MOVE, UK DFT, and individuals specifically raised issues of labor and employment laws, human rights laws, union policies and laws protecting the privacy rights of employees. Commenters also noted that in countries that already permit some type of drug and alcohol testing, the existing methodologies vary greatly.

The FAA received comments regarding existing laws that may conflict with the proposed rule in several countries including the United Kingdom, Ireland, Germany, the European Union, China, Singapore, Peru, and Japan. GE Aerospace provided a copy of their comments submitted to the ANPRM, which contained some current regulatory requirements for Hungary, Korea, Singapore, the UK, China, Australia, and Brazil.

Chile. An individual commented it is necessary to verify the impact of the policy according to the local law in Chile and that the policy must not conflict with the employments contracts, employment legislation, or labor legislation.

China. The FAA received 6 comments from Chinese repair stations HAECO Component Overhaul Xiamen Ltd., Hong Kong Aero Engine Services Limited, MTU Maintenance Zhuhai, Taikoo Xiamen Aircraft Engineering Co. Ltd, Taikoo Xiamen Landing Gear Services Co. Ltd, and Taikoo Shandong Aircraft Engineering Co., Ltd. These repair stations, along with The Boeing Company, stated the People's Republic of China has very strict management

and control of the illegal use of drugs, forbidding any misuse of prohibited drugs. Taikoo Shandong Aircraft Engineering Co., Ltd. noted that the laws of the People's Republic of China cover all the prohibited drugs listed in 49 CFR part 40. Commenters also stated that drug testing is not commonly requested by a business company in China and can only be conducted by police when drug use is suspected or when an individual is in recovery from drug use. The repair stations stated that they instead have internal procedures that effectively control alcohol misuse, including training/education and daily checks.

EU. DG MOVE commented that the EU has robust safety management provisions in place for maintenance stations and a verifiable track record demonstrating that drug and alcohol abuse do not represent a safety concern requiring further regulatory action. The issue is covered by EU aviation safety regulations, in addition to EU Member States' employment laws. DG MOVE stated that since 2003 and the adoption and application of EU legislation pertaining to the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organizations and personnel involved in these tasks, all EASA part 145 maintenance organizations are required to establish a Safety and Quality policy and a compliance monitoring system. Moreover, since December 2022 (date of applicability of Commission Implementing Regulation (EU) 2021/19632), all EASA part 145 maintenance organizations are required to establish a safety management system compliant with International Civil Aviation Organization (ICAO) Annex 19 provisions. Such policy mandates the conduct of random independent audits of all aspects of the organization ability to carry out maintenance to the required standard, including checks of all maintenance personnel's training and performance in relation to human factor issues, which could influence their ability to safely and properly exercise their tasks, explicitly including the issue of abuse of alcohol or drugs. DG MOVE states the new burdensome control measures implied by the proposed rule are in no way justified with regard to the EU and its Member States. DG MOVE also pointed to the existing U.S.-EU BASA, which is addressed in section V.G of this preamble.

Germany. The BDLI and Lufthansa Group stated random testing for drugs and alcohol is not compatible with the laws in Germany. A German foreign

repair station, Elbe Flugzeugwerke GmbH, commented that a general testing of alcohol and drugs without concrete suspicion is not permitted under German local law and that the local personal rights of the employee are in contradiction with the general requirement for testing, therefore, this rule cannot be implemented in Germany.

Ireland. MOOG Inc. commented that, legally, organizations in Ireland cannot force staff to undergo mandatory workplace drug testing or alcohol consumption exams and to do so could cause controversy. MOOG Inc. also mentioned privacy issues and human rights conflicts because presently there is no requirement in the Safety Health and Welfare at Work Act, 2005 clause 13(1)(c), which allows regulations to be made for testing for intoxicants.

Israel. EL AL Israel Airlines (EL AL) commented that Israeli law prohibits companies from performing random drug and alcohol testing on employees, though local law provides for testing based on suspicion or need. EL AL further asserted that Israeli law codifies a person's right to bodily autonomy and privacy and prohibits compelled medical examinations without a person's consent. EL AL also suggested that Israeli data privacy laws may deem regular and random drug and alcohol testing as illegal and illegitimate spying and as a violation of privacy. EL AL stated retaining the required consent for processing of Personal Information is a struggle for the airline and, even if obtained may not withstand proportionality tests as there may be other disciplinary measures with a lesser effect on the employee's privacy.

Japan. The FAA received comments from repair stations in Japan, including Panasonic Avionics Corp-Line Maintenance, who stated labor laws in Japan do not allow companies to conduct drug investigations. Another commenter, JAL Engineering Company Limited, stated the strict prohibition of drugs in Japan and its enforcement means the prevalence of drug use among the Japanese population is significantly lower than in the United States and Europe. The commenter also stated the Japan Civil Aviation Bureau mandates alcohol testing for maintenance personnel before the start of their shifts. Another Japanese repair station, IHI Corporation, commented that alcohol testing may be feasible, but drug testing causes concerns with the protection of personal information and consent to test. They also stated drug possession and its use are illegal in Japan and the consequences are expected to achieve

the goal of the implementation of the drug testing rule.

Mexico. Chromalloy, a repair station located in Mexico, stated the aviation laws in Mexico already include an alcohol and drugs testing as part of the medical examination required to obtain/renew aviation maintenance license and this medical examination is in accordance with ICAO recommendations. Furthermore, the commenter indicated under Article 47 of Mexico's Federal Labor Law, employees are prohibited from arriving at work intoxicated or under the influence of a narcotic or drug (with medical exception).

Peru. Seman Peru Sac, a foreign repair station, stated some aspects of the proposed rule are not in accordance with the reality of the country. For example, they stated there is no substantial consumption rate of amphetamines, heroin, and opioids in Peru. The most widely used drugs are cocaine, marijuana, and alcohol. They also stated drug testing at their location has been always negative because they follow the Advisory Circular DGAC Peru 91.010–2019, requiring unannounced detection of 10% of personnel once a year.

Singapore. The FAA received a comment from Excel Aerospace in Singapore which stated Singapore has extremely strict drug and alcohol regulations.

Türkiye. A repair station in Türkiye, GOODRICH THY TEKNİK SERVİS MERKEZİ LTD. ŞTİ, commented that drug and alcohol testing can only be requested if an individual is under the influence within the workplace or there is a suspicion, or if the nature of the job requires testing (e.g., drivers). They also stated employees who are notified of testing must be informed about the method, scope, and purpose of the test, and personal data must be protected, and explicit consent must be given before an employer allows employees to undergo alcohol and drug tests.

United Kingdom (UK). The UK DFT commented that the NPRM contains elements that overlap with domestic UK provisions, including the Railways and Transport Safety Act 2003 and the Employment Rights Act 1996. UK DFT stated aircraft maintenance personnel are required by the terms of their licenses and those of their organizations not to work whilst under the influence of drugs or alcohol. The Railways and Transport Safety Act 2003 sets out prescribed limits for people involved in aviation activities, including flight crew, ground crew and air traffic controllers. The Act does not contain provisions giving the power to conduct random

drug and/or alcohol testing without the consent of the test subject, which UK DFT states is contrary to the NPRM and has the potential to impose on UK sovereignty. UK DFT further states U.S. employment law is different from UK employment law, which is set out in the Employment Rights Act 1996. UK DFT stated the requirement of a program that complies with extremely detailed and onerous criteria that can be applied to U.S. repair stations presents practical difficulties if implemented on UK repair stations. It is likely to present problems in some cases of a clash between the requirements of the NPRM and UK domestic law on unfair dismissal under the Employment Rights Act 1996. UK DFT further discussed its responsibility for the British Overseas Territories, which do not have the same provisions as those contained in the Railways and Transport Safety Act 2003 or the Employment Rights Act 1996 but do have robust Employment Laws and regulatory enforcement mechanisms in place, including suspension and/or revocation of any license, certificate, or approval, within each individual Territories' own legal framework. UK DFT stated the measures suggested in the NPRM are unnecessary and disproportionately burdensome with the potential to encroach on UK sovereignty.

The FAA acknowledges each country impacted by this rule may have different laws on labor, employment, privacy, etc., which the repair stations in that country must follow. The FAA appreciates the information provided by other countries and individual foreign repair stations to help illustrate this point. As described previously, the FAA has expanded waiver eligibility to a foreign government, on behalf of its repair station operators within its territory, and the individual repair stations. This waiver based on recognition allows a foreign government or an individual repair station to provide the FAA with a written request for waiver based on recognition of an existing testing program or consequences promulgated under the laws of the country that meets the minimum criteria set forth in new § 120.10. Absent a waiver based on recognition, the foreign repair stations must meet the requirements of 14 CFR part 120 and 49 CFR part 40, with the option to request a waiver or exemption for those discrete regulations that may present an obstacle.

E. Human Rights Concerns

GAMA commented that the rule raises human rights concerns because it may result in outcomes inconsistent with

widely recognized norms of justice. Specifically, GAMA stated that foreign governments may use a positive test result obtained through a repair station's drug and alcohol testing program to prosecute a station employee. GAMA further asserted that station employees in some countries may face criminal conviction and excessive punishment, up to and including capital punishment, due to a test required under this rule. ARSA similarly commented that some countries impose harsh penalties for alcohol and drug use. CAA raised a concern of risks to employees of foreign repair stations where the host country's strict drug use laws carry severe punishments, and CAA questioned whether compliance with the rule would cause difficulty in retaining and hiring employees who fear criminal sanctions for their drug use.

The FAA acknowledges these concerns about the potential human rights implications of the rule's testing requirements. However, Congress has directed the FAA to promulgate a rule requiring that foreign repair stations ensure employees who perform safety-sensitive maintenance on part 121 air carrier aircraft are subject to a drug and alcohol testing program. Further, GAMA's concern about countries' ability to use positive tests resulting from this rule's requirements to obtain convictions and to impose excessive punishments is difficult to assess without additional information. These consequences turn on a country's laws, its criminal justice system, prosecutorial decision-making and discretion within that system, and several other factors that are beyond the FAA's understanding. The FAA acknowledges that certain safety-sensitive maintenance employees that engage in illegal drug use or alcohol misuse may be deterred from employment with a foreign repair station if testing pursuant to the final rule would uncover such conduct. The FAA lacks sufficient information to assess the extent of impacts on retention and hiring associated with an employee's fear of being sanctioned for drug use by their employer's government. In cases where a foreign government receives a waiver based on recognition of existing requirements, this final rule would not impose additional testing or requirements beyond what the foreign government requires.

GAMA also asked the FAA to reconsider issuing the rule if it could result in harsh, cruel, or unusual punishments in other countries. GAMA implored the FAA to, at a minimum, work with the U.S. Department of State or other appropriate government

agencies to reduce the likelihood of inhumane outcomes. The FAA notes that the waiver based on recognition option provided in the final rule would not impose additional testing or requirements beyond what the foreign government requires. Furthermore, the waiver based on recognition will permit countries and individual repair stations to seek recognition of a foreign government's existing requirements or testing program that may mitigate certain downstream risks associated with testing for drug use and alcohol misuse. The FAA notes that it regularly engages in inter-agency collaboration, such as with the U.S. Department of State, and would continue to do so to the extent any specific concerns are raised in the implementation of this rule.

F. Waivers and Exemptions

1. Waiver Burdens

ARSA asked the FAA to consider offering a blanket waiver from the requirements of 14 CFR part 120 in some circumstances, including where a foreign government has similar drug and alcohol testing requirements. ARSA stated that compliance with 49 CFR part 40 would not be required if the FAA issued a blanket waiver to 14 CFR part 120. The Teamsters, a supporting commenter, explained that the FAA has satisfied these concerns via the proposed waiver and exemption process.

The FAA disagrees that the proposed regulations improperly burden foreign repair stations that would be subject to the rule. As explained previously, the regulations as proposed comply with 49 U.S.C. 44733(d)(2): they require the relevant foreign repair stations to implement a testing program; they establish acceptable baseline requirements for a testing program; and they include mechanisms for compliance and adaptation, specifically through waivers and exemptions, to address inconsistencies with local laws. The FAA reasonably determined that the regulated community is best situated to seek relief from 49 CFR part 40 and 14 CFR part 120 to ensure consistency with local laws, which led the FAA to expand the waiver opportunities, as previously discussed in this final rule.

However, the FAA finds seeking such relief may require more time than the NPRM's proposed one-year implementation period. Accordingly, the FAA will set the effective date to 30 days while extending the compliance date to three years to provide existing foreign repair stations up to three years to comply with the pathways adopted

by this final rule. These measures provide foreign repair stations with sufficient time and flexibility to implement an appropriate drug and alcohol testing program consistent with any waivers. Additional explanation for the extension of the compliance date of the rule is included in sections IV.A and V.B.

2. Waiver Standard and Requirements

Several commenters raised concerns about the NPRM's proposed processes and applicable standards for issuing waivers and exemptions. A4A stated the proposed processes for issuance of waivers and exemptions is ambiguous and vague because it does not offer a standard under which the FAA will approve a waiver. A4A alleged that the process is therefore arbitrary and capricious, and it requested the FAA explain the process and standards for FAA waivers and DOT exemptions and give the public an opportunity to comment on the standards. The Lufthansa Group commented that waivers and exemptions would be reviewed through an unspecified process and rely on an individual's judgment rather than a particular standard. ARSA similarly commented that the NPRM failed to provide an objective standard for obtaining an exemption or waiver.

A4A stated the FAA asks for more than what Congress required within the waiver request process (*i.e.*, the "reasons why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol" and a "description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver, or, if applicable a justification of why it would be impossible to achieve the objective of the provision in any way").²⁶ A4A stated these items should not be part of the waiver process since the FAA cannot impose a program that is inconsistent with the applicable laws of the country in which the repair station is located, making this information irrelevant. Both A4A and ARSA suggested that the FAA and DOT must automatically grant a waiver or exemption when there is an inconsistency in the law. They argued that the proposed process indicates the FAA could deny waivers despite the clear Congressional mandate to avoid inconsistencies with foreign laws, and the FAA offered no standards for making these decisions in the proposed rule. ARSA provided suggested

²⁶ Proposed § 120.9(b)(5) and (6).

amendments to the regulatory text consistent with its comments. Some commenters including IHI Corporation, a repair station in Japan, would like to see more flexibility on the approval of a waiver, considering the context of the country's laws and regulations and their customs.

Alternatively, supporting commenters including TWU noted the waiver and exemption process outlined in the NPRM is appropriately tailored and urged the FAA to maintain a narrow view of what necessitates an exemption or waiver. The TTD agreed, stating the FAA must carefully review each request, examine the country's laws, and weigh the potential costs of relaxing important safety regulations. The Teamsters commented on the proposed requirements for requesting a waiver and stated maintaining a narrow process for granting waivers or exemptions is necessary for the pursuit of one level of safety across maintenance providers. They stated the elements the FAA requires to grant a waiver provide a high bar, and the FAA should maintain that high bar, not taking revenue or workforce size into account. They asked the FAA to maintain a narrow interpretation of what an "inconsistency" with another country's law is and require the requestor to cite laws that are explicitly inconsistent with the regulation. They also stated any request for a waiver or exemption will adversely affect accidents and injuries unless categorically proven otherwise. The Teamsters also stated it would be inappropriate and inconsistent with Congressional intent to only apply 14 CFR part 120 and 49 CFR part 40 in part.

The FAA recognizes that the different laws and regulations of some countries may place limitations on drug and alcohol testing, prohibit it entirely, or place conditions on how testing would be done. Congress contemplated this potential barrier in 49 U.S.C. 44733(d)(2) as evidenced by the language requiring the drug and alcohol program to be both acceptable to the Administrator and consistent with the applicable laws of the country in which the repair station is located. As explained in the NPRM, the FAA proposed to avoid situations whereby the regulations of the FAA are inconsistent with laws in other sovereign countries through waivers and exemptions.

To ensure that a waiver based on an inconsistent law results in an acceptable drug and alcohol testing program, § 120.9(b) requires the foreign repair station to explain why granting the waiver "would not adversely affect the

prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees," and describe "alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver or, if applicable, a justification of why it would be impossible to achieve the objectives of the provision in any way".²⁷ These elements of a request will inform the FAA's assessment of whether a waiver is appropriate upon a showing of an inconsistent law, and whether any conditions or mitigation would be appropriate to further the purposes and objectives of the drug and alcohol requirements already deemed acceptable to the Administrator.

The FAA recognizes that the varied laws of foreign countries could conflict with the drug and alcohol testing requirements in complex ways. Some asserted conflicts may be clear. For example, some countries may completely bar on privacy grounds any pre-employment drug testing, which is required by § 120.109(a), or random drug testing, which is required by § 120.109(b). More difficult conflicts may arise when a country's existing drug and alcohol testing requirements are inconsistent, though not outright barred, with the demands of the rule. These circumstances understandably result in uncertainty about how the FAA will address specific requests for waivers, but that uncertainty is inherent in the balance struck by Congress when it directed the FAA to require drug and alcohol testing in a manner acceptable to the Administrator and consistent with diverse foreign laws. The NPRM provided a standard that was deemed appropriate to the Administrator that will result in waivers to accommodate foreign laws upon a showing of inconsistency, though the FAA retains the authority to advance the purposes and objectives of the existing testing scheme to the greatest extent possible through appropriate conditions and limitations that still preserve consistency with foreign laws.

Supporting commenters NDASA and APA suggested modifications to the proposed rule text regarding waiver requirements. First, NDASA suggested that FAA include a requirement that copies of foreign laws provided to the FAA are translated in English. Although English is the expectation for any submitted documentation, the FAA does not find this distinction needs to be included in the regulatory text.

NDASA and APA recommended the modification of § 120.9(b)(6) to change

from "if applicable, a justification of why it would be impossible to achieve the objectives of the provision in any way" to instead state, "if applicable, an explanation of how the safety objectives of the provision will be met with procedures that create an equivalent level of safety." They asserted this change would always include safety, so it cannot be considered impossible to achieve. The FAA does not revise the adopted regulatory text to reflect this recommended revision in this final rule. As the FAA has acknowledged, each country impacted by this rule may have different laws on labor, employment, privacy, etc., which the repair stations in that country must follow. The FAA must consider the diversity of laws and ensure the regulatory language allows a repair station to remain consistent with the applicable laws of the country in which the repair station is located. Additionally, the element of safety is further explicitly accounted for in paragraph (b)(3), which requires an explanation of why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs or the misuse of alcohol by employees.

NDASA suggested adding a regulatory provision in 49 CFR part 40 to correspond with the NPRM's proposed § 120.9, likening the addition to the existing stand down waiver process, which has regulatory references in both § 40.21 and § 120.125. The FAA determined this recommendation is outside the scope of this rulemaking, which is limited to amending part 120.

3. Eliminating Waivers and Exemptions

NDASA and APA commented they preferred to see no waiver or exemption option. APA stated all safety-sensitive work on part 121 aircraft should be required to adhere to the same, or at least substantially similar, stringent criteria as required for part 121 maintenance personnel located within the United States to maintain a consistent minimum level of safety. APA further stated the FAA should prohibit part 121 operators from having maintenance performed in countries with laws that prohibit testing or make it impractical. They stated there is no logic behind permitting a knowing acceptance of reduced safety standards. NDASA agreed with APA's comment, asserting that if a country cannot meet the criteria, the safest approach would be to prohibit the U.S. carrier from having safety-sensitive maintenance functions performed within that country.

²⁷ Proposed § 120.9(b)(3) and (6).

APA and NDASA commented that the exemption process proposed in the NPRM is not the correct mechanism for allowing a foreign repair station to opt out of the rule, and the waiver process in part 120 is more appropriate. They both stated the exemption process should be removed for three reasons: (1) part 40 should be followed as written regardless of where testing occurs due to the quality, consistency, and protections it affords; (2) exemptions should only be granted when there are “special or exceptional circumstances, not likely to be generally applicable and not contemplated in connection with the rulemaking”, and (3) it is contrary to the Administrative Procedure Act and the DOT’s position on exemptions to make a regulation inviting exemptions from potentially 192 of the ICAO signatory countries and/or the individual repair stations in those countries. They stated that since the rule anticipates receiving petitions for exemption, the situation is not unusual and has been contemplated in the rulemaking, making the waiver process more appropriate. The commenters suggested deleting § 120.5 from the proposed rule and making this a waiver process under § 120.9 only.

The FAA appreciates the commenters’ concerns about exemptions under 49 CFR part 40 being used to accommodate foreign laws applicable to foreign repair stations that are inconsistent with the part’s requirements. The FAA agrees that compliance with those requirements would ensure consistent, high-quality testing occurs when required by this rule. However, the FAA lacks the authority to grant an exemption in whole or in part from 49 CFR part 40 under § 40.7 or implement a waiver process for relief from 49 CFR part 40. The exemption process described in 49 CFR part 5 is DOT’s established process for granting relief from 49 CFR part 40. Furthermore, because the availability of exemptions may be critical to compliance with the statutory mandate’s consistency requirement in some circumstances, the FAA defers to DOT to honor Congress’s intent if any appropriate exemptions are sought. As commenters noted, an exemption will only be granted under § 40.7 if the requestor documents special or exceptional circumstances (e.g., a country’s law) that make compliance with a specific provision of 49 CFR part 40 impracticable. These circumstances may not be generally applicable nor contemplated in connection with the rulemaking that finalized 49 CFR part 40,²⁸ and, considering the unique context of each

country’s laws, the FAA concludes that exemptions would not be generally applicable outside the foreign repair station’s country. Also, there is no evidence to suggest that DOT contemplated in the rulemaking finalizing 49 CFR part 40 the specific special or exceptional circumstances that may arise when a foreign law conflicts with the part’s requirements.

APA and NDASA were also concerned granting waivers or exemptions to foreign repair stations may open the door to granting similar waivers to domestic employers and may have an impact on long-standing international testing required by the Federal Railroad Administration, the Federal Motor Carrier Safety Administration, and the Coast Guard. These commenters requested the FAA address the potential impact on the DOT agencies that require testing.

The FAA does not find that the implementation of this final rule would have an impact on the testing requirements of another Federal agency requiring testing in accordance with 49 CFR part 40. Each regulating agency and DOT has the authority to determine the applicability of their respective regulation and whether to consider providing relief from their respective regulation either in part or in whole. Further, the waiver option presented in this rule is specifically applicable to foreign repair stations that perform safety-sensitive maintenance on part 121 air carrier aircraft. The FAA is not extending this option to domestic employers regulated under 14 CFR part 120.

4. Department of Transportation (DOT) Authority

A4A argued Congress did not confer authority to the FAA to impose a program over which it does not control, noting that 49 CFR part 40 is a DOT regulation and the FAA cannot grant exemptions to it. A4A also commented the FAA’s reliance on DOT’s exemptions far exceeds the Congressional limitations placed on the FAA, and the FAA cannot force the DOT to agree that an inconsistency meets the thresholds provided in 49 CFR part 5.

As a general matter, the FAA has broad statutory authority to promulgate regulations to implement programs established by statute and administered by the FAA. Under section 106 of title 49 of the United States Code, the Administrator “is authorized to issue, rescind, and revise such regulations as are necessary to carry out” the Administrator’s and the FAA’s functions. Those functions include

administering alcohol and drug testing programs codified in 49 U.S.C. chapter 451. Specifically, the FAA’s authority to issue rules on alcohol and drug testing is in 49 U.S.C. 45102, which directs the Administrator to prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct certain drug and alcohol testing. In addition to these authorities, the final rule is promulgated under section 308 of the 2012 Act, 49 U.S.C. 44733(d)(2), which directs the FAA to extend drug and alcohol testing requirements to foreign repair stations with employees that perform safety-sensitive maintenance functions on part 121 air carrier aircraft. Section 309 of the 2012 Act further requires that such testing requirements be acceptable to the Administrator. The FAA maintains that the standards set forth in 14 CFR part 120 and 49 CFR part 40, which are cooperatively administered by the FAA and DOT, respectively, are acceptable drug and alcohol testing programs as applied to persons that perform safety-sensitive maintenance functions at U.S.-based repair stations. Because the FAA lacks the data or studies to support a deviation from the current program requirements, for purposes of 49 U.S.C. 44733(d)(2), the Administrator finds that the current drug and alcohol testing scheme is acceptable as applied to foreign repair stations.

As the NPRM explained, the FAA and DOT have long engaged in a regulatory partnership regarding drug and alcohol testing of persons in the aviation industry.²⁹ This partnership has resulted in linked regulations that generally govern DOT agencies’—including the FAA’s—drug and alcohol testing procedures in 49 CFR part 40, and more specific FAA regulations on the same subjects in 14 CFR part 120. The FAA’s existing drug and alcohol testing regulatory framework functions through both DOT’s and FAA’s regulations.³⁰ As noted previously, the FAA has broad statutory authority to carry out its functions. Neither 49 U.S.C. 44733(d)(2) nor any other statute limits the FAA’s authority to promulgate regulations on drug and alcohol testing that are consistent with the long-established regulatory framework. Commenters offered no authority or analysis to suggest otherwise. They also did not explain how the FAA’s lack of control over DOT’s exemption process is relevant to the FAA’s statutory authority

²⁹ 88 FR at 85138.

³⁰ 49 CFR 40.1(a) states that 49 CFR part 40 applies to and instructs “all parties who conduct drug and alcohol tests required by [DOT] agency regulations how to conduct these tests and what procedures to use.”

²⁸ See 49 CFR 40.7(b).

to require a drug and alcohol testing program. The proposed regulations fall well within the FAA's statutory authority, and the FAA's continued reliance on 49 CFR part 40 is necessary to ensure consistency across the existing regulatory framework in which drug and alcohol testing conducted under this rule would occur.³¹ If an exemption from 49 CFR part 40 is necessary, a part 145 repair station must request it in writing from DOT under the provisions and standards of 49 CFR part 5. While the FAA lacks control over DOT's exemption process, the FAA and DOT may coordinate on these requests as they relate to implementation of a drug and alcohol testing program required by 14 CFR part 120, particularly if the foreign repair station concurrently requests a waiver from this part 120.

5. Department of Health and Human Services (HHS) Authority

A4A and ARSA stated the FAA did not address the requirements of the HHS that may apply to the testing program and whether repair stations may obtain relief from these requirements when inconsistent with foreign laws. The FAA disagrees with commenters that relief may need to be granted by HHS as part of this rule. Because requirements that connect to the HHS mandatory guidelines (e.g., laboratory certifications) are included in 49 CFR part 40, any relief needed by a foreign repair station, or its government, may be granted by DOT as part of the exemption process.³²

6. Waiver Cost

Commenters including ARSA, DG MOVE, MRO Holdings, and EL AL Israel Airlines expressed concern with the cost to request a waiver or exemption, stating the process is burdensome and will require the foreign citizen to obtain the services of experts in the fields of

international law as well as HHS, DOT, and FAA regulations to decipher whether compliance with each section of the rules can be achieved. Commenters stated the cost of this is not included in the NPRM.

Relatedly, CAA commented that the rulemaking fails to accurately account for the costly challenges if the rule was implemented as proposed and underestimates the practical and legal feasibility of implementing the conceived exemption process. They also stated that, as noted in the NPRM, over 900 repair stations in over 30 countries would come under this rulemaking and even if only half applied for exemptions, there is no proper accounting by the FAA of the personnel, time, cost, and inherent delays for processing hundreds of exemptions involving explanation of local law, expertise of additional personnel, time, and cost to the applicant.

The FAA acknowledges concerns regarding the cost of submitting waivers and exemptions. In the NPRM, the FAA, because of the uncertainty of how many repair stations would apply for a waiver or exemption, assumed that all repair stations would comply with the rule. The cost of creating and maintaining a drug and alcohol program is more expensive than the cost of all repair stations submitting a waiver or exemption. Therefore, the estimated cost in the NPRM is a conservative case in which the cost of the rule is higher. In response to comment, in the final rule, the FAA has expanded waiver eligibility to foreign governments, which FAA anticipates will mitigate the burden on foreign repair stations identified by commenters. Because of this addition, the FAA also added a second scenario that estimates the cost of all countries applying for this alternative means of compliance.

G. Bilateral Aviation Safety Agreements

In the NPRM, the FAA invited comments on whether any Bilateral Aviation Safety Agreements (BASAs) conflict with the requirements of the proposed rule. Though responsive commenters provided views on various BASAs, few offered evidence of direct conflicts with the requirements of those agreements. For example, BDLI commented that countries with existing BASAs already contain prohibitions and requirements regarding the consumption of drugs and alcohol in the workplace and any violation of these prohibitions would result in sanctions by the aviation authority and in serious cases criminal prosecution but did not explicitly provide which BASAs would conflict. Many commenters reiterated

concerns that were submitted in response to the ANPRM.³³ For example, commenters encouraged the FAA to honor the intent of the BASAs and to rely on them to implement aspects of the rule, focused on the need for consultation with BASA parties, and identified the potential for retaliation.

As the NPRM explained, the FAA has been directed by Congress to promulgate regulations requiring part 145 repair stations outside the U.S. to have a drug and alcohol testing program for their employees who perform work on part 121 aircraft. To the extent that BASA provisions concerning notice and consultation are applicable to the proposed regulations, the FAA intends to follow those provisions.

1. Governmental Commenters

Two foreign government transportation agencies representing the interests of the United Kingdom and the European Union commented in opposition to the NPRM and raised concerns about the BASAs between the United States and their respective jurisdictions. The UK DFT asserted that the US-UK BASA, Maintenance Implementation Procedure (MIP), and Maintenance Agreement Guidance (MAG) would need to be amended if the FAA finalized the NPRM as proposed and made it effective in the UK. In the UK DFT's view, the FAA would be in breach of the MIP if it refused to certify a UK-based part 145 repair station for failure to comply with the NPRM's proposed requirements. UK DFT also noted that the FAA did not consult on the proposal under the terms of the UK-US BASA prior to publication. Finally, the UK DFT encouraged the FAA to accept the UK aviation maintenance system as a whole and not seek to make changes to parts of it. The UK DFT further asked the FAA to respect the principles of trust, cooperation, communication, and safety culture which underpin the UK-US BASA.

For the European Union, DG MOVE commented that a full account should be taken of the mutual trust and equivalency principles that underlie the US-EU BASA, and the existing requirements in place within the European Union. DG MOVE stated the BASA provides for a privileged exchange on regulatory developments, which was not done prior to the issuance of the proposed rule. DG MOVE asked the FAA to honor the long-standing cooperative relationship between Europe and the United States,

³¹ While the final rule amends 14 CFR 120.5 to require regulated entities to comply with exemptions issued under part 40, the final rule makes no changes to the longstanding requirement that those entities "having a drug and alcohol testing program under this part must ensure that all drug and alcohol testing conducted pursuant to [part 120] complies with the procedures set forth in 49 CFR part 40."

³² Although HHS has no authority to regulate the transportation industry, the DOT does have such authority. DOT is required by law to develop requirements for its regulated industry that "incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any amendments to those guidelines . . ." See 49 U.S.C. 20140(c)(2). In carrying out its mandate, DOT requires by regulation at 49 CFR part 40 that its federally-regulated employers use only HHS-certified laboratories in the testing of employees, 49 CFR 40.81, and incorporates the scientific and technical aspects of the HHS Mandatory Guidelines.

³³ The ANPRM published at 79 FR 14621. The FAA responded to these comments in the NPRM, 88 FR at 85141.

to minimize economic burden on their respective aviation industries from redundant oversight, and to adhere to the comprehensive system of regulatory cooperation in civil aviation safety an environmental testing and approvals based on continuous communication and mutual confidence.

The FAA acknowledges the concerns raised by UK DFT and DG MOVE, particularly with respect to prior notice and consultation concerning the NPRM and the requirements now finalized in the rule. The FAA is committed to honoring the principles of trust and cooperation embodied in the BASAs between the United States and the United Kingdom, the European Union, and other signatory partners. The final rule amends the proposal to address some of the concerns raised by UK DFT and DG MOVE. Specifically, the FAA has revised the waiver and provided an additional waiver option that gives foreign governments the ability to obtain a waiver on behalf of repair stations in its territory based on recognition of its program. The FAA is confident that the changes to the waiver options made in response to comment will allow for a streamlined process for further productive discussions and, if appropriate, the recognition of a country's existing requirements as a compatible alternative pursuant to § 120.10. As explained previously, the FAA has set the effective date of this rule to January 17, 2025 and includes a three-year compliance period to provide existing foreign repair stations up to three years to comply with the pathways adopted by this final rule. The FAA will further consult with parties to BASAs, where appropriate, on the impact of the final rule's requirements on the relevant agreements during this three-year implementation period.

2. Labor, Trade, and Industry Commenters

Fourteen labor organizations, airline trade organizations, and companies in the airline and maintenance industry commented on the NPRM's impact on the BASAs. Like the governmental commenters, the labor, trade, and industry commenters raised concerns about consultation and honoring the BASAs' purposes and requirements. For example, Airbus commented that the FAA should take special care with countries where a BASA is in force, including engaging in in-person consultations on a regular basis to understand the legal, practical, and cultural issues related to drug and alcohol testing, and the measures already in place that may mitigate the need to deploy this rule. In addition,

several commenters raised the potential for retaliation by foreign governments against repair stations located in the United States if the NPRM were to be finalized as proposed.

Commenters including A4A, IATA, and ARSA argued that the rulemaking attempts an end-around of BASAs by including the proposal under 14 CFR part 120 instead of part 145. They also requested the FAA generally follow directives on bilateral agreements and procedures required by treaties. ARSA and A4A stated that drug and alcohol testing requirements would need to be included as amendments to the special conditions of certain BASAs, and that those changes should be made in accordance with the State Department's sanctioned process associated with bilateral partners. A4A further suggested that FAA's drug and alcohol testing program should be applied through part 145 rather than part 120. A4A asserted that this change would respect comity and reciprocity by clarifying that any compliance issues would be processed through existing BASA provisions for special conditions. Accordingly, A4A explained that the proposed drug and alcohol testing requirements would automatically apply only in foreign jurisdictions without reciprocal recognition of the foreign repair station certificate (*i.e.*, a BASA). IATA stated their agreement with these comments, adding that the proposed rule disregards the relevance of existing BASAs which recognize part 145 repair stations that are certificated by the safety regulator where the facility is located. IATA recommended that the FAA instead accept a country's drug and alcohol testing requirements if there is a BASA in place that already addresses drug and alcohol testing. IATA asserted that a BASA should be renegotiated if there is no provision for drug and alcohol testing in an existing agreement. BDLI suggested that the FAA should treat as equivalent and sufficient any prohibitions and requirements regarding drug and alcohol consumption in a BASA party state. Airbus and Lufthansa Group alleged that the NPRM is incompatible with the U.S.-EU BASA. Airbus further noted that the U.S.-EU BASA Maintenance Annex Guide (MAG) is silent on drug and alcohol testing programs, but argued that this silence does not mean the NPRM would avoid conflict with the U.S.-EU BASA MAG. In their comment supporting the NPRM, the Teamsters noted opposing commenters have not provided evidence demonstrating that international obligations (*i.e.*, BASAs) are inherently in conflict with the NPRM and that the

FAA should not permit these concerns to impact the rulemaking.

The FAA disagrees with the commenters' characterization of the NPRM as an attempt to circumvent the requirements or purposes of the BASAs. To the extent BASAs address repair stations, including through annexes and special conditions, those BASAs concern how the parties will inspect, evaluate, and certify that maintenance organizations meet the requirements of part 145 and its equivalent in the foreign jurisdiction. The FAA's drug and alcohol testing regulations do not contain any maintenance standards that would be subject to special conditions.³⁴ As the Teamsters correctly noted, commenters have not identified a specific conflict between the NPRM and the BASAs. However, the FAA agrees with the governmental commenters who suggested that further consultations and amendments to address the change of circumstances may be appropriate, consistent with the consultation provisions under applicable BASAs. The FAA is committed to doing so if a provision is identified warranting such.

Opposing commenters argued that the FAA should transfer drug and alcohol testing requirements to part 145 for the limited purpose of ensuring that those requirements would be subject to the special conditions process under current BASAs. However, BASA parties have other means to address concerns about the requirements finalized in this rule, including provisions in each BASA allowing for consultation between the parties on amendments to address either party's revisions to its regulations, procedures, or standards (including those outside of part 145). For these reasons, the FAA concludes that relocating the drug and alcohol testing requirements applicable to part 145 repair stations is not appropriate or necessary.

Some labor, trade, and industry commenters also raised concerns about retaliation against U.S.-based repair stations if drug and alcohol testing were extended beyond U.S. borders. For example, A4A and IATA commented that the NPRM's impact on BASAs could increase the risk that foreign governments impose reciprocal and retaliatory drug and alcohol testing or other requirements on U.S.-based repair stations outside of a BASA's mutual and cooperative certification regime. GAMA

³⁴ For example, the UK-US BASA MIP defines "special conditions" to mean the requirements of "14 CFR parts 43 and 145 or in the (UK) Part-145 that have been found, based on a comparison of the regulatory maintenance systems, not to be common to both systems and which are significant enough that they must be addressed." US-UK BASA 1.7(h)

warned that the FAA should not take any action that may dissuade other countries from entering into these agreements. MOOG Inc. similarly commented that the NPRM could result in backlash within current BASAs and limit the possibility of future agreements. The FAA acknowledges the commenters' concerns and has taken steps in the final rule to lessen the burdens on foreign governments and repair stations that could incentivize retaliation. As explained above, the FAA anticipates that the waiver changes made in response to comments in the final rule will facilitate recognition of a foreign government's existing requirements as a compatible alternative that contains the minimum key elements of 14 CFR part 120.

H. Safety Case

1. Lack of Sufficient Data or Risk

Twenty commenters including ARSA, IATA, MOOG Inc., and Lufthansa Group stated that there is insufficient statistical data (*i.e.*, no safety case) to justify a rule requiring drug and alcohol testing programs at foreign repair stations. Several commenters continue to question the safety risk that would make issuance of a new regulation necessary, with A4A asserting safety measures must be data-driven and risk-based because the FAA fosters the industry's success with its scientifically-based and data-driven safety regulations and programs. Because there have been no accidents or incidents related to safety-sensitive maintenance personnel using drugs or alcohol, A4A argued Congress requires this rule, not the FAA's safety mandate. Commenters asserted the FAA has no data showing evidence that drug use or alcohol misuse has ever caused or contributed to a maintenance function-related accident or incident, ergo there are no "proven accidents and incidents" involving drug use or alcohol misuse by maintenance personnel in the United States, European Union, and beyond. Some commenters argued that the absence of data indicates that there is no safety risk or productivity justification for the rule.

Commenters including Airbus Commercial Aircraft, ARSA, IATA, CAA, and RAA emphasized how the FAA acknowledged in the NPRM there have been no accidents or incidents related to safety-sensitive maintenance personnel using drugs or alcohol and that the FAA could not determine whether the rule would have any additional impact on safety because the FAA does not have testing data or knowledge of existing testing programs in other countries. Some commenters,

including GAMA and MOOG Inc., confirmed they have no records showing an issue with safety records and quality performance. Similarly, commenters from China (including Taikoo Shandong Aircraft Engineering Co., Ltd, Taikoo Xiamen Aircraft Engineering Co. Ltd, Taikoo Xiamen Landing Gear Services Co. Ltd, and HAECO Component Overhaul Xiamen Ltd.).

BDLI, IHI Corporation, and JAL Engineering provided information that there is no record of an accident or incident that can be attributed to drug use or alcohol misuse. DG MOVE and UK DFT commented that there have been no occurrences of safety data at the United States level or the European Union level to substantiate the need to extend the current requirements to the EU. DG MOVE noted that a review of the European Central Repository looking at all incidents, serious incidents, and accidents in the EU Member States/EEA States between 2015–2023 showed only 4 references to maintenance engineers who were suspected of consuming alcohol before work. In addition, IATA commented that between 1970 and 2012, there were no occurrence reports of drug or alcohol intake at maintenance facilities in the ICAO Accident Data Reporting system. IHI Corporation would like the FAA to show how much flight safety will improve by conducting this testing, to ensure the cost is worth the benefit. BDLI stated lack of training, failure to follow instructions, overconfidence, distraction, fatigue, or a non-ergonomic workplace are far more likely to be named as potential sources of danger.

The FAA acknowledges that it continues to have insufficient data to estimate a baseline level of safety risk associated with drug use and/or alcohol misuse at foreign repair states by safety-sensitive maintenance personnel. The FAA believes that the safety data showing the number of positive test results for maintenance personnel subject to testing under the FAA's domestic program offers strong support for this rulemaking. Based on the data reported to the FAA from all regulated domestic employers from 2005–2017, maintenance employees were subject to 1,343,887 drug tests (including all test types). Of those tests, 17,046 resulted in a verified positive drug test result for one or more of the drugs tested. From 2009–2017, employers reported that maintenance employees were subject to 568,156 alcohol tests (including all test types), and 1,516 of those tests had a confirmed alcohol concentration of 0.04 or greater. As the FAA has stated in

previous rules,³⁵ the FAA does not believe it should wait until there is an actual loss of human life before taking action to ensure safety-sensitive maintenance personnel are subject to testing. Only one link in the safety chain would have to fail for an accident to occur. Therefore, although the FAA cannot determine the quantitative impact on safety, Congressional intent has determined there is a safety benefit and the FAA has scoped this final rule to address the specific statutory mandates in 49 U.S.C. 44733(d)(2) and 49 U.S.C. 44733.

2. Existing Regulations

Many commenters noted that drug use and alcohol misuse in the aviation industry is sufficiently addressed through existing regulations of sovereign nations (including the European Union), as well as by the policies of employers within the industry. For example, DG MOVE commented they have robust safety management provisions in place for maintenance stations and the issue is covered by EU aviation safety regulations, in addition to Member States' employment laws. RAA mentioned the industry has been successful implementing Safety Management Systems including drug and alcohol abatement programs, which foster scientifically-based and data-driven approaches as well as voluntary reporting programs.

Boeing Research and Technology commented that stringent drug and alcohol monitoring policies are already in place in many countries and the existing policies are designed to ensure the safety and reliability of aviation maintenance work, often exceeding the requirements proposed by the FAA. They also stated that in some countries, laws are not standardized at the national level, but instead vary by state or province; they also may vary by the class of driver.

The FAA received 2 comments from South Korean company Sharp Aviation K which requested an exemption and waiver from the rule due to the strict drug policy of South Korea. The company stated that South Korea's citizens are prohibited from using drugs and drug testing is already mandatory for every worker as pre-employment requirements including foreign workers prior to visa issuance.

Two commenters from Singapore questioned whether their existing processes were acceptable to meet the requirements of this rule. One individual questioned if a repair station

³⁵ For example, 71 FR 1666.

that already sends personnel for drug and alcohol testing during their pre-employment checkup needs to comply. The second, ST Engineering Aerospace Services Company Pte. Ltd., a foreign repair station, commented that Singapore already has a very strong policy against the sale and consumption of drugs, and their CAAS or local National Aviation Authorities (NAA) also has a bilateral agreement with FAA. They also stated they have a written policy on drug and alcohol testing which is accepted by other NAAs. They questioned whether their current policy is acceptable.

The FAA appreciates the few commenters that provided information about their countries' own testing laws, regulations, and/or requirements. This type of information helped the FAA better understand how countries impacted by this rule may have existing drug and alcohol testing requirements and local laws that could meet the same safety intent of the domestic requirements. As described previously, in response to comments, this final rule provides a waiver option allowing a foreign government, on behalf of all repair stations in the country, to submit an existing testing program for acceptance by the Administrator. An individual foreign repair station may also seek a waiver based on the laws of its country and current testing regimes or consequences that exist and meet the intent of the mandate. If a foreign repair station or its government, on behalf of all repair stations in the country, does not submit a request for waiver based on recognition of an existing testing program, the foreign repair stations must meet the requirements of 14 CFR part 120 and 49 CFR part 40, with the option to request a waiver or exemption as proposed in the NPRM.

3. Alleviate Public Safety Concerns

Twelve commenters who supported the NPRM noted the increased safety benefit the rule would bring and the need for a single level of safety domestically and in foreign countries. These commenters included the Teamsters, TTD, TWU, APA, NDASA, a software provider (Nexus 33 Group), and six individuals. The Teamsters argued for a single level of safety, stating the current "two-tiered" system of regulation is inappropriate and fundamentally unsafe. They also stated the ability of air carriers to evade regulatory responsibilities and the attendant costs of those responsibilities has played a role in the continued outsourcing of heavy maintenance. TTD stated it is a glaring and troubling loophole in the regulation that workers

at domestic facilities must undergo extensive drug and alcohol testing while foreign mechanics working on U.S. aircraft are exempt. One individual commenter stated the benefit to safety outweighs any cost to foreign repair stations to implement these programs and potential obstacles of implementation. Nexus 33 Group LLC commented that safety is a team effort regardless of location and a drug free workplace is essential to safety. They stated that they recognize that many international repair stations already have a drug free workplace in place, and this would simply confirm their current enforcement of internal policies with oversight. An individual commented that airlines should always strive to keep their operations as safe as possible, and this NPRM could bring an additional "cushion" towards that. Another individual commented that they have seen the benefits of enhanced safety protocols as they relate to a sound workplace drug and alcohol testing program in the U.S., and it makes sense from a safety standpoint to expand a similar program to further ensure the safety of the traveling public. APA commented that although there have been no instances of an accident due to drug or alcohol use by someone in a safety-sensitive position, it is not an effective approach to safety to wait for something to happen before taking steps to prevent it from happening. APA further stated safety is not negatively impacted by these drug and alcohol programs, so there is no downside to implementing them from a safety perspective.

As previously discussed in the NPRM, the FAA does not have sufficient data to estimate a baseline level of safety risk associated with drug use and/or alcohol misuse at foreign repair stations. The FAA received minimal explicit quantitative or qualitative information pertaining to foreign countries' laws and regulations, program elements of acceptable drug and alcohol testing, and existing drug and alcohol testing programs in other countries. The FAA also continues to recognize the number of accidents and incidents involving drug use and/or alcohol misuse by safety-sensitive maintenance personnel at foreign repair stations is unknown. Because the FAA does not have sufficient testing data or knowledge of existing testing programs in other countries, the FAA is unable to estimate the impact of the final rule in detecting and deterring drug use and/or alcohol misuse. However, the FAA acknowledges commenters that asserted a public safety concern with foreign

repair stations and agrees with commenters that acknowledged the safety benefits of drug and alcohol testing programs in the U.S. The FAA supports such programs to further ensure safety of the traveling public.

I. Financial, Technical, and Operational Concerns

1. Benefits and Costs

Nineteen commenters mentioned the necessity of considering whether the benefits of mandating drug and alcohol testing programs in foreign repair stations outweigh the costs. Many commenters believed this rulemaking would create an excessive economic burden on the company without a significant benefit, including BDLI. Moreover, several commenters stated such a program would impose excessive costs on business operations, which would ultimately be transferred to customers, placing an additional burden on domestic operators.

Airbus Commercial Aircraft commented that the lack of testing alternatives may convince some foreign repair stations to surrender their certificate because the volume of their activities with domestic operators no longer justifies their investment. A4A commented similarly, stating the FAA must consider the indirect competitive cost implications of the NPRM to the United States airline industry and assess the NPRM's indirect costs to domestic airlines if foreign repair stations refuse to comply and forgo their part 145 certification. Commenters generally expressed concern that the rulemaking will result in aircraft maintenance becoming unavailable to domestic air carriers at repair stations or in countries with few repair stations and will give an unfair competitive advantage to foreign air carriers. A4A asked the FAA to consider the likelihood of the loss of maintenance operations overseas for U.S. air carriers and the resulting economic and competitive impact for U.S. air carriers and the public that rely on their transportation. A4A stated the possibility is very real and included data on the strain on airline operations that currently struggle to obtain the necessary volume of maintenance services on a global scale.

Several commenters from China including HAECO Component Overhaul Xiamen Ltd., Hong Kong Aero Engine Services Limited, and Taikoo Xiamen Landing Gear Services Co. Ltd stated that such a program would provide no additional benefit while imposing excessive costs on their business operations, which would ultimately be

transferred to customers, placing an additional burden on U.S. operators.

The FAA acknowledges the commenters' concerns regarding the primary and secondary cost impacts to the industry. Given that the FAA is offering in the final rule an expanded waiver and an exemption option, foreign repair stations will be afforded several avenues to achieve compliance with the rule and maintain current operations without consequential additional costs.

2. Cost Data Based on U.S. Costs

Commenters including A4A, DG MOVE and ARSA expressed concerns about the accuracy of the cost data included in the NPRM, stating the FAA has not comprehensively assessed the practical and economic implications of the rule implementation in foreign countries. These commenters believed a complex and costly testing program of non-U.S. based personnel should be supported by solid data, including a comprehensive cost basis that is reflective of the local, regional situation and not based on United States pricing. DG MOVE stated the cost of implementation cannot be solely based on the cost for domestic organizations to comply since there are practicalities of implementation specific to foreign organizations that can have a large influence on cost, which cannot be reliably estimated. DG MOVE further stated the impact assessment is incomplete and does not allow for a relevant cost-benefit analysis. ARSA stated that the cost estimate does not include the cost of compliance if the rule cannot be implemented as if the repair station was in the United States.

The FAA acknowledges the commenters' concern with respect to using data denominated in U.S. dollars such data does not represent costs in local and regional situations. However, there is no country- or region-specific data available. Therefore, the FAA has converted the costs from U.S. dollars to exchange rates based on the Purchasing Power Parity (PPP). The FAA acknowledges this adjustment only accounts for exchange rates and heterogeneous price levels and not heterogeneous additional costs countries may incur as compared to complying with the rule within the jurisdiction of the United States, such as translation or legal services. However, the FAA does not have the data to estimate all the different cases that may arise in all the affected countries.

With respect to the practical and economic implications of the rule implementation in foreign countries, the FAA has considered the heterogeneous

impact this rule will have in different countries and has concluded that an analysis of such implications would be impracticable due to its complexity, uncertainty, and lack of necessary data. Furthermore, as previously noted, legal challenges may limit some countries from complying with the rule. Because of this uncertainty, the FAA is providing a waiver option that will allow countries or individual repair stations to demonstrate they have met the intent of the rule if they have testing standards that meet the elements set forth in this rule.

3. Costs Based on Compliance With HHS Requirements

Several commenters argued that the NPRM failed to account for the costs of compliance with HHS requirements that are incorporated through 49 CFR part 40. Among other things, ARSA commented that the FAA must assess the costs of obtaining HHS approval of laboratories and personnel, use of approved testing equipment, and transportation of specimens if necessary. ARSA argued that the FAA must review cost assessments included in the earlier rulemaking proceeding promulgating HHS requirements that would be applicable to foreign repair stations under the rule.

The FAA acknowledges the commenters' concerns regarding compliance with HHS requirements, which are included in 49 CFR part 40. However, the FAA regulatory impact analysis (RIA) assumed all repair stations would send their testing samples to already-approved HHS laboratories, which are all in the U.S. and Canada, and would not elect to request HHS approval of a laboratory in their own country. Therefore, the cost of laboratory approval is not included in the RIA.

As previously discussed, in this final rule the FAA is allowing a foreign government to obtain a waiver by requesting recognition of an existing testing program promulgated under the laws of the country that meets the minimum key elements set out in the regulation. If a foreign government chooses not to avail itself of this option, an individual foreign repair station may make its own request for a waiver based on recognition of an existing testing program. Under this option, the FAA may provide a waiver based on recognition of an existing testing protocol to the country as a whole or to an individual repair station, which would require no additional cost estimate.

4. Small Business and Subcontractor Costs

ARSA commented that the FAA must consider all tiers of small business that must comply with the current and proposed regulations and that the impact on small entities will be at least four times the amount estimated. They stated each repair station must evaluate whether their contractors and subcontractors will need to be included in their own programs to conduct aircraft maintenance, and the FAA failed to include the impact to contractors and subcontractors in the cost of the rule. Further, because they were not included, ARSA contended that these contractors and subcontractors did not have reasonable time to comment on the proposal. A4A agreed with the comments made by ARSA regarding the FAA's cost-benefit analysis.

The FAA acknowledges the impact to small businesses and their subcontractors. The FAA has included an analysis on the impact to small entities in the Regulatory Flexibility Act section.

With respect to subcontractors, this rule applies to foreign repair stations who perform maintenance on part 121 air carrier aircraft outside the U.S. The FAA did not estimate the cost to subcontractors because if a foreign repair station decides to contract with another non-certificated maintenance provider to perform safety-sensitive aircraft maintenance functions on a part 121 air carrier aircraft, the certificated repair station must include the personnel performing aircraft maintenance functions in their testing program. This rule does not require or allow a non-certificated contractor or subcontractor to implement its own FAA or DOT drug and alcohol testing program, which is why these parties are not accounted for in the rule. While this is different than how FAA applies testing within the U.S., the mandate for testing does not extend to non-certificated contractors or subcontractors that perform maintenance on part 121 air carrier aircraft outside the U.S.

5. Quantitative and Qualitative Benefits

APA and NDASA addressed the lack of economic data provided to the FAA, stating the lack of data does not nullify the safety benefit of the rule. NDASA suggested the FAA use a qualitative economic analysis for the rule, rather than a quantitative analysis. NDASA further commented the domestic program is effective as a deterrent, and the efficacy of drug and alcohol testing

programs is well-proven and without question. The history of the domestic program proves the deterrent effect of Federally mandated drug and alcohol testing. NDASA asserted the more than 35 years of effective deterrence is an important consideration that should be used to evaluate the costs and benefits of this rulemaking.

NDASA further commented that if a quantitative analysis is needed, the FAA should assess the costs of illicit drug use and substance abuse disorders rather than the cost of equivalent testing programs in other countries. NDASA referred to “Injury Costs” and the “Substance Abuse Cost Calculator” on the National Safety Council website and the calculator for workplace costs of substance use disorders on the National Institute of Health’s National Library of Medicine 2017 article from the Journal of Occupational Medicine for data.

The FAA agrees that drug and alcohol testing has certain qualitative benefits that are discussed in other sections of this preamble and the regulatory impact analysis supporting this final rule. With respect to quantitative data, the FAA declines to rely on the commenter’s proposed sources of data for a quantitative analysis. Those sources provide aggregated U.S.-based statistics and tools without a basis for extrapolation to aviation-sector employers in foreign countries. Furthermore, as noted in the NPRM and supporting documents, there are no documented cases in which an accident was connected to a repair station employee. Therefore, it is not possible to conduct a quantitative benefits analysis for this rule. The quantitative cost analysis the FAA conducted, as discussed herein and in the NPRM, accounts for the costs of implementing and maintaining an alcohol and drug testing program and the cost associated with submitting and reviewing requests for waivers and exemptions.

6. Economic Equity Between Domestic and Foreign Repair Stations

TWU and one individual noted the NPRM would level the economic playing field between foreign and domestic repair stations helping to correct an imbalance that benefits foreign repair stations. TWU stated the current regulatory requirements have created a loophole benefitting foreign repair stations by enabling and effectively encouraging the offshoring of aircraft maintenance jobs. Because foreign repair stations are not required to meet the same regulatory requirements as domestic repair stations, TWU claimed the number of foreign repair stations has grown more

than 40% since 2016, and approximately 56% of the total workforce maintaining, repairing, and overhauling U.S.-flagged aircraft is based outside of the United States. TWU pointed out China specifically, stating they employ more than 7% of the global workforce doing this work. They stated exempting these foreign repair stations from the regulation creates a relative advantage for those firms that are directly competing against the U.S. workforce.

In addition to the safety benefits, the FAA acknowledges that an alcohol and drug testing program for foreign repair stations that is equal to those programs required in the jurisdiction of the FAA would create uniform standards for all repair stations. The FAA further acknowledges the pathways provided in the final rule (*e.g.*, waivers pursuant to §§ 120.9 and 120.10) will not create a uniform standard for all foreign repair stations or between domestic and foreign repair stations. The purpose of these regulations is to obtain safety benefits equal to those required in the U.S. to the extent permissible under the Congressional mandate, which requires a balance between the safety benefits of domestic testing requirements deemed acceptable by the Administrator and conflicting foreign requirements.

7. Specific Implementation Concerns

A number of commenters believed costs of implementation for a domestic repair station are minimal compared to the burden on the government and the foreign citizens because of the drug and alcohol testing requirements. A4A pointed out such obstacles may be so unreasonable to overcome or present such burdens that the cost of compliance far outweighs any measurable benefit and asked the FAA to strongly consider any obstacles that may result in validity issues, unfairly threaten the careers of qualified maintenance employees, or make compliance unreasonably burdensome for a repair station. RAA agreed with this comment and asked the FAA to address how the FAA envisions small repair stations to implement the program, especially in remote locations. Commenters including ARSA and IATA pointed out many examples of requirements of 49 CFR part 40 that will be difficult to implement in a foreign country, such as the dependence upon qualifications and training for service agents (*e.g.*, Medical Review Officers, collectors, and substance abuse professionals) that are specific to the United States, or equipment such as alcohol screening devices that may not be readily available in every country.

IATA commented that these testing devices also have very specific use and care requirements that can only be performed by its manufacturer or a certificated maintenance representative. New Era Drug Testing, MRO Holdings, and ASAP addressed the need for established training for collectors and other personnel in the testing process, including collectors and MROs. New Era also brought up the need for multilingual translators for MROs during donor interviews. ASAP further stated the FAA needs to do further engagement with foreign governments and stakeholders to fully understand the practical challenges of adapting the procedures. Airbus Commercial Aircraft commented that not all maintenance personnel should be automatically subject to alcohol and controlled substance testing because this could lead to organizations circumventing the costs associated with the establishment and maintenance of a testing program. Specifically, Airbus stated that some organizations maintaining components off wing may be tempted to deliver their components to distributors who do not hold a part 145 certificate, or to establish such a company to distribute their components. MOOG Inc., also stated that aircraft undergoing maintenance may have components removed and replaced by new or maintained articles which, as produced under FAA part 21 requirements, are not subject to drug and alcohol programs, meaning a component removed from a part 121 aircraft and replaced with a new component will not be manufactured with a drug and alcohol program compliant to 14 CFR part 120 and 49 CFR part 40.

Commenters including A4A, DG MOVE, MRO Holdings, Airbus, and New Era expressed concern for the lack of laboratories certified by the Department of Health and Human Services under the National Laboratory Certification Program outside of the United States and the significant burden associated with shipping specimen to a laboratory in the United States in a manner that complies with HHS’s strict chain of custody requirements, or attempting to get a local laboratory certified, which they stated is not a cost accounted for in the rule. A4A and MRO Holdings also noted the possibility of specimen validity and the potential for a sample to be exposed to extreme temperature variances, causing distortion if repair stations are required to ship specimens across borders. Other commenters mentioned foreign repair station operations in remote locations where available individuals qualified to

perform collections as well as access to timely resources and shipping options are limited. Airbus commented it is unclear why the flexibility provision applicable to the domestic repair stations not electing to implement a drug and alcohol testing program is not equally offered to foreign part 145 certificated repair stations and the lack of suitable solutions may convince some part 145 certificated repair stations located outside the U.S. to surrender their certificate, for example, because the volume of their activities with U.S. operators no longer justifies their investment.

A SAP directory service that supported the rule, *SAPlist.com*, also brought attention to the difficulty outside of cost to implementing the return-to-duty process outside of the U.S., citing language barriers, exams, time differences, and international referrals for substance abuse professionals. The commenter raised several questions regarding the SAP process, including whether the SAP must be in the U.S. or in the foreign country. If the SAP is in the U.S. and provides a virtual assessment, the commenter asked how a SAP could make referrals for treatment in another country, noted language differences, online resources being in another language, time differences, and virtual assessments requiring certain technologies. If the SAP is in the foreign country, the commenter raised the issue of ensuring the SAP is qualified to DOT standards with no qualification training or exams in another language than English, and SAP credentials outside the U.S. The commenter also asked whether DOT will provide the regulations in other languages. DG MOVE also mentioned the cost of training and qualification of SAPs. ASAP raised similar questions about international SAP qualifications; the availability of international SAPs and treatment programs that understand the local requirements and U.S. regulations; the geographical, logistical, and legal challenges of international telehealth services, international substance use treatment protocols; and whether repair stations will need to make international referrals. ASAP commented adapting part 40 requirements for use in foreign certificated repair stations involves careful consideration of the local legal systems, cultural norms, and available substance abuse treatment resources.

A4A recommended the FAA undertake a full cost-benefit analysis of the burdens of implementation as recommended by OMB Circular No. A-4, which states analysis should “look beyond the obvious benefits and costs of

your regulation and consider any important additional benefits or costs, when feasible.” A4A requested a supplemental proposal to minimize these obstacles and present an updated regulatory impact analysis.

The FAA acknowledges commenters’ extensive concerns about implementing the requirements of 14 CFR part 120 and 49 CFR part 40 outside the territories of the U.S. Further, the FAA acknowledges commenters’ concerns that some testing or procedural requirements in the regulations would be especially burdensome and costly to meet for a part 145 repair station located outside the territory of the U.S. (e.g., use of HHS-certified laboratories). As discussed above, this final rule expands waiver options to foreign governments on behalf of repair station operators within its territory. The waiver option is now also available to an individual foreign repair station, which may seek a waiver based on recognition of an existing testing program promulgated under the laws of the country as a compatible alternative that meets the key elements set out in the regulation. By obtaining a waiver based on recognition, a foreign repair station may meet the requirements of this final rule without applying 14 CFR part 120 and 49 CFR part 40 directly. It will allow them to present a program or other requirements that exist in their country’s existing framework to the Administrator for recognition as the basis for the waiver, which will eliminate the need to meet requirements in 14 CFR part 120 and 49 CFR part 40 that have been identified by commenters as exceedingly difficult to implement.

The FAA also acknowledges the commenters’ concerns regarding the secondary cost impacts to the industry. Given that FAA has provided more flexibility for the waiver options and there are exemption options in the final rule, there will be several avenues for foreign repair stations to comply with the rule and maintain current operations without consequential additional costs. The regulatory impact analysis has been updated to reflect the additional means of compliance included in the final rule.

J. Extending Testing to Part 121 Maintenance Personnel

In the NPRM, the FAA sought comments as to whether the testing requirements should be extended to foreign aircraft mechanics working directly for part 121 carriers. Commenters were asked to submit data that would allow the FAA to quantify the benefits and costs of expanding drug

and alcohol testing requirements to these mechanics.

Three commenters who supported the NPRM, including the Teamsters, stated that if the goal of the NPRM is to eliminate an aviation maintenance ecosystem in which the ability to uphold a single level of safety is predicated on the geographic location of the maintenance facility, all aircraft mechanics working on part 121 aircraft should be captured in the rulemaking. The Teamsters and TWU warned that without this coverage, the rule may create an incentive for part 121 carriers to move maintenance from a contracted part 145 repair station to an in-house facility where the airline can evade the regulatory costs associated with compliance. NDASA pointed out the statute does not explicitly restrict the FAA from including part 121 mechanics, and adding them to the rule is consistent with the statute. Airbus Commercial Aircraft commented that the absence of drug and alcohol testing requirements for employees of part 121 certificate holders located outside the United States may create an inconsistent treatment of maintenance personnel working at the same location and result in a weakness of a safety net.

Opposing commenters also commented on the proposal to include part 121 air carrier employees who perform aircraft maintenance, with A4A stating FAA’s safety data does not support an expansion of the rule and the FAA has not adequately considered or analyzed the costs and benefits of an expansion. A4A and GAMA noted that the FAA should stay within the confines of the statutory mandate and not expand the scope without support from safety data. By contrast, ARSA argued that the FAA must explain why it is not extending testing requirements to similarly-situated part 121 employees in foreign countries, and the failure to apply drug and alcohol testing in a uniform and consistent manner belies the FAA’s requirement to ensure aviation safety. A4E also commented on the differing treatment of employees from part 145 repair stations and part 121 operators, noting that the proposed regulations would not “level the playing field” for these entities because maintenance personnel employed by part 121 operators outside the U.S. are not subject to drug and alcohol testing while employees serving the same function for part 145 repair stations outside the U.S. would be under these regulations. The Lufthansa Group similarly commented that the proposal would not create a “level playing field.”

In response to the NPRM, the FAA received no safety data justifying the

benefits and costs of expanding drug and alcohol testing requirements to foreign aircraft mechanics working directly for part 121 carriers. Because the statutory mandate specifically required all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft outside the U.S. to be subject to an alcohol and controlled substances testing program determined acceptable by the Administrator and consistent with the applicable laws of the country in which the repair station is located, and because the FAA lacks safety data to support an expansion of the rule, this final rule does not expand the scope of the rule to foreign aircraft mechanics working directly for part 121 carriers.

The FAA acknowledges comments noting that the final rule may result in differing treatment of part 145 and part 121 employees outside of the U.S. but finds the commenters' arguments unpersuasive. As discussed above, the FAA does not have an articulable safety basis to extend drug and alcohol testing to part 121 employees outside the U.S., and Congress has not instructed the FAA to do so. By contrast, Congress has mandated the FAA to require such testing of part 145 employees. Accordingly, though commenters suggested that the FAA must extend testing requirements to part 121 employees to ensure equivalent treatment to part 145 employees, the FAA concludes that the suggestion is misplaced because the record before the agency does not support an extension.

K. EU and International Civil Aviation Organization (ICAO)

A4E commented a European Union-wide solution is preferable for waivers and exemptions. The Lufthansa Group commented they would like to see a waiver option established at the European Union level, since they have multiple repair stations located outside of Germany but within the European Union, each with its own defined labor law rules, regulations, and restrictions. This process should allow for bilateral discussions and negotiations and conclude with a formal agreement that expressly recognizes the laws of each country and appropriately addresses any inconsistencies at the country level, rather than the individual repair station level. They stated this will allow the foreign government to provide a single and unified position on its laws versus the potential for individual repair stations to inconsistently interpret the laws of their country, which may result in contrary waivers or exemptions for repair stations in the same country, and

thereby reducing the number of waiver and exemption requests the FAA and DOT would receive. Commenters stated this cooperation between governments would foster safety, the respective rights of individuals, consistency, and operational, administrative, and implementation efficiency regarding maintenance operations and employees.

Although some commenters suggested an EU-wide option for submitting waivers and exemptions, the FAA has not implemented this option. An EU-wide option is also not available for the second pathway of compliance with this rule where a foreign government, on behalf of its repair station operators within its territory, or an individual repair station may request a waiver based on recognition of an existing testing program promulgated under the laws of the country as a compatible alternative. Because each country has its own individual laws and requirements that may impact its drug and alcohol testing programs, each foreign government is in the best position to know the laws imposed on their own citizens.

Eighteen commenters including A4E, IATA, CAA, BDLI, GE Aerospace, Airbus Commercial Aircraft, and GAMA stated that the appropriate vehicle through which to require drug and alcohol testing at foreign repair stations would be a new ICAO initiative. These commenters believed consultation and coordination with ICAO member States is the only way to ensure the FAA meets the statutory requirement to be "consistent with the applicable laws of the country where the repair station is located." Specifically, the DG MOVE called upon the FAA to bring this issue to the attention of ICAO to examine the safety case and pursue a global solution through the establishment of international standards, where warranted.³⁶ GAMA stated ICAO should issue Standards and Recommended Practices (SRPs) governing such testing to ensure a single Member State does not violate the national sovereignty of others and that consultation and coordination through ICAO and with ICAO member states is the only method that can ensure the final rule is consistent with the applicable laws of a foreign repair station's country. Commenters believed an ICAO initiative

would set a common baseline for safety with adequate flexibility for varying customs and laws, which governments could follow when issuing their own regulations. A4A noted the single request the FAA made for countries to support ICAO action to establish alcohol and controlled substance testing requirements may have been compliant with the mandate, but it is not enough to reflect the FAA's support for international standardization. A4A mentioned other countries have continued their push for ICAO action on minimum standards for drug and alcohol testing, and they encouraged the FAA to continue efforts at ICAO for an international standard in lieu of the proposed rule. IATA also commented that an agreement through ICAO would preclude extraterritorial mandates and violations of local laws while providing the framework for a global solution and that without such a solution, they are concerned that the FAA's current extraterritorial proposal would invite retaliation by other governments.

A supporting commenter, APA, stated that approaches to working with other countries and ICAO to develop joint guidelines have yielded little progress in implementing or enforcing drug and alcohol standards internationally. They stated that despite jointly developed ICAO standards in Annex 1 to the Convention on International Civil Aviation and various countries' aviation regulations prohibiting the use of drugs and alcohol, many countries either do not mandate compliance testing for aviation personnel or they exclude maintenance personnel from testing.

The FAA has supported the development of international drug and alcohol testing standards since the Congressional mandate was first introduced and believes that they could help deter and detect drug use and alcohol misuse that could compromise aviation safety. In addition to promulgating a proposed rulemaking, the FAA Modernization and Reform Act of 2012 sought to direct the Secretaries of State and Transportation, acting jointly, to request the governments of foreign countries that are members of ICAO to establish an international standard for alcohol and controlled substances testing of persons who perform safety-sensitive work on commercial air carriers. The Department of State sent a cable to all embassies on October 19, 2012. Although the response was minimal, most of the member states that did respond supported these efforts. However, as explained in the NPRM, ICAO standards still do not require ICAO Member States to establish (or direct industry to

³⁶ The FAA notes that, after the comment period closed, the FAA engaged in a meeting with DG MOVE and EASA for the Bilateral Oversight Board for the U.S.-EU Safety Agreement on June 11, 2024. At that time, DG MOVE reiterated its concerns with the proposal and specifically suggested collaboration with the FAA at ICAO to pursue a more global approach on the issue. The FAA uploaded a Memorandum to the docket summarizing the interaction as of July 8, 2024.

establish) testing programs to deter or detect drug use and alcohol misuse by aviation personnel in the performance of safety-sensitive functions. Although the ICAO standards set forth in Annex 1 and many countries' aviation regulations prohibit the use of drugs and alcohol by certain aviation personnel when use may threaten aviation safety, many countries either do not require testing of aviation personnel to verify compliance or do not extend testing to safety-sensitive maintenance personnel. Should ICAO adopt drug and alcohol program standards in the future, it is FAA policy to conform to ICAO SARPs to the maximum extent practicable in keeping with U.S. obligations under the Convention on International Civil Aviation.

The FAA reconsidered and expanded its waiver options for the final rule, whereby a foreign government, on behalf of its repair station operators, or an individual foreign repair station, may seek a waiver based on the laws of the country. This alternative to meeting the requirements of 14 CFR part 120 and 49 CFR part 40 will allow a repair station to operate a testing program based on the laws of its country and current testing regimes or consequences that exist. The FAA publishes this final rule in accordance with the Act's statutory mandate in an area within which there are no applicable ICAO SARPs. The FAA expects this waiver to more easily allow for the application of a testing program that is in alignment with any future SARPs.

L. Scope of Safety-Sensitive Functions

Commenters requested clarification on what qualifies as an aircraft maintenance function. A4E argued the FAA failed to define the term in its regulation and has left it up to the Flight Standards Service of the FAA to determine, causing significant confusion. Airbus stated they believe only maintenance personnel performing tasks that could result in a failure, malfunction, or defect endangering the safe operation of the aircraft if not performed properly or if improper parts or materials are used should be considered for testing, and GAMA specified the testing should only apply to those performing "heavy maintenance" to meet the language of the statute. Some foreign repair station commenters expressed confusion about whether their repair station performs aircraft maintenance functions or stated they do not perform it, such as Excel Aerospace in Singapore and Honeywell in Brazil. There was also confusion among commenters about the status of manufacturing and whether it is

considered maintenance, and IHI Corporation requested examples of target roles of safety-sensitive maintenance functions. Airfoil Services in Malaysia sought clarification if they need a program because they perform maintenance on components that are delivered to a customer to be assembled later. Another foreign repair station, Tamagawa Aero Systems in Japan, asked which employee category they fall under in § 120.105. ARSA also commented the FAA is targeting maintenance providers, and no other type of safety-sensitive function regulated under 14 CFR part 120 is required to test at "any tier" in the contract.

Further, Airbus proposed limiting this rule to individuals with the authority to designate (identification/callout), implement, and/or perform inspection of Required Inspection Items (RII), which they state would make the requirements match the direction given by Congress. Airbus stated that when the FAA defined persons involved in aircraft maintenance (broad sense) with safety-sensitive functions, it implied that all personnel involved in maintenance carry out aviation safety-related aircraft maintenance. It stated the FAA should exclude maintenance personnel that are involved in aircraft maintenance that does not put aviation safety at risk.

Airbus also commented with respect to maintenance and preventive maintenance duties, stating it is unclear whether the qualifying term 'aircraft' is to refer to aircraft maintenance in the broad sense (e.g., aircraft maintenance vs. airport maintenance) or maintenance performed on aircraft (i.e., on-wing), excluding maintenance on articles and components not installed on an aircraft (i.e., off-wing). Airbus proposed a regulatory text change to 14 CFR 120.105(a) and 120.215(a) to read: "Duties related to required inspections of maintenance and alteration items of aircraft" instead of "aircraft maintenance and preventive maintenance duties." They stated this wording would allow the Administrator to use any appropriate designation, free from ambiguity, to target a precise population of personnel involved in maintenance and alteration of aircraft.

The FAA disagrees that further explanation or definition of aircraft maintenance functions are necessary in the rule. The drug and alcohol testing regulations intentionally do not differentiate between heavy or safety critical and non-safety critical forms of maintenance. When determining whether a safety-sensitive employee performs aircraft maintenance duties,

whether under a foreign or domestic repair station, impacted parties should consider the duties of their employees as they relate to the FAA's definition of maintenance under 14 CFR 1.1 and 14 CFR part 43. According to 14 CFR 1.1, maintenance includes inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance. For example, a manufacturer that performs a test on a component to determine the extent of repairs necessary or the serviceability of a component is performing maintenance since the testing performed on the aircraft component may be part of an inspection requirement in the technical data being used in the testing process. The Flight Standards Service aviation maintenance inspectors are the experts in determining what functions meet the definitions of aircraft maintenance. The Flight Standards Service and the Drug Abatement Division in the FAA's Office of Aerospace Medicine developed guidance about the most common functions that are considered aircraft maintenance, which is provided in FAA Advisory Circular (AC) 120–126.³⁷ If an impacted party needs further guidance after reviewing the definitions and examples provided in FAA's AC 120–126, they should consult with the Flight Standards Service or their FAA Principal Maintenance Inspector (PMI). The FAA has made no regulatory changes to the definition of aircraft or maintenance based on these comments.

M. Miscellaneous Comments

Out of Scope Comments. One individual commenter stated the FAA should require testing and maintain the same standards as in the U.S., even if the laws of a country do not allow it. The FAA can override neither, first, the sovereignty of another country, nor, second, the Congressional direction in 49 U.S.C. 44733 to promulgate a rule requiring part 145 repair station employees be subject to an alcohol and controlled substances testing program that is consistent with the applicable laws of the country in which the repair station is located. One individual commenter stated the FAA should include truck drivers from Mexico and Canada when crossing the border to the U.S. The comments are outside the scope of the Congressional mandate and this rulemaking.

Excluded Countries. A4E commented on their concern for the creation of a

³⁷ FAA Advisory Circular 120–126, Guidelines to Establish, Implement, and Maintain a DOT/FAA Drug and Alcohol Testing Program (Jul. 10, 2024). https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document/information/documentID/1042452

level playing field since the NPRM will not apply to countries without a requirement for a part 145 repair station certificate (e.g., Canada). Like part 121 employees outside the U.S. discussed in section IV.J, the FAA does not have an articulable safety basis to extend drug and alcohol testing generally to employees performing safety-sensitive maintenance functions for an organization that does not hold a part 145 repair station certificate located outside the territory of the U.S., and Congress has not instructed the FAA to do so. Instead, Congress has mandated the FAA to require such testing of part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft. Accordingly, though the commenter suggested that the FAA must extend testing requirements to non-certificated maintenance organizations that perform safety-sensitive maintenance, the FAA concludes that the suggestion is misplaced because the record before the agency does not support an extension.

Oral Fluid Testing. NDASA stated they believe the use of oral fluid testing will make implementation of part 40 easier outside of the U.S. once there are oral fluid laboratories available. Specifically, it may reduce the number of petitions for waiver or exemption from the rule since other countries may deem oral fluid testing less intrusive from a privacy perspective than urine testing. They stated oral fluid testing is preferred in Australia, New Zealand, and other countries. The FAA acknowledges this comment and agrees that the use of oral fluid drug testing may make drug testing collection more accessible to foreign repair stations.

Guidance. Airbus commented that it was unclear who is the principal maintenance inspector for European Approved Maintenance Organizations (AMOs) that obtained their U.S. part 145 repair station certificate under the U.S.-EU BASA MAG. Airbus recommended that guidance material should be developed, reviewed, and tested with several affected AMOs before the entry into force of the final rule of this rulemaking proposal to ensure a smooth implementation. The FAA acknowledges this comment and will work with AMOs to the extent necessary to comply with the final rule.

Random Testing Rates. MRO Holdings expressed concern as to how the FAA will calculate the random pool testing rate. The rate is determined by reviewing the positive rate for the “entire industry,” but these rates will differ from country to country, which could cause countries with low rates to

have burdensome and costly tests that are not aligned with usage rates of that country. Foreign repair stations that are required to meet the requirements of 14 CFR part 120 and 49 CFR part 40 may be required to submit an annual report of testing statistics in accordance with 14 CFR 120.119(a) and 120.219(b)(1), which allows the FAA to determine the positive rate for the entire industry. Because the Administrator’s decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry, testing data submitted by foreign repair stations will be included in this calculation. Foreign repair stations with a waiver under section 120.10 are exempt from the obligations under subparts E and F of 14 CFR part 120; therefore, data will not be provided or considered in a random testing rate.

Addition of Unannounced Inspections. One individual commented that the FAA should mandate all foreign Aviation Maintenance Inspection and Repair on all U.S.-registered commercial aircraft, components, and articles to also mirror the U.S. by allowing unannounced inspections by the FAA and requiring duty time limitations. The commenter further stated that the NPRM’s current provisions, though promising, may benefit from a more granular examination to enhance the effectiveness of the proposed rule and address potential loopholes that might arise in practical implementation. The final rule implements a statutory mandate to require acceptable drug and alcohol testing of certain part 145 repair station employees outside the U.S. consistent with local laws where the repair station is located. Because this mandate does not include any changes to inspections or duty time limitations, this comment is outside the scope of this rulemaking.

More Inclusive Mandate. An individual commented that they advocate for a more inclusive mandate to mirror current U.S. regulations to ensure that the final regulations are not only effective but also resilient to the evolving landscape of Commercial Aviation Maintenance, Inspection and Repair to include both aircraft, components, and articles of all parts 121 and 145 entities outside of the U.S. This comment is outside the scope of the Congressional mandate and this rulemaking. This final rule implements a mandate to require acceptable drug and alcohol testing of certain part 145 repair station employees responsible for safety-sensitive maintenance on part 121 air carrier aircraft outside the U.S. consistent with local laws where the

repair station is located. Congress did not direct the FAA to comprehensively regulate entities or activities outside the U.S.

Withdrawal of the Rule. ARSA commented that the FAA may comply with the statutory mandate by withdrawing the NPRM. The FAA disagrees. Section 302 of the 2024 Act directed the FAA to issue a final rule that carries out the requirements of section 2112(b) of the 2016 Act within 18 months of the 2024 Act’s enactment. Conversely, the 2016 Act required a rulemaking to be “finalized.” Accordingly, Congress has directed the FAA to publish these regulations, and withdrawal would not be considered publication of a final rule.

Definitions. An anonymous commenter requested the FAA define the term “part 121 air carrier aircraft,” specifically asking whether it means the aircraft needs to be on the part 121 Operations Specifications, and if it needs to be in revenue service. The commenter believed a definition is necessary, and that the explanation in the preamble to the rule was insufficient. The FAA disagrees that a definition of “part 121 air carrier aircraft” is needed in this rule. Historically, testing applies to maintenance personnel who repair aircraft or aircraft parts listed on the part 121 air carrier’s Operations Specifications (D085).

V. Severability

As discussed earlier in the final rule, Congress directed the FAA to issue a final rule that requires all part 145 repair station employees responsible for safety-sensitive maintenance functions on part 121 air carrier aircraft outside the U.S. to be subject to an alcohol and controlled substances testing program determined acceptable by the Administrator and consistent with the applicable laws of the country in which the repair station is located. 49 U.S.C. 44733(d)(2).³⁸ Consistent with that mandate, the FAA is requiring foreign repair stations to comply with 14 CFR part 120 and 49 CFR part 40, subject to any waivers and exemptions. However, the FAA recognizes that these distinct pathways for compliance and certain provisions of this final rule will affect foreign repair stations and various stakeholders in different ways. Therefore, the FAA finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other.

³⁸ Section 302 of the 2024 Act directed the FAA to issue a final rule implementing Congress’s mandate in 49 U.S.C. 44733(d)(2).

In the event a court were to invalidate one or more of this final rule’s provisions, the remaining provisions should stand, thus allowing the FAA to continue to carry out Congress’s statutory commands and objectives concerning the safety of maintenance on part 121 air carrier aircraft conducted by certificated repair stations located outside the U.S.

VI. Regulatory Notices and Analyses

Federal agencies consider the impacts of regulatory actions under a variety of requirements. First, Executive Order 12866, Executive Order 13563, and Executive Order 14094 (“Modernizing Regulatory Review”) direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is \$183 million using the most current (2023) Implicit Price Deflator for the Gross Domestic Product. The FAA has provided a detailed Regulatory Impact Analysis (RIA) in the docket for this rulemaking. This portion of the preamble summarizes the FAA’s analysis of the economic impacts of this rule.

In conducting these analyses, the FAA has determined that this rule: will result in benefits that justify costs; is not a significant regulatory action under section 3(f)(1) of Executive Order 12866 but raises legal or policy issues for

which centralized review would meaningfully further the President’s priorities or the principles set forth in section 3(f) of Executive Order 12866, as amended by Executive Order 14094; will create unnecessary obstacles to the foreign commerce of the United States; and will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector. These analyses are summarized below.

A. Summary of the Regulatory Impact Analysis

Total Benefits and Costs of This Rule

In response to Congressional direction, the FAA requires certificated part 145 repair stations located outside the U.S. and its territories whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft to ensure those employees are subject to a controlled substances and alcohol testing program consistent with the applicable laws of the country in which the repair station is located. This rule requires a part 145 repair station located outside the territory of the U.S. to cover its employees performing safety-sensitive maintenance functions on part 121 air carrier aircraft under its own testing program that meets the requirements of 49 CFR part 40 and 14 CFR part 120. However, if a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (e.g., the laws of the country where the repair station is located are inconsistent with the regulations), it may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, it may apply for a waiver in accordance with the waiver authority established in this rule. In addition, foreign governments, on behalf of their repair station operators within their territories, may request a waiver based on recognition of existing requirements promulgated under the laws of the country as a compatible alternative that contains the minimum key elements of 14 CFR part 120. However, if a foreign government chooses not to avail itself of this option, § 120.10 will provide that an individual foreign repair station may make its own

request for waiver based on recognition of an existing testing program that meets the key elements identified in the regulation.

Although the FAA was unable to identify any quantifiable benefits to this rulemaking at this time, this rulemaking applies the FAA’s existing primary tool for detecting and deterring substance abuse by safety-sensitive aviation employees, especially illegal drug use, throughout the international aviation community to enhance aviation safety.

Since the rule provides multiple opportunities for waiver, the FAA estimated low- and high-cost cases. The low-cost case assumes all countries with certificated repair stations will submit a request for waiver based on recognition. The total undiscounted cost is \$129,012 with the cost to industry at \$48,129 and \$80,882 to the FAA. At a seven percent discount rate, the total cost is \$116,690, \$64,540 annualized, and \$123,459 at a three percent discount rate, \$64,521 annualized. The benefits remain the same in the low-case as in the high-case. In the high-cost case the total cost, at seven percent present value, of this rule equals the foreign repair station cost of \$62 million, plus FAA cost of \$6.5 million for a total of \$68.5 million (\$69.8 million at three percent present value) over five years. The FAA has placed the Regulatory Impact Analysis for this rule in the docket for this rulemaking.

Who is potentially affected by this rule?

- Part 145 Certificated Foreign Repair Stations outside the U.S. that perform safety-sensitive maintenance functions on part 121 aircraft.
- The FAA Office of Aerospace Medicine.

Costs of This Rule

Part 145 certificated foreign repair stations outside the U.S. and the FAA will incur the cost of this final rule. In the low-cost case the FAA assumes all countries with certificated repair stations will submit a request for a waiver based on recognition. The cost to the industry consists of reporting and submission costs for the request. The cost to the FAA consists of review of the request.

TABLE 2—PRICE LEVEL ADJUSTED COST FOR THE WAIVER BASED ON RECOGNITION
[2022 U.S. dollars]

Year	Industry	FAA	Total	Discounted costs (7%)	Discounted Costs (3%)
1	\$24,468	\$41,063	\$65,532	\$61,244	\$63,623
2	23,661	39,819	63,480	55,446	59,836

TABLE 2—PRICE LEVEL ADJUSTED COST FOR THE WAIVER BASED ON RECOGNITION—Continued
[2022 U.S. dollars]

Year	Industry	FAA	Total	Discounted costs (7%)	Discounted Costs (3%)
Total	48,129	80,882	129,012	116,690	123,459
Annualized				64,540	64,521

In the high-cost case, the estimated cost of the final rule to part 145 certificated foreign repair stations are the costs to implement a drug and alcohol testing program that adheres to U.S. domestic testing standards. Cost to foreign repair stations will consist of

developing a drug and alcohol testing program, training, testing safety sensitive maintenance employees for drugs and alcohol, and documentation. Total cost to foreign repair stations over five years, at seven percent present value, sums to \$49.6 million with an

annualized cost of \$12.1 million. At three percent present value, estimated total cost to foreign repair stations is \$55.6 million with an annualized cost of \$12.1 million.

TABLE 3—COST TO PART 145 FOREIGN REPAIR STATIONS OVER 5 YEARS
[\$Millions]*

Year	Program and training development & maintenance	Training	Testing (drug and alcohol)	Annual reports	Total cost (7% PV)	Total cost (3% PV)
1	\$0.4	\$7.6	\$0.0	\$2.1	\$9.4	\$9.8
2	0.3	1.0	4.5	6.8	11.0	11.9
3	0.3	1.0	4.5	6.8	10.4	11.6
4	0.3	1.0	4.6	6.9	9.7	11.3
5	0.3	1.0	4.6	6.9	9.1	11.0
Total	1.6	11.7	18.2	29.4	49.6	55.6

*These numbers are subject to rounding error.

Cost to the FAA would include inspections and the necessary documentation associated with monitoring these repair stations. Total cost to FAA over five years, at seven percent present value, sums to \$6.5 million with an annualized cost of \$1.6 million. At three percent present value, total cost is \$7.4 million with an annualized cost of \$1.6 million.

Benefits of This Rule

Congress mandated that the FAA propose a rule that establishes drug and alcohol testing programs for foreign repair stations. Any benefits of the regulations would result from potential reductions in safety risks, any improvements in safety in detecting and deterring drug use and/or alcohol misuse, and reductions in lost worker productivity. The FAA concludes that two specific sets of benefits may accrue from this rulemaking:

- The prevention of potential injuries and fatalities and property losses resulting from accidents attributed to controlled substances use/alcohol misuse or neglect or error on the part of individuals whose judgement or motor skills may be impaired by the presence of alcohol or drugs; and

- The potential reduction in absenteeism, lost worker productivity, and other cost to employers, as well as improved general safety in the workplace, by the deterrence of drug use and/or alcohol misuse.

However, the FAA lacks sufficient data to estimate a baseline level of safety risk associated with a drug and alcohol testing program at part 145 certificated foreign repair stations that perform safety-sensitive maintenance on part 121 aircraft. Additionally, it is difficult to estimate (and the FAA does not have data on) the impact of the final rule in detecting and deterring drug use and/or alcohol misuse. To estimate safety and productivity benefits that would result from the proposed rule, the FAA would need estimates of the following:

- Baseline risks attributable to drug use and/or alcohol misuse;
- Effectiveness of the rule; and
- Value of the reduction in risk of affected outcomes.

The FAA sought comments on this issue and did not receive any data. The FAA also requested that commenters submit data that would allow it to quantify the safety and productivity benefits of extending the proposed rule to foreign aircraft mechanics employed

directly by part 121 certificate holders and did not receive any data.

Baseline Risks Attributable to Drug Use and/or Alcohol Misuse

The FAA does not have data to estimate a baseline level of safety risk associated with safety-sensitive maintenance personnel drug use and/or alcohol misuse. The FAA acknowledges it is aware of no accidents or incidents related to safety-sensitive maintenance personnel using drugs or misusing alcohol. The FAA may use accidents or incidents related to part 121 aircraft that list maintenance as either a cause or factor in the accident report as a proxy to assess the decreased risk of injuries, fatalities, and property losses. However, it is difficult to attribute an accident or incident that occurs months after the maintenance was completed to poor maintenance work related to drug use and/or alcohol misuse.

Effectiveness of the Rule

The FAA would also need data on the effect of the rule on maintenance workers' drug use and/or alcohol misuse and the resulting effect on job performance. For example, drug and alcohol programs may serve as a

deterrent, resulting in less drug use and/or alcohol misuse by employees and higher productivity. However, it would be difficult to analyze the direct causal effect of less drug use and/or alcohol misuse to improved productivity. The FAA would need to retrieve extensive data, such as employees' health levels, employees' sleep patterns, changes to operating procedures, levels of education and training, and staffing levels, amongst other factors, to isolate the direct effect of a decrease in drug use or alcohol misuse on productivity levels. Additionally, even if this data were available, the analysis would be extensive and there would be academic questions regarding whether the causal effect was properly measured.

Additionally, as mentioned above, there are no accidents or incidents directly related to drug use and/or alcohol misuse to estimate the effect of the rule on injuries, fatalities, or property loss. Therefore, there is a lack of information to establish a baseline.

Value of Risk Reduction

The safety risks from drug use and/or alcohol misuse are increased risk of injuries and fatalities in the event of an accident or incident. The FAA values the reductions in such risks using the value of statistical life (VSL) for fatalities and fractions of the VSL based on the Maximum Abbreviated Injury Scale (MAIS) for injuries. The Department of Transportation guidance on valuing reductions in fatalities and injuries³⁹ could be used to monetize and quantify estimates of the potential safety benefits associated with this rulemaking.

Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not propose to require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through ICAO to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, 49 U.S.C. 44733(d)(2) requires the FAA to expeditiously proceed with this rulemaking. In other

words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given the time, resources, and scope of the adoption of an international standard. This alternative may not meet Congressional direction due to the multitude of Member State equities considered in the implementation of an ICAO standard.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) and the Small Business Jobs Act of 2010 (Pub. L. 111–240), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The FAA published an Initial Regulatory Flexibility Analysis (IRFA) in the proposed rule to aid the public in commenting on the potential impacts to small entities. The FAA considered the public comments in developing the final rule and this Final Regulatory Flexibility Analysis (FRFA). A FRFA must contain the following:

- (1) A statement of the need for, and objectives of, the rule;
- (2) A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
- (4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (5) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

1. A Statement of the Need for, and Objectives of, the Rule

This rule requires certificated part 145 repair stations located outside the territory of the United States (U.S.) to ensure that employees who perform aircraft maintenance on part 121 air carrier aircraft are subject to a drug and alcohol testing program. A part 145 repair station located outside the territory of the U.S. will cover its employees performing maintenance functions on part 121 air carrier aircraft under its own testing program meeting the requirements of 49 CFR part 40 and 14 CFR part 120. If a part 145 repair station cannot meet one or all requirements in 49 CFR part 40 (e.g., the laws of the country where the repair station is located are inconsistent with the regulations), the part 145 repair station may apply for an exemption using the process described in 49 CFR 40.7. Similarly, if a part 145 repair station cannot meet one or all requirements in 14 CFR part 120, they may apply for a waiver in accordance with waiver authority established in this rule.

In addition, foreign governments may request a waiver, on behalf of their repair station operators within their territories, based on recognition of existing requirements promulgated under the laws of the country as a compatible alternative that contains the minimum key elements of 14 CFR part 120. However, if a foreign government chooses not to avail itself of this option, § 120.10 provides that an individual foreign repair station may request its own waiver based on recognition of an existing testing program that meets the key elements identified in the regulation.

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (49 U.S.C.), specifically 49 U.S.C. 106 and 49 U.S.C. 45102. This final rule is further promulgated under section 308 of the FAA Modernization and Reform Act of 2012 (49 U.S.C. 44733); section 2112 of the FAA Extension, Safety, and Security Act of 2016 (the 2016 Act), which directed publication of a notice of

³⁹ DOT Departmental Guidance on Valuation of a Statistical Life. Economic Analyses. Office of the Secretary of Transportation. <https://www.transportation.gov/office-policy/transportation-policy/valued-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis>.

proposed rulemaking in accordance with 49 U.S.C. 44733; and section 302 of the FAA Reauthorization Act of 2024, which directed the issuance of a final rule carrying out the requirements of section 2112 of the 2016 Act.

2. Significant Issues Raised in Public Comments in Response to the Initial Regulatory Flexibility Analysis

The FAA received a comment summarized and acknowledged above concerning impacts to small entities. In response to commenters concerns, in this final rule, the FAA allows foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule, to obtain a waiver based on recognition of a compatible alternative that contains minimum key elements in lieu of compliance with

certain components of the Drug and Alcohol Testing Program.

3. A Response to SBA Comments

The FAA did not receive comments from the Chief Counsel for Advocacy of the SBA in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

4. Small Entities To Which the Rule Will Apply

This rule will impact part 145 repair stations located outside the territory of the U.S. that perform safety-sensitive maintenance functions on part 121 air carrier aircraft. The Regulatory Flexibility Act defines a small business as “a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution

to the U.S. economy through payment of taxes or use of American products, materials or labor.”⁴⁰ While the regulatory flexibility determination does not require small foreign entities to be considered, foreign repair stations may be using U.S. components or labor, especially if they are working on U.S.-manufactured aircraft; therefore, the FAA assumes the RFA applies.

The SBA established size standards for various types of economic activities, or industries, under the North American Industry Classification System (NAICS).⁴¹ These size standards generally define small businesses based on the number of employees or annual receipts. Table 4 shows the SBA size standard, based on the NAICS code, applicable to repair stations, as it encompasses air transport support activities to include aircraft maintenance and repair services.

TABLE 4—SMALL BUSINESS SIZE STANDARDS: AIRCRAFT MAINTENANCE AND REPAIR SERVICES

NAICS code	Description	Size standard
488190	Other Support Activities for Air Transportation	\$40.0 million.

Source: SBA.

NAICS = North American Industrial Classification System.

SBA = Small Business Administration.

Although the FAA was able to identify a size standard for repair stations to be considered small, the FAA lacks financial data to determine if foreign repair stations meet the applicable size standard. Instead, the FAA provides an analysis estimating the total cost to small entities based on available data for domestic repair stations. A 2011 antidrug and alcohol misuse prevention rule for domestic repair stations analyzed the effect on domestic repair stations that were small entities and subcontractors those entities used. That rule based the

regulatory flexibility determination analysis on a Transportation Security Administration (TSA) study that used Dun & Bradstreet data to estimate the share of domestic repair stations that would be considered small entities.⁴² The findings show that 93.28% of domestic repair stations would be classified as small entities. Extrapolating this estimate to the 977 foreign repair stations used in the analysis of this rulemaking results in 912 foreign repair stations that could be considered small entities.⁴³

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Based on the total nominal cost of the rule to repair stations, \$60.9 million, the cost per repair station is \$62,331.⁴⁴ Multiplying the cost per repair station by the estimated 912 repair stations that are small entities results in a total cost to small entities of \$56.8 million over five years. Table 5 shows the estimated annualized compliance costs by category.

TABLE 5—AVERAGE COST OF COMPLIANCE AND SMALL ENTITIES

Category	Number of small entities	Average annualized cost per repair station
Program and Training Development & Maintenance Cost	912	\$322.52
Training	912	1,942.83
Testing Cost	912	3,027.79
Paperwork	912	4,897.96

1. Based on a baseline of existing practices and using a 7% discount rate.

⁴⁰ 13 CFR 121.105(a)(1). The Regulatory Flexibility Act defines a “small business” as having the same meaning as “small business concern” under section 3 of the Small Business Act. 5 U.S.C. 601(3). Section 121.105 of 13 CFR contains the Small Business Administration’s implementing regulations clarifying the definition of “small business concern.”

⁴¹ Small Business Administration (SBA). 2019. Table of Size Standards. Effective August 12, 2019. <https://data.sba.gov/dataset/small-business-size-standards/resource/d89a5f17-ab8e-4698-9031-dfeb34d0a773>.

⁴² Final Rule, Supplemental Regulatory Flexibility Determination, Antidrug and Alcohol

Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities: Supplemental Regulatory Flexibility Determination, 76 FR 12559 (Mar. 8, 2011).

⁴³ The calculation is as follows: $977 \times .9328 = 911.31$. This estimate is rounded up to 912.

⁴⁴ $\$60,896,928 / 977 = \$762,330.53$.

The final rule also allows foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule, to obtain a waiver based on recognition of a compatible alternative that contains minimum key elements in lieu of compliance with certain components of the Drug and Alcohol Testing Program. Entities that choose this means of compliance will incur \$1,325 in one-time costs.

6. Significant Alternatives Considered

Alternative 1—the Status Quo—The status quo represents a situation in which the FAA would not require part 145 foreign repair stations to test their safety-sensitive maintenance personnel for drugs and alcohol. This alternative is counter to Congressional direction and, therefore, rejected.

Alternative 2—The FAA would work through ICAO to create an international standard for drug and alcohol testing of maintenance personnel at repair stations. While the FAA is willing to work with ICAO, 49 U.S.C. 44733(d)(2) requires the FAA to expeditiously proceed with this rulemaking. In other words, Congress directed the FAA to establish a program acceptable to the Administrator; working through ICAO to create an international standard may not expeditiously meet this intention given the time, resources, and scope of the adoption of an international standard.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the U.S. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the U.S., so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This rulemaking is congressionally mandated. The FAA assessed the potential effect of this rule and determined that it ensures the safety of the American public. Several commenters including organizations representing the interests of foreign governments, the commercial aviation industry, aviation workers, and foreign

repair stations voiced their opposition to an FAA drug and alcohol testing standard for foreign repair stations. As discussed in this preamble, these commenters cited failure to recognize each nation's sovereignty. They also noted that ICAO would be the more appropriate vehicle to set worldwide standards. As a result, this rulemaking could create an obstacle or retaliation to foreign commerce.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$183.0 million in lieu of \$100 million. This rule does not contain such a mandate; therefore, the requirements of title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

This action contains the following amendments to the existing information collection requirements previously approved under OMB Control Number 2120–0535. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted these information collection amendments to OMB for its review.

Summary: Under §§ 120.1, 120.123 and 120.227, this rule extends the drug and alcohol testing regulations beyond the territory of the U.S. certificated part 145 repair stations located outside the territory of the United States to implement a drug and alcohol testing program in accordance with 14 CFR part 120 and 49 CFR part 40 to cover their employees who perform safety-sensitive maintenance functions on part 121 air carrier aircraft. Each repair station would be required to obtain an Antidrug and Alcohol Misuse Prevention Program

Operations Specification. In addition, each repair station located outside the territory of the U.S. would be required to provide drug and alcohol testing program management information system (MIS) data.

In addition, the final rule establishes a waiver process for foreign governments, on behalf of certificated repair stations within their territories, and individual foreign repair stations subject to the rule to obtain a waiver based on recognition of a country or foreign repair station's existing requirements or testing program(s) promulgated under the laws of the country as a compatible alternative that contains minimum elements of 14 CFR part 120. Affected foreign repair stations that receive a waiver based on recognition by the Administrator will be relieved from comprehensive compliance with subparts E and F of 14 CFR part 120 (in turn, providing relief from 49 CFR part 40) and will not need to seek further waivers or exemptions from 14 CFR part 120 or 49 CFR part 40.

Use: The information will be used by the part 145 repair station located outside of the territory of the U.S. to certify implementation and maintenance of a drug and alcohol testing program. The FAA's Drug Abatement Compliance and Enforcement Inspectors will use this information to identify those foreign repair stations with an active program for inspection scheduling. Inspections are used to verify compliance with the drug and alcohol testing regulations and requirements. In addition, the Drug Abatement Division will use the annual MIS data reported to calculate the annual random drug and alcohol testing rates in the aviation industry.

Under the expanded waiver option, *i.e.*, a waiver based on recognition, the information will be used by foreign governments, on behalf of their repair stations within their territories, or foreign repair stations if their regulating country does not avail themselves of this option, to demonstrate the foreign government or the part 145 repair stations located outside of the territory of the U.S. existing requirements promulgated under the laws of the country as a compatible alternative that contains the minimum key elements of 14 CFR part 120.

Respondents (including number of): There are currently 977 part 145 certificated repair stations located in 65 countries.

Frequency: Part 145 repair stations located outside the territory of the U.S. will provide information for program certification only once; however, these repair stations will also incur annual

program maintenance: *e.g.*, updates to the programs per new guidance; the random pool list; and the overall testing process. The aggregate annual testing data would be provided electronically

through the Department of Transportation's Drug and Alcohol Management Information System. For a waiver based on recognition, foreign governments, or part 145 repair stations located outside the territory of

the U.S. if their regulating country does not avail themselves of this option, will provide information for the Administrator's approval only once.

Annual Burden Estimate:

1. BURDEN FOR PROGRAM CERTIFICATION AND ANNUAL PROGRAM MAINTENANCE

Documentation	Number of repair stations	Hours per repair station	Hourly wage	Total cost
Antidrug and Alcohol Misuse Prevention Program Operations Specification	977	16.2 ⁴⁵	\$29.43 ⁴⁶	\$465,800

2. BURDEN FOR ANNUAL TEST DATA

Documentation	Total records ⁴⁷	Time per record (hours)	Hourly wage	Total cost	Average yearly cost ⁴⁸
Training records	544,176	0.25	⁴⁹ \$33.57	\$2,756,696	\$551,339
Records related to the alcohol and drug collection process, test results, refusal to test, employee dispute records, SAP reports, follow-up tests	262,384	5.0	34.47	26,584,052	5,316,810
Total	806,560	N/A	N/A	29,340,748	5,868,150

To calculate the number of drug and alcohol training records, the FAA took the 2021 data showing 147,194 mechanics and 29,439 supervisors and accounted for a 0.49 percent growth rate over five years. Accounting for these rates results in an initial first year total of 148,637 mechanics and 29,728 supervisors. This is a total of 178,365 employees. In the first year all mechanics and supervisors will take anti-drug and alcohol training. These are two separate trainings. This requirement will result in 178,365 records for anti-drug training and 178,365 for alcohol training. In addition, supervisors will have to take an additional supervisor reasonable cause/reasonable suspicion determinations training for drugs and alcohol. This requirement will add another 59,456 records since they are two separate trainings as well.⁵⁰ Therefore, in the first year, there will be a total of 416,186 records.⁵¹

For year two and beyond, for drug records, the total records reflect the increase in new mechanics and supervisors which will be required to take the drug training. Using the growth

rate this results in 727 mechanics and 145 supervisors for a total of 872 records. The 145 new supervisors will also have to take the reasonable cause/reasonable suspicion determinations for drugs training. In addition, there is recurrent reasonable cause/reasonable suspicion determinations for drugs training that all supervisors will have to take every 12 to 18 months. In year two, this results in 29,728 supervisors taking the recurring trainings. Thus, the records for drug training in year two is 30,745.⁵² In addition, new mechanics and supervisors will be required to take alcohol training and supervisors will have to take the reasonable cause/reasonable suspicion determinations for alcohol training. This adds another 1,017 records. There is no recurrent alcohol training for supervisors. Therefore, in year two the total records are 31,762.⁵³

The same calculation for year two is repeated for years three through five. There are 31,919 records in year three, 32,075 in year four, and 32,234 in year five. This results in a total of 544,176 total training records over the five years.⁵⁴

To calculate the number of records related to alcohol and drug collection, the FAA sums the number of pre-employment drug tests, random drug and alcohol tests, and post-accident, reasonable cause, return to duty, and follow-up drug and alcohol tests per year beginning in year two. First, for drug testing, every new employee performing maintenance will be required to take a pre-employment drug test but not an alcohol test. Second, the FAA estimates 25 percent of current employees performing maintenance will be randomly drug tested per year. Third, there will be post-accident, reasonable cause, return to duty, or follow-up testing. The FAA estimates 1.70 percent of employees tested in a given year will be tested again under this category. The total drug tests over the five years is 187,202.⁵⁵

For alcohol testing, no pre-employment alcohol testing is required. The other two categories of alcohol testing will be the same as for drug testing. However, the FAA estimates random drug testing will occur at a rate of 10 percent of current employees and 4.10 percent for post-accident,

⁴⁵ Based on the previous PRA, the FAA assumes 16 hours in the first year to establish the testing program and one hour to register with the FAA's Drug Abatement Division. Therefore, 17 hours are required for the first year. For each year after, the recurring time to update and maintain the testing list will be 16 hours. The average over five years results in the 16.2 hours per year.

⁴⁶ Office and Administrative Support Workers (SOC 43-9199), May 2022; Mean Hourly Wage \$20.75 <http://www.bls.gov/oes/2022/May/oes439199.htm>. The total wage includes BLS compensation data. For 2020, BLS has wages at 70.5 percent total compensation while benefits are 29.5

percent. Employer Costs for Employee Compensation—December 2022. https://www.bls.gov/news.release/archives/ecec_03172023.htm.

⁴⁷ Estimated number of records from 2018 to 2022.

⁴⁸ Average yearly cost is calculated by dividing total cost by five years.

⁴⁹ Information and Records Clerks (SOC 43-4000), May 2022; Mean Hourly Wage \$23.67 https://www.bls.gov/oes/2022/may/naics3_481000.htm#43-4000. The total wage includes BLS compensation data. For 2022, BLS has wages at 70.5 percent total compensation while benefits are 29.5 percent.

Employer Costs for Employee Compensation—December 2022. https://www.bls.gov/news.release/archives/ecec_03172023.htm.

⁵⁰ $29,728 * 2 = 59,456.0$

⁵¹ $178,365 + 178,365 + 59,456 = 416,186$.

⁵² $872 + 145 + 29,728 = 30,745$.

⁵³ $30,745 + 1,017 = 31,762$

⁵⁴ $416,186 + 31,762 + 31,919 + 32,075 + 32,234 = 544,176$

⁵⁵ This is broken down by category as 3,516 pre-employment drug tests, 180,558 random drug tests, 3,128 post-accident, reasonable cause, return to duty, and follow-up tests.

reasonable cause, return to duty, and follow-up tests. The total alcohol tests

over the five years is 75,182.⁵⁶ Taking the sum of drug and alcohol tests results

in 262,384 records related to alcohol and drug collection.

WAIVER BASED ON RECOGNITION

Documentation	Total submissions ⁵⁷	Time per submission ⁵⁸	Hourly wage ⁵⁹	Total cost
Request for a Waiver Based on Recognition	65	20	\$66.25	\$86,124

The FAA assumes that every foreign government that regulates part 145 repair stations located outside the territory of the U.S. will submit a request for a waiver based on recognition. There are 65 countries that have part 145 repair stations within their territories so there will be 65 submissions. Each submission will require 20 hours at an hourly wage of \$66.25. Thus, the total cost for all 65 of the submissions is \$86,124. This will be one time cost.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6f for regulations and involves no extraordinary circumstances.

VII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order (E.O.) 13132, Federalism. The FAA has determined

that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, will not have federalism implications.

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

The FAA analyzed this final rule under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The FAA has determined that it is not a “significant energy action” under the executive order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policy and agency responsibilities of Executive Order 13609 and has determined that this action could create differences in international regulatory requirements. The FAA acknowledges that a foreign government may ask the FAA to revisit certain international agreements, as discussed in section IV.I, to accommodate this action.

VIII. Additional Information

A. Electronic Access and Filing

A copy of the NPRM, all comments received, this final rule, and all background material may be viewed online at <https://www.regulations.gov> using the docket number listed above. A copy of this final rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register’s website at <https://www.federalregister.gov> and the Government Publishing Office’s website at <https://www.govinfo.gov>. A copy may also be found on the FAA’s Regulations and Policies website at https://www.faa.gov/regulations_policies.

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

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

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official or the person listed under the **FOR FURTHER INFORMATION CONTACT**

⁵⁶ This is broken down by category as 72,223 random drug tests and 2,959 post-accident, reasonable cause, return to duty, and follow-up tests.

⁵⁷ Each foreign government that regulates part 145 repair stations will provide one submission.

⁵⁸ The total hours per submission is 20 hours and is disaggregated between a government program analyst that will do 15 hours of the work and a government manager that will do 5 hours of work.

⁵⁹ The hourly wage is the weighted average between the wages of the government program analyst and the government manager. Since the government program analyst will do 15 hours of the total 20 hours of work their wage, \$59.93, is multiplied by 0.75 (15/20 = 0.75). The government manager does the other 5 hours of work (5/20 = 0.25) and thus their wage, \$86.41, is multiplied by 0.25. (((\$59.93*0.75) + (\$86.41*0.25)) = \$66.25).

FAA Technical Pay Band, K Band with Washington DC locality; effective Jan. 2022, minimum salary \$131,917. The total loaded salary

of \$179,737 is divided by 2,080 hours to get the \$86.41 hourly wage. https://web.archive.org/web/20220402230925/https://www.faa.gov/sites/faa.gov/files/2022-02/core_salary_with_conversion.xlsx.

FAA Technical Pay Band, I Band with Washington DC locality; effective Jan. 2022, minimum salary \$90,877. The total loaded salary of \$123,820 is divided by 2,080 hours to get the \$59.93 hourly wage. https://web.archive.org/web/20220402230925/https://www.faa.gov/sites/faa.gov/files/2022-02/core_salary_with_conversion.xlsx.

heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 120

Alcoholism, Air carriers, Alcohol abuse, Alcohol testing, Aviation safety, Drug abuse, Drug testing, Operators, Reporting and recordkeeping requirements, Safety, Safety-sensitive, Transportation.

The Amendment

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

PART 120—DRUG AND ALCOHOL TESTING PROGRAM

■ 1. The authority citation for part 120 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 40101–40103, 40113, 40120, 41706, 41721, 44106, 44701, 44702, 44703, 44709, 44710, 44711, 44733, 45101–45105, 46105, 46306.

■ 2. Revise and republish § 120.1 to read as follows:

§ 120.1 Applicability.

This part applies to the following persons:

(a) All air carriers and operators certificated under part 119 of this chapter authorized to conduct operations under part 121 or part 135 of this chapter, all air traffic control facilities not operated by the FAA or by or under contract to the U.S. military; and all operators as defined in 14 CFR 91.147.

(b) All individuals who perform, either directly or by contract, a safety-sensitive function listed in subpart E or subpart F of this part.

(c) All part 145 certificate holders located in the territory of the United States who perform safety-sensitive functions and elect to implement a drug and alcohol testing program under this part.

(d) Beginning December 20, 2027, all part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft, except that section 120.5 and subparts E and F of this part do not apply to part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft that have obtained recognition pursuant to § 120.10.

(e) All contractors who elect to implement a drug and alcohol testing program under this part.

■ 3. Effective December 20, 2027, amend § 120.1 by revising paragraph (d) to read as follows:

§ 120.1 Applicability.

* * * * *

(d) All part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft, except that section 120.5 and subparts E and F of this part do not apply to part 145 certificate holders outside the territory of the United States who perform safety-sensitive maintenance functions on part 121 air carrier aircraft that have obtained recognition pursuant to § 120.10.

■ 4. Revise § 120.5 to read as follows:

§ 120.5 Procedures.

Each employer having a drug and alcohol testing program under this part must ensure that all drug and alcohol testing conducted pursuant to this part complies with the procedures set forth in 49 CFR part 40 and any exemptions issued to that employer by the Department of Transportation in accordance with 49 CFR 40.7.

■ 5. Add § 120.9 to read as follows:

§ 120.9 Waivers for Part 145 certificate holders outside the territory of the United States.

(a) A part 145 certificate holder whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft outside the territory of the United States may request a waiver from the Administrator from any requirements under 14 CFR part 120, subpart E or F, if specific requirements of subpart E or F are inconsistent with the laws of the country where the repair station is located.

(b) Each waiver request must include, at a minimum, the following elements:

(1) Information about the organization, including the name and mailing address and, if desired, other contact information such as a fax number, telephone number, or email address;

(2) The specific section or sections of this part from which the organization seeks a waiver;

(3) The reasons why granting the waiver would not adversely affect the prevention of accidents and injuries resulting from the use of prohibited drugs and/or the misuse of alcohol by employees;

(4) A copy of the law that is inconsistent with the provision(s) of this part from which a waiver is sought;

(5) An explanation of how the law is inconsistent with the provision(s) of this part from which a waiver is sought; and

(6) A description of the alternative means that will be used to achieve the objectives of the provision that is the subject of the waiver or, if applicable, a justification of why it would be impossible to achieve the objectives of the provision in any way.

(c) Each request for a waiver must be submitted to the Federal Aviation Administration, Office of Aerospace Medicine, in a form and manner acceptable to the Administrator.

(d) Each request for a waiver must be submitted at least 90 days before the organization needs it to take effect.

■ 6. Add § 120.10 to read as follows:

§ 120.10 Waiver based on recognition of a foreign government's existing requirements or an existing testing program of a Part 145 certificate holder outside the territory of the United States.

(a) *General.* A foreign government on behalf of its part 145 certificate holders, or a part 145 certificate holder whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft outside the territory of the United States (herein referred to as a foreign repair station), may request a waiver from the Administrator from the requirements of this part in recognition of the foreign government's existing requirements, or the foreign repair station's existing testing program developed consistent with the laws of its home country, as a compatible alternative to the requirements of this part.

(b) *Compatibility.* A request for recognition must demonstrate that the foreign government's existing requirements, or the foreign repair station's existing testing program, contain the following key elements of this part:

(1) A testing protocol or established consequences used to detect or deter, or both, employees who are responsible for safety-sensitive maintenance on part 121 air carrier aircraft from misusing alcohol and using drugs.

(2) An education or training program or materials that explain the impact and consequences of misusing alcohol and using drugs while performing safety-sensitive maintenance.

(3) The method used to rehabilitate and ensure that safety-sensitive maintenance employees who return to work on part 121 air carrier aircraft after a drug or alcohol test violation or consequence no longer misuse alcohol or use drugs.

(c) *Requests for recognition of a foreign government's existing requirements or a foreign repair station's existing testing program.* (1) Each request for recognition of a foreign

government's existing requirements or a foreign repair station's existing testing program must contain:

- (i) The name, title, address, email address, and telephone number of the primary person to be contacted regarding review of the request;
- (ii) Documentation of the foreign government's existing requirements or the foreign repair station's existing testing program demonstrating that the requirements or program contain the key elements of this part described in paragraph (b) of this section, including, if appropriate, copies of applicable laws, regulations, and other requirements carrying the force of law; and
- (iii) Appropriate data, records, or supporting explanation for the Administrator to consider in determining whether the foreign government's existing requirements or the foreign repair station's existing testing program contain the key elements of this part; and
- (iv) A statement that the requestor intends to notify the Administrator within 30 days of any change to the key elements described in paragraph (b) of this section that form the basis of the Administrator's recognition pursuant to paragraph (d)(2) of this section and provide a description of those changes in such notification.

(2) Each request for recognition must be submitted to the Federal Aviation Administration, Office of Aerospace

Medicine, in a form and manner acceptable to the Administrator.

(3) Each request for recognition must be submitted at least 90 days before the organization needs it to take effect.

(d) *Disposition.* (1) The Administrator will evaluate a request for recognition and may request additional information, documentation, or explanation, as needed, to supplement the request.

(2) A foreign government's existing requirements or a foreign repair station's existing testing program will be recognized as a compatible alternative to the requirements of this part if the Administrator determines that:

- (i) The request complies with the requirements of paragraph (c) of this section; and
- (ii) The foreign government's existing requirements, or the foreign repair station's existing testing program, contain the key elements of this part as described in paragraph (b) of this section.

(e) *Effect and validity.* (1) Recognition by the Administrator issued to a foreign government pursuant to paragraph (d)(2) of this section will apply to all foreign repair stations within the territory of the foreign government and subject to the recognized compatible alternative to the requirements of this part.

(2) Recognition by the Administrator will remain valid so long as the foreign government's existing requirements, or the foreign repair station's existing

testing program, retains the key elements of this part that formed the basis of the Administrator's recognition pursuant to paragraph (d)(2) of this section.

(f) *Compliance.* (1) Each foreign repair station subject to existing requirements or an existing testing program recognized as a compatible alternative to the requirements of this part pursuant to paragraph (d)(2) of this section must maintain an FAA-issued letter on file documenting the recognition.

(2) The FAA may modify, suspend, or withdraw recognition by the Administrator when:

- (i) A recognition is no longer valid;
- (ii) A foreign repair station fails to implement a testing program consistent with a recognition issued pursuant to paragraph (d)(2) of this section; or
- (iii) A foreign government or foreign repair station has not provided the notification described in paragraph (c)(1)(iv) of this section.

■ 7. Amend § 120.117 by:

■ a. Revising paragraph (a)(5);

■ b. Redesignating paragraph (a)(6) as paragraph (a)(7);

■ c. Adding new paragraph (a)(6); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 120.117 Implementing a drug testing program.

(a) * * *

If you are . . .

You must . . .

(5) A part 145 certificate holder located inside the territory of the United States who has your own drug testing program.

Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591, if you opt to conduct your own drug testing program.

(6) A part 145 certificate holder located outside the territory of the United States whose employees perform safety-sensitive maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.

Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.

(c) If you are an individual or company that intends to provide safety-sensitive services by contract to a part 119 certificate holder with authority to

operate under part 121 and/or part 135 of this chapter, an operation as defined in § 91.147 of this chapter, or an air traffic control facility not operated by

the FAA or by or under contract to the U.S. military, use the following chart to determine what you must do if you opt to have your own drug testing program.

If you are . . .

You must . . .

(1) A part 145 certificate holder located inside the territory of the United States and opt to conduct your own program under this part.

(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specification or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591,

If you are . . .	You must . . .
(2) A part 145 certificate holder located outside the territory of the United States whose employees perform maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.	(ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under part 121 or 135, or operator as defined in § 91.147 of this chapter, and (iii) Meet the requirements of this subpart as if you were an employer.
(3) A contractor who opts to implement a testing program under this part.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement a drug testing program acceptable to the Administrator no later than December 20, 2027, and (iii) Meet the requirements of this subpart as if you were an employer in accordance with any applicable waivers or exemptions.
	(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA drug testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under part 121 or 135, or operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military, and (iii) Meet the requirements of this subpart as if you were an employer.

* * * * *

■ 8. Effective December 20, 2027, amend § 120.117 by revising paragraph (c)(2) to read as follows:

§ 120.117 Implementing a drug testing program.

* * * * *

(c) * * *

If you are . . .	You must . . .
(2) A part 145 certificate holder located outside the territory of the United States whose employees perform maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement a drug testing program acceptable to the Administrator, and (iii) Meet the requirements of this subpart as if you were an employer in accordance with any applicable waivers or exemptions.
* * * * *	* * * * *

■ 9. Amend § 120.123 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.123 Drug testing outside the territory of the United States.

(a) Except for those testing processes applicable to persons testing pursuant to § 120.1(d), no part of the testing process (including specimen collection, laboratory processing, and MRO actions) shall be conducted outside the territory of the United States.

(1) Except for those persons testing pursuant to § 120.1(d), each employee

who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of this subpart shall not apply to any individual who performs a function listed in § 120.105 by contract for an employer outside the territory of the United States.

■ 10. Amend § 120.225 by:

■ a. Revising paragraph (a)(5);

■ b. Redesignating paragraph (a)(6) as paragraph (a)(7);

■ c. Adding new paragraph (a)(6); and

■ d. Revising paragraphs (c), (d) introductory text and (d)(1).

The revisions and addition read as follows:

§ 120.225 How to implement an alcohol testing program.

(a) * * *

If you are . . .	You must . . .
(5) A part 145 certificate holder located inside the territory of the United States who has your own alcohol testing program.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector or register with the FAA Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591, if you opt to conduct your own alcohol testing program.
* * * * *	* * * * *

If you are . . .	You must . . .
(6) A part 145 certificate holder located outside the territory of the United States who performs safety-sensitive maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.	Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector.

* * * * *

* * * * *

(c) If you are an individual or company that intends to provide safety-sensitive services by contract to a part 119 certificate holder with authority to operate under part 121 and/or part 135 of this chapter, or an operator as defined in § 91.147 of this chapter, use the following chart to determine what you must do if you opt to have your own drug testing program.

If you are . . .	You must . . .
(1) A part 145 certificate holder located inside the territory of the United States and opt to conduct your own program under this part.	(i) Have an Antidrug and Alcohol Misuse Prevention Program Operations Specifications or register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA alcohol testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with the authority to operate under parts 121 and/or 135, or operator as defined in § 91.147 of this chapter, and (iii) Meet the requirements of this subpart as if you were an employer.
(2) A part 145 certificate holder located outside of the territory of the United States who performs maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement an alcohol testing program acceptable to the Administrator no later than December 20, 2027, and (iii) Meet the requirements of this subpart as if you were an employer in accordance with any applicable waivers or exemptions.
(3) A contractor	(i) Register with the FAA, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue SW, Washington, DC 20591, (ii) Implement an FAA alcohol testing program no later than the date you start performing safety-sensitive functions for a part 119 certificate holder with authority to operate under parts 121 and/or 135, or operator as defined in § 91.147 of this chapter, and (iii) Meet the requirements of this subpart as if you were an employer.

(d) To obtain an antidrug and alcohol misuse prevention program operations specification:

(1) You must contact your FAA Principal Operations Inspector or Principal Maintenance Inspector.

Provide him/her with the following information:

* * * * *

■ 11. Effective December 20, 2027, amend § 120.225 by revising paragraph (c)(2) to read as follows:

§ 120.225 How to implement an alcohol testing program.

* * * * *

(c) * * *

If you are . . .	You must . . .
(2) A part 145 certificate holder located outside of the territory of the United States who performs maintenance functions on part 121 air carrier aircraft, unless you have received recognition pursuant to § 120.10.	(i) Obtain an Antidrug and Alcohol Misuse Prevention Program Operations Specification by contacting your Principal Maintenance Inspector. (ii) Implement an alcohol testing program acceptable to the Administrator, and (iii) Meet the requirements of this subpart as if you were an employer in accordance with any applicable waivers or exemptions.

* * * * *

■ 12. Amend § 120.227 by revising paragraphs (a) introductory text, (a)(1), and (b) to read as follows:

§ 120.227 Employees located outside the U.S.

(a) Except for those persons testing pursuant to § 120.1(d), no covered employee shall be tested for alcohol

misuse while located outside the territory of the United States.

(1) Except for those persons testing pursuant to § 120.1(d), each covered employee who is assigned to perform safety-sensitive functions solely outside

the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

* * * * *

(b) Except for those persons testing pursuant to § 120.1(d), the provisions of

this subpart shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

Issued under authority provided by 49 U.S.C. 106(f), 45102, 44731(d), in Washington, DC.

Michael Gordon Whitaker,
Administrator.

[FR Doc. 2024–29837 Filed 12–16–24; 8:45 am]

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Part VII

Environmental Protection Agency

40 CFR Parts 123, et al.

Clean Water Act Section 404 Tribal and State Assumption Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 123, 124, 232, and 233**

[EPA-HQ-OW-2020-0276; FRL-6682-01-OW]

RIN 2040-AF83

Clean Water Act Section 404 Tribal and State Assumption Program**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing the Agency's first comprehensive revisions to the regulations governing Clean Water Act (CWA) section 404 Tribal and State programs since 1988. The primary purpose of the revisions is to respond to longstanding requests from Tribes and States to clarify the requirements and processes for the assumption and administration of a CWA section 404 permitting program for discharges of dredged and fill material. The revisions facilitate Tribal and State assumption and administration of CWA section 404, consistent with the policy of the CWA as described in section 101(b), by making the procedures and substantive requirements for assumption transparent and straightforward. It clarifies the minimum requirements for Tribal and State programs while ensuring flexibility to accommodate individual Tribal and State needs. In addition, the final rule clarifies the criminal negligence standard in the CWA section 404 program, as well as making a corresponding change in the section 402 program. Finally, the final rule makes technical revisions, including removing outdated references associated with the section 404 Tribal and State program regulations.

DATES: This rule is effective on January 17, 2025. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of January 17, 2025.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2020-0276. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available in hard copy form. Publicly

available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Christine Maietta, Oceans, Wetlands and Communities Division, Office of Water (4504-T), Environmental Protection Agency, Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202-564-1854; email address: cwa404g@epa.gov; website: <https://www.epa.gov/cwa404g>.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Executive Summary
- II. General Information
 - A. What action is the Agency taking?
 - B. What is the Agency's authority for taking this action?
 - C. What are the incremental costs and benefits of this action?
- III. Background
 - A. Statutory and Regulatory History
 - B. Need for Rulemaking Revisions
- IV. Final Rule
 - A. General
 - B. Program Approval
 - C. Program Operations
 - D. Compliance Evaluation and Enforcement
 - E. Federal Oversight
 - F. Eligible Indian Tribes
 - G. Impacts on Existing Programs
 - H. Technical Revisions
 - I. Incorporation by Reference
 - J. Severability
- V. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 14094: Modernizing Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All
 - K. Congressional Review Act

I. Executive Summary

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into navigable waters, defined as

"waters of the United States." 33 U.S.C. 1344. The section 404 program, introduced in the 1972 amendments to the Federal Water Pollution Control Act, is generally administered by the U.S. Army Corps of Engineers ("Corps"). However, in 1977, Congress amended section 404 of the CWA to allow States to administer their own dredged or fill material permitting programs in certain waters of the United States within their jurisdiction, subject to EPA approval. *Id.* at 1344(g). A Tribe or State administering a section 404 program is responsible for permitting discharges of dredged and fill material, authorizing discharges under general permits, taking enforcement actions with respect to unauthorized discharges, and ensuring compliance with the terms and conditions of permits under the Tribe's or State's authority. EPA maintains oversight of Tribal and State section 404 programs.

In 1980, EPA promulgated regulations to establish procedures and criteria for approving or disapproving State programs under section 404(g) and for oversight of State programs after approval. 45 FR 33290 (May 19, 1980). EPA revised the regulations in 1988. 53 FR 20764 (June 6, 1988). The 1988 revisions updated procedures and criteria used in approving, reviewing, and withdrawing approval of section 404 State programs, as well as incorporating section 404 program definitions and section 404(f)(1) exemptions at 40 CFR part 232. Although the Agency made targeted revisions to 40 CFR part 233 in the early 1990s and 2000s in light of other statutory and regulatory changes (e.g., new provisions addressing treatment of Tribes in a similar manner as States), the Agency has not comprehensively revised these regulations since 1988.

Nearly half of States and a few Tribes have expressed some level of interest to EPA over time in assuming the section 404 dredged and fill permit program, but only two States (Michigan and New Jersey) currently administer the program.¹ Tribes and States have identified several barriers to program assumption. One of the barriers they identified is uncertainty regarding the scope of assumable waters. To address this, the Agency convened the Assumable Waters Subcommittee in

¹ Florida obtained EPA's approval to assume the CWA section 404 program on December 17, 2020. On February 15, 2024, the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's program. *Center for Biological Diversity v. Regan*, No. 21-119, 2024 WL 655368 (D.D.C.). Accordingly, only the impacts of this rule on the Michigan and New Jersey programs are discussed in this rule. An appeal of the district court's decision is pending. See No. 24-5101 (D.C. Cir.).

2015 to provide advice and develop recommendations as to how EPA could best clarify the scope of waters over which a Tribe or State may assume CWA section 404 permitting responsibilities, and the scope of waters over which the Corps retains CWA section 404 permitting responsibilities. The final report of the Subcommittee was submitted to the National Advisory Council for Environmental Policy and Technology (NACEPT), which adopted the majority recommendation in the Subcommittee report. In its 2017 letter to the Administrator conveying this recommendation, NACEPT recommended that EPA develop regulations to clarify assumed and retained waters.²

In this rule, the Agency also responds to longstanding requests from Tribes and States to streamline and clarify the requirements and processes for the assumption and administration of a CWA section 404 program as well as EPA oversight.³ The final rule facilitates Tribal and State assumption of the section 404 program, consistent with the policy of the CWA as described in section 101(b), by making program assumption procedures and requirements transparent and straightforward and addresses State-identified barriers to assumption. The final rule clarifies how Tribes and States can ensure their program meets the minimum requirements of the CWA while allowing for flexibility in the way these requirements may be met. It clarifies the criminal enforcement requirements for Tribal and State section 404 programs and makes a corresponding change in section 402 Tribal and State program requirements. The Agency is also finalizing other minor updates and technical revisions in 40 CFR parts 232, 233, and part 124 associated with Tribal and State section 404 programs. This rule is

comprehensive in that EPA has updated all of the provisions in 40 CFR parts 232, 233, and 124 associated with Tribal and State 404 programs that it determined needed to be clarified or updated at this time. This rule does not reopen any other provisions in parts 232, 233, or 124.

II. General Information

A. What action is the agency taking?

Assumption enables Tribes and States to administer the CWA section 404 program, placing them in the primary decision-making position for permitting discharges of dredged or fill material into certain waters of the United States. EPA is revising and modernizing its regulations to clarify requirements for Tribal and State program assumption and administration, reduce barriers to assumption, and make technical corrections to facilitate Tribal and State assumption and administration of the section 404 program. This rule also addresses EPA's procedures and criteria for approving, exercising oversight, and withdrawing Tribal and State programs under CWA section 404(g)–(k) and EPA's implementing regulations at 40 CFR part 233, with one corresponding clarification to CWA section 402 National Pollutant Discharge Elimination System (NPDES) Tribal and State section 402 permitting program requirements for criminal enforcement at 40 CFR 123.27.

B. What is the Agency's authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 101, 301, 309, 402, 404, 501, and 518.

C. What are the incremental costs and benefits of this action?

The costs and benefits are qualitatively discussed in the *Economic Analysis for the Clean Water Act Section 404 Tribal and State Program Regulation*. The benefits of the final rule are primarily attributable to establishing a process to develop a retained waters description, providing a program effective date, and providing opportunities for Tribal input. The incremental costs of the final rule are primarily attributable to a potential burden increase for Tribes to meet revised judicial review requirements and a potential burden increase to Tribes, States, and permittees from revisions that expand on existing Tribal opportunities to provide input. The Agency expects these benefits to justify the costs. The economic analysis does not quantify these potential incremental

economic impacts, as there is very limited data associated with these changes on which to base estimates.

III. Background

A. Statutory and Regulatory History

1. CWA Section 404

In 1972, Congress amended the Federal Water Pollution Control Act (FWPCA), or the CWA as it is commonly called,⁴ to address longstanding concerns regarding the quality of the nation's waters and the Federal Government's ability to address those concerns under existing law. The objective of the 1972 statutory scheme is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve this objective, Congress provided, "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* at 1311(a). A "discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters⁵ from any point source," which includes the discharge of dredged or fill materials from a point source into waters of the United States. *Id.* at 1362(12).

Section 404 of the CWA establishes a permitting program to regulate the discharge of dredged or fill material from a point source into navigable waters, unless the discharge is associated with an activity exempt from section 404 permitting requirements under CWA section 404(f). *Id.* at 1344. Discharges of dredged materials, such as the redeposit of dredged material (other than incidental fallback), and discharges of fill materials, such as rock, sand, or dirt, may be associated with activities such as site development, erosion protection, bridges and piers, linear projects (such as pipelines), natural resource extraction, shoreline stabilization, and restoration projects.

Section 404(a) of the CWA authorizes the Secretary of the Army to issue permits after notice and opportunity for public hearings to discharge dredged or fill material into navigable waters at specified disposal sites. *Id.* at 1344(a). The Act specifies that the Secretary of the Army acts through the Chief of

² Available at <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report> and in the docket for this final rule, Docket ID No. EPA–HQ–OW–2020–0276.

³ See, e.g., letter from Thomas W. Easterly, Chair, Water Committee, The Environmental Council of States, Lucy C. Edmondson, Vice Chair, The Environmental Council of States, to Peter Silva, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, February 26, 2010; Letter from R. Steven Brown, Executive Director, The Environmental Council of States, to Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, July 22, 2011. Subject: Progress Report and Recommended Actions to Further Clarify Section 404 Assumption Application Requirements and Implementation by Tribes and States; Letter from Alexandria Dapolito Dunn, ECOS, Sean Rolland, ACWA, and Jeanne Christie, ASWM to Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, April 30, 2014.

⁴ The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, EPA will generally refer to the FWPCA in this document as the CWA or the Act.

⁵ The CWA uses the term "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

Engineers, and thus the Corps generally administers the day-to-day permitting program under section 404, unless EPA approves a Tribe's or State's request to do so. *See id.* at 1344(d), (g).

The 1977 Amendments made the regulation of the discharge of dredged or fill material a shared responsibility of the States and the Federal Government.⁶ This partnership is consistent with the policy of CWA section 101(b) that "preserve[s] and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." and provides for States to "implement the permit programs under sections 1342 and 1344 of this title."⁷ To facilitate State assumption of the section 404 program, Congress structured requirements and procedures to leverage States' existing authority to administer the CWA section 402 program.⁸ *See* section III.A.4 of this preamble for further discussion on the specific statutory provisions that apply to assumed programs.

Under the section 404 program, discharges of dredged or fill material into waters of the United States are authorized by individual or general permits. Individual permits are processed by the permitting agency (*i.e.*, the Corps, or a Tribe or State with an approved program), which evaluates them for consistency with the environmental criteria outlined in the

CWA section 404(b)(1) Guidelines⁹ or corresponding Tribal or State laws or regulations, respectively. General permits developed by the permitting agency may authorize discharges that will have only minimal adverse effects, individually and cumulatively, to the aquatic environment. General permits must be consistent with the environmental review criteria set forth in the CWA section 404(b)(1) Guidelines and may be issued on a nationwide, regional, or programmatic basis for discharges from specific categories of activities. General permits allow activities that meet specified conditions to proceed with little or no delay. For example, a general permit can authorize discharges associated with minor road activities or utility line backfill, if the regulated activities under the general permit will cause only minimal adverse environmental effects when performed separately, will have only minimal cumulative adverse effects on the environment, and the discharge complies with the general permit conditions and the CWA section 404(b)(1) guidelines.

While the Corps is the Federal permitting agency and administers the Federal section 404 program on a day-to-day basis, EPA also plays an important role in the Federal section 404 program. Both agencies develop and interpret policy and guidance and have promulgated section 404 regulations.¹⁰ Both EPA and the Corps have enforcement authorities pursuant to section 404, as specified in sections 301(a), 309, 404(n), and 404(s) of the CWA. In the context of section 404, the Corps does the day-to-day work of conducting jurisdictional determinations,¹¹ making permit decisions, ensuring compliance, and taking enforcement actions, as necessary for the implementation of the Federal section 404 program.

Under section 404, EPA establishes environmental criteria used in

evaluating permit applications (*i.e.*, the CWA section 404(b)(1) Guidelines) in conjunction with the Corps; determines the applicability of section 404(f) exemptions; approves and oversees Tribal and State assumption of the section 404 program (sections 404(g)–(l)); may review and comment on general permits, authorization under general permits, and individual permit applications issued by Tribes, States, or the Corps; may prohibit, deny, or restrict the use of any defined area as a disposal site (section 404(c)); and may elevate Corps issued permits for resolution (section 404(j)).

2. Scope of Tribal and State CWA Section 404(g) Programs

When Congress enacted the CWA in 1972, the Corps had long been regulating "navigable waters of the United States" as defined under the Rivers and Harbors Act of 1899 (RHA). The CWA defined "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Corps' initial post-CWA regulations treated the two jurisdictional terms under the two different statutes interchangeably. 39 FR 12115, 12119 (April 3, 1974). In 1975, the U.S. District Court for the District of Columbia found that "waters of the United States" under the CWA exceeds the scope of jurisdiction under the RHA and ordered the Corps to adopt new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

In July 1975, the Corps issued new regulations expanding the section 404 program in phases to cover all waters of the United States, in compliance with the court's order. 40 FR 31320 (July 25, 1975). Phase I, which was effective immediately, regulated discharges of dredged or fill material into coastal waters or inland navigable waters of the United States and wetlands contiguous or adjacent to those waters. Phase II, effective on July 1, 1976, addressed discharges of dredged or fill material into primary tributaries and contiguous or adjacent wetlands, as well as lakes. Phase III, effective after July 1, 1977, addressed discharges of dredged material or fill material into "any navigable water [including intrastate lakes, rivers and streams . . .]." *Id.* at 31326. The intent of the phased approach was to provide time for the Corps to increase staffing and resources to implement the expanded jurisdiction and workload. *Id.* at 31321 ("[i]n view of man-power and budgetary constraints it is necessary that this program be phased in over a two year period.").

⁶ *See, e.g.*, H.R. Report No. 95–830 at 52 (1977) ("Federal agencies are to cooperate with State and local agencies to develop solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources"). *See also* S. Report No. 95–370 at 78 (1977) ("Several States have already established separate State agencies to control discharges of dredge or fill materials" and "The amendment encourages the use of a variety of existing or developing State and local management agencies."). *See also id.* at 11 ("The provision solves most real problems with section 404: (a) by providing general delegation authority to the States . . ."). The 1977 amendments also introduced exemptions and general permits. *See* 33 U.S.C. 1344(e)–(f).

⁷ *See* S. Report No. 95–370 at 77 (1977) ("The committee amendment is in accord with the stated policy of Public Law 92–500 of 'preserving and protecting the primary responsibilities and rights of States or [stet] prevent, reduce, and eliminate pollution.'").

⁸ *See id.* at 77 ("[The amendment] provides for assumption of the permit authority by States with approved programs for control of discharges for dredged and fill material in accord with the criteria and with guidelines comparable to those contained in 402(b) and 404(b)(1)."). *See also id.* at 77–78 ("By using the established mechanism in section 402 of Public Law 92–500, the committee anticipates the authorization of State management of the permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the program quickly."). A Tribe or State need not have an approved CWA section 402 program prior to seeking to assume administration of CWA section 404.

⁹ The CWA section 404(b)(1) Guidelines are regulations established by EPA pursuant to CWA section 404(b)(1) in conjunction with the Corps and codified at 40 CFR part 230. They set forth the substantive environmental review criteria used to evaluate permits for discharges of dredged and/or fill material under CWA section 404.

¹⁰ The substantive and procedural requirements applicable to section 404 are detailed in EPA's regulations at 40 CFR parts 230 through 233 and the Corps' regulations at 33 CFR parts 320, 323, 325–328, 330 through 333, and 335 through 338.

¹¹ EPA decisions on jurisdiction do not constitute approved jurisdictional determinations as defined by the Corps regulations at 33 CFR 331.2. EPA has final administrative authority over the scope of CWA jurisdiction. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Op. Att'y Gen. 197 (1979).

Thus, the phases did not mean all of the waters in the final regulation were not waters of the United States, but rather reflected when the Corps would have capacity to begin regulating activities within each type of jurisdictional water.

Some in Congress were concerned about breadth of the new interpretation of “waters of the United States” under the Corps’ CWA dredged and fill regulatory program. In 1976, the House of Representatives passed H.R. 9560, which would have redefined the CWA term “navigable waters” specifically for the section 404 program (but not the rest of the CWA) as follows:

The term “navigable waters” as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).

H.R. Rep. No. 94–1107, at 63 (1976). The House Committee explained that the new definition would mirror the longstanding RHA section 10 definition of “navigable waters of the United States,” except that it would omit the “historical test” of navigability. *Id.* at 19. The House thought that discharges of dredged or fill material occurring in “waters other than navigable waters of the United States . . . are more appropriately and more effectively subject to regulation by the States.” *Id.* at 22.

The Senate disagreed. It declined to redefine “navigable waters” for purposes of the section 404 program and the House bill was not enacted into law. Instead, the Senate addressed the desire for State control by passing a bill allowing States to assume section 404 permitting authority, subject to EPA approval, in Phase II and III waters (as defined in the Corps’ 1975 regulations quoted above). S. Rep. No. 95–370, at 75 (1977).¹² After assumption, the Corps would retain section 404 permitting authority in Phase I waters. This general approach was codified in the final bill, H.R. 3199, referred to as the 1977 CWA Amendments: it did not change the definition of “navigable waters” for the section 404 program, but it allowed States to assume permitting authority in “phase 2 and 3 waters after the approval of a program by [EPA].” H.R. Rep. No.

95–830, at 101 (1977).¹³ The final amendments included a parenthetical phrase in section 404(g)(1) that defined Corps-retained waters using the same language that the House Committee had used in its effort to limit the Corps’ jurisdiction, other than waters that were historically used as a means to transport interstate or foreign commerce but no longer do so, and with the addition of “wetlands adjacent thereto.” H.R. Rep. No. 95–830, at 39. The preamble to the Corps’ 1977 regulations described Corps-retained waters under section 404(g)(1) as “waters already being regulated by the USACE,” *i.e.*, those waters the Corps regulated under section 10 of the RHA, “plus all adjacent wetlands to these waters.” 42 FR 37122, 37124 (July 19, 1977). The legislative history suggests that the Senate expected widespread assumption of the section 404 program, leaving the Corps to regulate only RHA section 10 waters that are currently used as a means to transport interstate or foreign commerce, and adjacent wetlands. S. Rep. No. 95–370, at 77–78, *reprinted in* 4 Legis. History 1977, at 710–11; *see* 33 U.S.C. 1344(g)(1).

3. Overview of CWA Section 404(g) Statutory Requirements for Program Administration and Implementation

Congress laid out general procedures for Tribal¹⁴ and State submissions and EPA’s approval, upon which EPA has further elaborated in regulation, as discussed in section III.A.4 of this preamble below. Pursuant to section 404(g), a Tribe or State seeking to assume the section 404 program must submit to the EPA Administrator a full and complete description of the proposed program and a statement from the attorney general (or attorney for Tribal or State agencies that have independent legal counsel) that it has adequate authority to establish and carry out the proposed program under Tribal or State law. 33 U.S.C. 1344(g)(1). The Administrator has up to ten days after the receipt of the program description and attorney general statement to provide copies to the Secretary of the Army and Secretary of the Interior (acting through the Director of the United States Fish and Wildlife Service), who in turn have up to 90 days from the Administrator’s receipt of a complete program description and

attorney general statement to provide comments to the Administrator.¹⁵ *Id.* at 1344(g)(2)–(3).

Section 404(h) of the Act identifies eight authorities EPA must ensure a Tribe or State has prior to approving a request to assume and administer a section 404 program. *Id.* at 1344(h)(1)(A)–(H). First, a Tribe or State must have the authority to issue permits that apply and assure compliance with the requirements of section 404 (including but not limited to the CWA section 404(b)(1) Guidelines); issue permits for a set duration which cannot exceed five years; and terminate or modify an issued permit. *Id.* at 1344(h)(1)(A). Second, the Tribe or State must have the authority to inspect, monitor, enter and require reports in association with issued permits to the same extent as required under section 1318 of the Act. *Id.* at 1344(h)(1)(B). Third, the Tribe or State must have the authority to provide public notice, provide an opportunity to comment on proposed permits, and provide an opportunity for a public hearing. *Id.* at 1344(h)(1)(C). Fourth, the Tribe or State must have authority to assure EPA receives notice and a copy of each application (unless review is waived). *Id.* at 1344(h)(1)(D). Fifth, the Tribe or State must have authority to provide notice to Tribes and States whose waters may be affected by the permit and for the affected Tribe or State to provide written recommendations. *Id.* at 1344(h)(1)(E). Sixth, a Tribe or State must also have the authority to assure no permit will be issued if it would substantially impede anchorage and navigation of the navigable waters. *Id.* at 1344(h)(1)(F). Seventh, the Tribe or State must have authority to abate violations of permits and the program—including both civil and criminal penalties as well as other ways and means of enforcement. *Id.* at 1344(h)(1)(G). And lastly, the Tribe or State must have authority to assure continued coordination with Federal and Federal-State water-related planning and review processes. *Id.* at 1344(h)(1)(H).

If the EPA Administrator determines that a Tribe or State that has submitted a program request under section 404(g)(1) has the authority set forth in section 404(h)(1) of the CWA, then the Administrator “shall approve” the Tribe’s or State’s request to assume the section 404 program. *Id.* at 1344(h)(2). If the Administrator fails to make a determination with respect to any

¹² The Senate Report is reprinted in Comm. On Env’t & Publ. Works, 95th Cong., 4 A Legislative History of the Clean Water Act of 1977 (Legis. History) at 635, 708 (October 1978).

¹³ The House Report is reprinted in 3 Legis. History 1977, at 185, 285.

¹⁴ The 1987 amendments to the CWA added section 518, which authorizes EPA to treat eligible Indian Tribes in a manner similar to States for a variety of purposes, including administering each of the principal CWA regulatory programs such as CWA section 404. 33 U.S.C. 1377(e).

¹⁵ Per the regulations, a copy is also provided to the National Marine Fisheries Service. *See* 40 CFR 233.15(d).

program request submitted by a Tribe or State within 120 days after the date of receipt of the request, the program shall be deemed approved. *Id.* at 1344(h)(3). The Act also provides for EPA to withdraw assumed programs that are not administered in accordance with the requirements of the Act. *Id.* at 1344(i).

A Tribe or State assuming the section 404 program must have authority under Tribal or State law to assume, administer, and enforce the program; EPA's approval does not delegate authority to issue a permit on behalf of the Federal Government. By assuming administration of the section 404 program under section 404(g), an eligible Tribe or State takes on the primary responsibility of permitting discharges of dredged and/or fill material into certain waters of the United States within its jurisdiction.¹⁶ For section 404 permitting purposes, the Tribe or State must exercise jurisdiction over all assumed waters subject to the CWA except those waters to be retained by the Corps. 33 U.S.C. 1344(g). The Corps retains CWA section 404 permitting authority for all non-assumed waters as well as RHA section 10 permitting authority in all waters subject to RHA section 10. For example, States generally do not assume CWA section 404 authority over Tribal waters or waters in lands of exclusive Federal jurisdiction. Tribal or State programs can also regulate waters that are retained by the Corps, or waters that are not waters of the United States, under Tribal or State law, but the Corps will remain the CWA 404 permitting authority for retained waters.

4. CWA Section 404 Tribal and State Program Regulations

In 1980, in response to the 1977 CWA Amendments, EPA promulgated regulations to establish procedures and criteria to approve or disapprove State programs under section 404(g) and monitor State programs after approval. 45 FR 33290 (May 19, 1980).¹⁷ On June

6, 1988, EPA revised these procedures and criteria used in approving, reviewing, and withdrawing approval of section 404 State programs and codified them at 40 CFR part 233. 53 FR 20764 (June 6, 1988). The 1988 regulations provided States with flexibility in program design and administration while still meeting the requirements and objectives of the CWA. They also incorporated section 404 program definitions and section 404(f)(1) exemptions at 40 CFR part 232.¹⁸

The regulations at 40 CFR part 233 described the assuming Tribe's or State's program requirements, EPA responsibilities, approval and oversight of assumed programs, and requirements for review, modification, and withdrawal of Tribal and State programs (as necessary). Subpart B of the 404 State Program Regulations sets forth the elements of program approval, including the program description, the Attorney General's statement, the Memorandum of Agreement between the Tribe or State and EPA, and the Memorandum of Agreement between the Tribe or State and the Secretary. It also establishes procedures for approving and revising Tribal or State programs. 40 CFR 233.10 through 233.16. Subpart C addresses Permit Requirements, subpart D lays out Program Operation Requirements, subpart E establishes requirements for Compliance Evaluation and Enforcement, and subpart F discusses Federal Oversight authority. *Id.* at 233.20–53. In subpart G, EPA lays out requirements and procedures for Tribal assumption, *id.* at 233.60–62, and subpart H codifies EPA's approval of Michigan and New Jersey's programs and incorporates certain State laws by reference. *Id.* at 233.70–71. These regulations implement key principles of Tribal and State assumption, including that an assumed program must be consistent with and no less stringent than the Act and implementing regulations, allow for public participation, ensure consistency with the CWA 404(b)(1) Guidelines, and have adequate enforcement authority.

Since 1988, the Agency has made several targeted revisions and additions to the CWA section 404 Tribal and State program regulations at 40 CFR part 233. On February 13, 1992, EPA finalized a rule amending the regulations to reflect the newly created Environmental

Appeals Board in Agency adjudications, including revising section 233.53 related to withdrawal. 57 FR 5320 (February 13, 1992). In 1993, the Agency added subpart G to 40 CFR part 233 pursuant to CWA section 518, which required EPA to promulgate regulations specifying how Indian Tribes may qualify for treatment in a similar manner as a State (TAS) for purposes of assuming the section 404 program. 58 FR 8172 (February 11, 1993).¹⁹ The 1993 rule also revised 40 CFR part 232 by adding new definitions for “Federal Indian reservation,” “Indian Tribe,” and “States.” *Id.* The Agency further revised the subpart G regulations regarding Tribal eligibility at sections 233.60, 233.61, and 233.62 in 1994 to improve and simplify the process for Tribes to obtain EPA approval to assume the section 404 program. 59 FR 64339, 64345 (December 14, 1994). Under that rule, known as the Simplification Rule, a Tribe does not need to prequalify for TAS before requesting to assume the section 404 program. Instead, it can establish its TAS eligibility at the program approval stage, subject to EPA notice and comment procedures for State program approval. *Id.* at 64339–40. A 2005 rule on cross-media electronic reporting added section 233.39 on electronic reporting. 70 FR 59848 (October 13, 2005). EPA also codified the approval of the Michigan program on October 2, 1984 (49 FR 38947) and the New Jersey program on March 2, 1994 (59 FR 9933) in subpart H of 40 CFR part 233.

B. Need for Rulemaking Revisions

Although nearly half of the States and a few Tribes have expressed some level of interest to EPA over time in assuming the Federal section 404 dredged and fill permit program, only two States currently administer the program.²⁰ In 2010 and 2011 letters to EPA, the Environmental Council of States

¹⁶ Legislative history makes clear that Congress did not intend Tribal or State assumption under section 404(g) to be a delegation of the permitting program. H.R. Rep. No. 95–830 at 104 (1977). (“The Conference substitute provides for the administration by a State of its own permit program for the regulation of the discharge of dredged or fill material. . . . The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority.”) The conference report is available at https://www.epa.gov/sites/production/files/2015-11/documents/1977_conf_rept.pdf.

¹⁷ In 1983, EPA reorganized the presentation of the permit programs in the CFR, including moving the regulations for 404 State programs to their current location at 40 CFR part 233, but made no substantive changes to any of the affected sections. 48 FR 14146, 14208 (April 1, 1983).

¹⁸ The 1988 regulations essentially recodified at 40 CFR part 232 the section 404 program definitions and section 404(f)(1) permit exemptions in a new, separate part to eliminate any confusion about their applicability. The section 404 program definitions at 40 CFR part 232 apply to both the Federal and State administered programs.

¹⁹ When the term “State Program” is used in the regulations, it refers to an approved program run by any of the entities described in the definition of “State,” including Tribes. 58 FR 8183 (“State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe, as defined in this part, which meet the requirements of § 233.60. For purposes of this part, the word State also includes any interstate agency requesting program approval or administering an approved program.”).

²⁰ Florida obtained EPA's approval to assume the CWA section 404 program on December 17, 2020. On February 15, 2024, the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's program. *Center for Biological Diversity v. Regan*, No. 21–119, 2024 WL 655368 (D.D.C.). An appeal of the district court's decision is pending. See No. 24–5101 (D.C. Cir.).

recommended further steps to encourage Tribal and State assumption of the program, remove barriers to assumption, and improve the efficiency of the program.²¹ While some Tribes and States have considered assumption, they have expressed to EPA the need for further clarification regarding the regulations, including which waters a Tribe or State may assume and which waters the Corps retains. For example, in a 2014 letter to then-Acting Assistant Administrator Nancy Stoner,²² State associations asked EPA to clarify the scope of assumable waters, citing uncertainty on this issue as a barrier to assuming the program.

In 2015, EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations as to how EPA could best clarify the scope of waters over which a Tribe or State may assume CWA section 404 permitting responsibilities, and the scope of waters over which the Corps retains CWA section 404 permitting responsibilities. The Subcommittee included 22 members representing States, Tribes, Federal agencies, industry, environmental groups, Tribal and State associations, and academia. The Subcommittee presented its recommendations to NACEPT on May 10, 2017. NACEPT endorsed the Subcommittee report in its entirety and submitted it to former Administrator Scott Pruitt on June 2, 2017, with additional notations and recommendations, such as a preference for clarity through regulation. The “Final Report of the Assumable Waters Subcommittee, May 2017,” recommended that EPA develop policies, guidance, and regulations to clarify assumed and retained waters.²³

²¹ Letter from Thomas W. Easterly, Chair, Water Committee, The Environmental Council of States, Lucy C. Edmonson, Vice Chair, The Environmental Council of States, to Peter Silva, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. February 26, 2010; Letter from R. Steven Brown, Executive Director, The Environmental Council of States, to Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. July 22, 2011. Subject: Progress Report and Recommended Actions to Further Clarify Section 404 Assumption Application Requirements and Implementation by Tribes and States.

²² Letter from Alexandria Dapolito Dunn, ECOS, Sean Rolland, ACWA, and Jeanne Christie, ASWM, to Nancy Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. April 30, 2014.

²³ Available at <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report> and in the docket for the final rule, Docket ID No. EPA-HQ-OW-2020-0276.

In addition to the needs identified by Tribes and States, the Agency also recognized the need for other revisions, including several technical revisions to the regulations. For example, while the 1988 regulations recognized that the part 124 regulations do not apply to Tribal or State section 404 programs, the Agency did not make conforming revisions. The regulation also required other revisions throughout 40 CFR part 233 to update cross-references, ensure consistent use of terminology, and facilitate efficient program operation.

On June 11, 2018, the Agency published its 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions²⁴ announcing the Agency was considering a rulemaking to provide the first comprehensive revisions to the section 404 Tribal and State program regulations since 1988.

In September 2018, the Agency sent letters to Tribal leaders and State governors announcing opportunities for Tribes and States to provide input on areas of the regulation that could benefit from additional clarity and revision. Tribes and States provided input on various topics at Tribal and State engagement sessions, including requests for flexibility in assuming and administering the section 404 program and clarification on retained and assumed waters. See section V.E and F of this preamble for further discussion on Tribal and State engagement in this rule effort. In 2023, EPA held informational webinars for States on January 24 and for Tribes on January 2–5 and January 31. At these webinars, EPA provided Tribes and States with an update on the rulemaking effort and an overview of previously received Tribal and State input to EPA. EPA did not seek additional input from Tribes or States at the January 2023 webinars.

The Agency announced a proposed rule to revise the CWA section 404 Tribal and State program regulations on July 19, 2023; the Agency also posted a draft of the proposed rule on its website. On August 14, 2023, the Agency published the proposed rulemaking in the **Federal Register**, 88 FR 55276, which initiated a 60-day public comment period that lasted through October 13, 2023. EPA held a virtual public hearing on September 6, 2023, and hosted input sessions for interested State and Tribal parties throughout August 2023, including one State input session on August 24, 2023, and two Tribal input sessions on August 15 and 30, 2023. In finalizing the proposed

rule, the Agency reviewed 44 comments received on the proposed rulemaking, in addition to input received during pre-proposal, at the public hearing, and at the Tribal and State input sessions. Commenters provided a range of feedback on the proposal. The Agency discusses comments received and responses in the applicable sections of this preamble to the rule. A complete response to comments document is available in the docket for the rule (Docket ID No. EPA-HQ-OW-2020-0276).

The rule addresses many of the issues raised by Tribes and States as challenges to assuming section 404, as well as drawing from EPA’s experience working with Tribes and States pursuing assumption and in program oversight.

IV. Final Rule

EPA is finalizing revisions to the CWA section 404 Tribal and State program regulations at 40 CFR part 233 to provide additional clarity on conflict of interest prohibitions, program approval procedures and requirements, permit requirements, program operations, compliance evaluation and enforcement, Federal oversight, and Tribal provisions. EPA is also finalizing revisions to the criminal enforcement requirements in 40 CFR 123.27 and 40 CFR 233.41, which apply to Tribes and States that administer the CWA section 402 National Pollutant Discharge Elimination System (NPDES) permitting program as well as the section 404 program.

This section of this preamble addresses changes to seven sub-sections in the existing subpart structure of the 40 CFR part 233 regulations: Subpart A—General, Subpart B—Program Approval, Subpart C—Permit Requirements, Subpart D—Program Operations, Subpart E—Compliance Evaluation and Enforcement, Subpart F—Federal Oversight, and Subpart G—Eligible Indian Tribes. Each sub-section contains topics covered under that subpart of the regulation. Within each topic, this preamble includes (1) an overview of the topic and its relevant final rule provision(s) and (2) a summary of the Agency’s final rule rationale and public comments. Where applicable, some topics also address implementation considerations for the final rule provisions. This preamble is structured in a manner intended to clearly convey the relevant changes to the regulatory text. Following this preamble discussion on the final rule provisions, this section of this preamble also includes four sub-sections that discuss the impact of the final rule on existing programs, technical revisions,

²⁴ Available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2040-AF83>.

incorporation by reference, and severability.

A. General

1. Conflict of Interest

a. Overview and What the Agency Is Finalizing

The Agency's 1988 regulations for the section 404 Tribal and State program provided a general prohibition that public officers or employees with direct personal or pecuniary interests in a decision must make the interest known and not participate in such decision. In the proposal to this rule, the Agency proposed to clarify to whom the provision applies. The proposal specified that individuals who exercise responsibilities over section 404 permitting and programs may not be involved in any matters in which they have a direct personal or pecuniary interest. The proposal also clarified that this provision applies to decisions by the Tribal or State permitting agency as well as any entity that reviews decisions of the agency.

After reviewing public comments, the Agency is finalizing the revisions to the conflict of interest provision as proposed. EPA is also affirming the importance of ensuring public confidence when a Tribe or State issues a permit to one of its agencies or departments, though has determined that codifying specific processes or requirements to address self-issuance of permits by assuming Tribes and States is unnecessary. This provision does not address or affect Federal or State court review of permitting actions.

b. Summary of Final Rule Rationale and Public Comment

CWA section 404 does not require EPA to establish guidelines on conflicts of interest for Tribal or State programs. In contrast, the CWA requires EPA to establish guidelines for section 402 State programs that prohibit any entity which approves permit applications from having members who receive, or have during the previous two years received, a significant portion of their income from permit holders or applicants for a permit. 33 U.S.C. 1314(i)(D). EPA's section 402 regulations, accordingly, provide that "State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit." 40 CFR 123.25(c). The provision then defines the terms "board

or body," "significant portion of income," "permit holders or applicants for a permit," and "income." *See id.* at 123.25(c)(1).

In 1984, EPA proposed to codify the section 402 provision in its revisions to the section 404 Tribal and State program regulations. 49 FR 39012 (October 2, 1984). However, EPA ultimately decided not to hold Tribe and State section 404 programs to the same conflict of interest standards as State NPDES programs because of practical differences between the two programs. 53 FR 20764, 20766 (June 6, 1988). At that time, EPA noted that NPDES discharges are usually long-term discharges, often from certain specific types of industrial or municipal facilities. *Id.* In contrast, discharges authorized by section 404 typically tend to be one-time discharges and generated by a broader range of dischargers than NPDES, "ranging from private citizens to large corporations, from small fills for boat docks or erosion prevention to major development projects." *Id.* EPA concluded that an absolute ban on anyone with a financial interest in a permit from serving on a board that approves permits is likely to be more difficult to comply with under the section 404 program because so many people would be considered to be financially interested in section 404 permits and therefore eliminated from the pool of potential board members. *Id.* Instead, EPA provided a general prohibition that public officers or employees with such interests in a decision shall make the interest known and not participate in such decision. *Id.*

Similar distinctions between the sections 402 and 404 programs apply today. For example, if an individual needed a section 404 permit for the discharge of fill material into one lake to install a boat ramp at one point in time, EPA does not think it necessary to permanently preclude that individual from participating in any section 404-related decision-making. The Agency proposed to revise the section 404 conflict of interest provision, however, to further clarify to whom the provision applies. The purpose of this clarification was to ensure that individuals who exercise responsibilities over section 404 permitting and programs are not involved in any matters in which they have a direct personal or pecuniary interest. The proposal also clarified that this provision applies to any section 404-related decisions by the agency as well as any entity that reviews these decisions. For example, if a Tribe or State has established boards or other bodies to advise, oversee, or review appeals of agency decisions, members of

such boards would be subject to this conflict of interest provision even if they are not officers or employees of the Tribe or State agency.

Some commenters expressed concerns that the change in the conflict of interest provision weakens or injects uncertainty into the section 404 assumption process. A commenter argued that the language is too "vague and [its] broad articulation makes it unclear to whom, exactly, this provision applies." EPA disagrees; as explained above, the final rule more clearly articulates who must provide notification of potential conflicts of interest and recuse themselves from any section 404 program decision for which they have a conflict of interest, not just decisions that exceed a monetary threshold. In EPA's view, this new language is clear and does not create uncertainty; EPA presumes that any person participating in a matter subject to a section 404 decision by the agency will be aware that they are doing so, and they should also be aware if they have personal or pecuniary interests in that matter. If a person is uncertain as to whether the conflict of interest provision applies, they can always seek guidance from the Tribal or State agency or from EPA.

With respect to Tribal and State permits being issued for Tribal or State projects, the Agency has determined that distinct procedures to address these types of permits are unnecessary, as all permits must comply with the section 404(b)(1) Guidelines and other requirements of CWA section 404. The CWA does not distinguish between a Tribe or State with an approved program as a permittee and other permittees. Most State permitting entities have experience issuing permits to other agencies within that respective State. For example, States that implement the section 402 program routinely issue NPDES permits to various departments and agencies within that State.²⁵ To the extent the courts have considered this matter, they have found no legal impediment to issuance of an NPDES permit by an authorized State to itself. *See, e.g., West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159 (4th Cir. 2010). EPA is unaware of any significant concerns arising from the issuance of NPDES permits by States to other agencies or departments within that respective State.

²⁵ One territory, the Virgin Islands, and all states except Massachusetts, New Hampshire, New Mexico, are authorized to implement at least some portion of the NPDES program. *See* <https://www.epa.gov/npdes/npdes-state-program-information>.

Likewise, to EPA's knowledge, the agencies in Michigan and New Jersey have been issuing section 404 permits to authorize the agencies' own activities and activities of other agencies within those States for many years without encountering any significant issues. The Florida Department of Environmental Protection did the same between December 2020 and February 2024 without significant conflict of interest issues, to EPA's knowledge. A common example of self-issuance by one State agency to another is when the State water quality agency issues a permit to the State department of transportation for aquatic resource impacts associated with the construction of a State road. Similarly, the Corps issues CWA section 404 permits to other Federal agencies, and EPA does not have—nor did commenters provide—any information that raises concerns on the part of EPA about the integrity and neutrality of these intra-governmental permitting processes.

The Agency did not propose any regulatory text on the self-issuance of permits. The Agency received one comment on this issue, expressing concern that conflicts of interest are presented when private developers or State agencies provide funding to the permitting agencies, which in turn allow the permitting agency to employ permit processors that will handle the permit applications submitted by the same private developers or State agencies. In effect, the commenter stated, the private developer or non-permitting State agency becomes the employer of their permit processor. This rule does require that all permits must comply with the section 404(b)(1) Guidelines and other requirements of CWA section 404. Tribes and States that assume the CWA section 404 program must also follow public notice and comment procedures for permit applications, thereby ensuring transparency and providing the public with an opportunity to submit input to address any concerns. Additionally, the CWA provides EPA with oversight authority of Tribes' and States' assumed section 404 permits, allowing Federal review of assumed programs in general and applications for particular proposed permits, including self-issued permits. To the extent EPA has concerns that permits are not compliant, whether based on its own analysis or based on comments from other agencies or interested parties, EPA may object to the issuance of permits.

Tribes, States, and EPA have the discretion to implement additional measures if, in a particular circumstance, they desire to further

ensure public confidence that certain permits are consistent with the CWA and not the subject of special considerations. For example, an assuming Tribe or State could separate its permit-issuing function from departments or offices that apply for and receive permits or expand public participation requirements for self-issued permits. EPA and an assuming Tribe or State could also agree in the Memorandum of Agreement that EPA would exercise heightened oversight (*i.e.*, would not waive review) over permits issued by and to Tribal or State agencies or departments. EPA encourages Tribes and States to implement measures to ensure transparency in the permitting process based on the specific structures and procedures of their agencies. For all of these reasons, EPA does not find that it is necessary to include in this regulation any additional processes or requirements to address self-issuance of permits by assuming Tribes and States.

2. Compliance With the CWA 404(b)(1) Guidelines

a. Overview and What the Agency Is Finalizing

The CWA section 404(b)(1) Guidelines are the substantive environmental criteria used to evaluate discharges of dredged and/or fill material under CWA section 404. EPA may approve a Tribal or State request for assumption only if EPA determines, among other things, that the Tribe or State has authority to issue permits that comply with the CWA 404(b)(1) Guidelines. 33 U.S.C. 1344(h)(1)(A)(i). The regulations already require that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA 404(b)(1) Guidelines. However, stakeholders have requested clarity regarding the way in which a Tribe or State wishing to assume the CWA section 404 program can demonstrate that it has authority to issue permits that “apply, and assure compliance with” the CWA 404(b)(1) Guidelines. *See id.* EPA did not propose any new regulatory text on compliance with the CWA 404(b)(1) Guidelines, because the Agency did not want to unintentionally constrain how Tribes and States can demonstrate their authority. But in response to stakeholder requests, EPA discussed various approaches that Tribes and States can undertake to demonstrate that they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines in this preamble to the proposed rule. After reviewing public

comments, the Agency is finalizing its proposed approach.

b. Summary of Final Rule Rationale and Public Comment

Pursuant to CWA section 404(h)(1)(A)(i), EPA may approve a Tribal or State request for assumption only if EPA determines, among other things, that the Tribe or State has authority “[t]o issue permits which—(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection [404](b)(1). . . .” The CWA 404(b)(1) Guidelines also direct that “no discharge of dredged or fill material shall be permitted” if there is a less environmentally damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10(a)); if it would cause or contribute to violations of applicable water quality standards taking into account disposal site dilution and dispersion (40 CFR 230.10(b)(1)); if it would violate any applicable toxic effluent standard or prohibition (40 CFR 230.10(b)(2)); if it would cause or contribute to significant degradation of waters of the United States (40 CFR 230.10(c)); or if it would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)); or unless appropriate and practicable steps have been taken to minimize potential impacts of the discharge on the aquatic ecosystem. *See* 40 CFR 230 Subpart H; *see also* section IV.B.4 of this preamble for further discussion on mitigation.

Consistent with CWA section 404(h)(1)(A)(i), the section 404 Tribal and State program regulations require that assuming Tribes and States may not impose conditions less stringent than those required under Federal law (40 CFR 233.1(d)); that Tribes and States may not issue permits that do not comply with the requirements of the Act or this part of the regulations, including the CWA 404(b)(1) Guidelines (40 CFR 233.20(a)); that “[f]or each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines” (40 CFR 233.23(a)); and that “The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or

regulations” (40 CFR 233.34(a)). Because the regulations already require that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA 404(b)(1) Guidelines, EPA did not propose adding to the regulatory text.

Several commenters asserted that the only way to ensure that Tribes and States have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines is to require Tribes and States to adopt the CWA 404(b)(1) Guidelines verbatim or incorporate them by reference into the Tribal or State program. To the extent these commenters assert that adoption or incorporation is the most straightforward way for a Tribe or State to demonstrate sufficient authority, EPA agrees. However, while a Tribe or State may choose to adopt verbatim or incorporate into their programs by reference the CWA 404(b)(1) Guidelines or other Federal requirements, nothing in the CWA requires that they do so. *See* 49 FR 39012, 39015 (October 2, 1984); *cf.* 40 CFR 123.25(a) Note.

Requiring Tribes and States to adopt or incorporate the CWA 404(b)(1) Guidelines would complicate efforts by Tribes and States to impose more stringent requirements as part of their CWA section 404 programs. By not requiring that Tribes and States adopt verbatim or incorporate by reference the CWA 404(b)(1) Guidelines, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps.

This flexibility is consistent with the nature of the CWA 404(b)(1) Guidelines themselves. Recognizing that a CWA section 404 permit may be required for a variety of discharges into a wide range of aquatic ecosystems, EPA explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide “a certain amount of flexibility,” consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980). EPA further explained in this preamble to the Guidelines: “[c]haracteristics of waters of the United States vary greatly, both from region to region and within a region. . . . As a result, the Guidelines concentrate on specifying the tools to be used in evaluating and testing the impact of dredged or fill material discharges on waters of the United States rather than on simply listing

numerical pass-fail points.” *See id.*; *see also* 40 CFR 230.6.

EPA is not adding further regulatory text addressing how Tribes and States may ensure compliance with the CWA 404(b)(1) Guidelines. The section 404 Tribal and State program regulations as well as CWA section 404(h)(1)(A)(i) already require that Tribal and State permits and environmental review criteria apply and assure compliance with the CWA 404(b)(1) Guidelines while allowing for flexibility as to how Tribes and States wishing to assume implementation of the CWA section 404 program can demonstrate that they have sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines.

Tribes and States can choose to adopt verbatim or incorporate by reference the CWA 404(b)(1) Guidelines. To the extent a Tribe or State wishing to assume the CWA section 404 program desires to incorporate more stringent requirements or otherwise desires to craft a program more tailored to that Tribe’s or State’s circumstances, the Tribe or State should demonstrate clearly in its program description that it has sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines. For example, a Tribe or State could provide a crosswalk between the Tribal or State program and the CWA 404(b)(1) Guidelines or a similar written analysis of the Tribal or State program authority, which it could include in its request to assume the program. A Tribe or State also could develop and include with its program submission a permit checklist or other documentation to be used in connection with each permit decision to document on a case-by-case basis how each permit decision applies the CWA 404(b)(1) Guidelines. Where a Tribe’s or State’s request for assumption relies upon an already established and ongoing dredged and fill permit program under Tribal or State law, that Tribe or State could supplement its program description by demonstrating that the terms and conditions of permits for discharges into waters of the United States that were issued pursuant to the preexisting Tribal or State program complied with the CWA 404(b)(1) Guidelines comparably with or more stringently than Federal permits issued by the Corps for the same discharge.

Several commenters discussed the portion of the preamble to the proposed rule in which EPA suggested various ways that Tribes and States could demonstrate authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines’ prohibition on authorization of a

discharge if the discharge would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 (listed species) or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). Many of these commenters asserted that the final rule must ensure that listed species and critical habitat receive the same protections under a Tribal or State program as they would if the Corps had processed the permit and engaged in consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the Services) pursuant to section 7 of the Endangered Species Act (ESA). These commenters proposed various ways of ensuring protection of listed species and critical habitat, including requiring the Tribes and States to undertake ESA section 7 consultation themselves or requiring EPA to consult with the Services on each Tribal or State permit as part of EPA’s oversight. Several commenters asserted that EPA must consult with the Services prior to approving a Tribal or State program. A few commenters noted that Tribal and State permittees must comply with the take provisions of section 10 of the ESA, and one commenter recommended that EPA continue to pursue an approach similar to that associated with EPA’s approval of Florida’s section 404 program whereby EPA and the U.S. Fish and Wildlife Service engaged in a programmatic consultation under ESA section 7 resulting in an incidental take permit covering all permittees in Florida. Other commenters expressed concerns about the protection afforded listed species and critical habitat by Florida’s or other State section 404 programs.

EPA’s approval of Florida’s section 404 program is the subject of ongoing litigation (*see Center for Biological Diversity v. Regan*, No. 24–5101 (D.C. Cir.), and will not be addressed here. EPA’s obligation to undertake ESA section 7 consultation in connection with its approval and/or oversight of a Tribal or State CWA section 404 program is beyond the scope of this rulemaking.

To the extent commenters assert that assuming Tribal and State programs must incorporate the procedural requirements of the ESA, issuance of a permit by a Tribe or State pursuant to an assumed program under CWA section 404(g) is not a Federal action subject to the procedural requirements of the ESA. *See* H.R. Rep. No. 95–830 at 104 (1977) (“The conferees wish to emphasize that such a State program is

one which is established under State law and which functions in lieu of the Federal program”); *see also Chesapeake Bay Foundation v. Virginia State Water Control Bd.*, 453 F. Supp. 122 (E.D. Va. 1978).

Although decisions by Tribal and State section 404 programs do not trigger the Federal consultation process laid out in ESA section 7, Tribes and States must demonstrate that they have sufficient authority to issue permits that comply and assure compliance with 40 CFR 230.10(b)(3), which states that “[no] discharge of dredged or fill material may be permitted if it . . . [j]eopardizes the continued existence of [threatened or endangered species listed under the ESA]” or would adversely modify critical habitat. 40 CFR 230.10(b)(3). A few commenters asserted that the discussion in the preamble to the proposed rule regarding how Tribes and States could demonstrate compliance with this aspect of the CWA 404(b)(1) Guidelines was too generalized and/or insufficiently prescriptive or protective. On the other hand, one commenter asserted that EPA should defer to Tribal and State expertise. The discussion in the preamble to the proposed rule was not intended to be exhaustive or to provide a checklist. Tribes and States retain flexibility to tailor their programs consistent with the types of listed species and critical habitat within their jurisdictions.

EPA recommends that Tribes and States include in the program submission provisions and procedures to protect listed species and habitat. EPA recommends that Tribes and States develop a method for identifying the listed species and areas of designated critical habitat within their geographic boundaries and for determining whether federally listed species or critical habitat are present or would be affected by a particular discharge. Tribes and States also could develop processes for ensuring that their identification of federally listed species and designated critical habitat remains up to date as well as processes to avoid impacts to these resources.

EPA continues to encourage Tribes and States to proactively coordinate with the relevant Services’ regional or field offices when developing their programs. To the extent that Tribes and States coordinate with the Services as they develop their programs, such work would help inform the Services’ review opportunity to comment to EPA on a Tribal or State program submission. *See* 33 U.S.C. 1344(g)(2) and 1344(h)(1); *see also* 40 CFR 233.15(d) and (g). Such work would also facilitate EPA’s

coordination with the Services on permits for which EPA has not waived review. *See* 33 U.S.C. 1344(j).

Several Tribes expressed concern that the preamble to the proposed rule did not provide sufficient guidance regarding how a Tribe or State could demonstrate that it has sufficient authority to apply and assure compliance with subpart F of the CWA 404(b)(1) Guidelines. Pursuant to subpart F (40 CFR 230.50 through 230.54), the permit issuing authority should consider potential effects on human use characteristics, including “areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value,” when making the factual determinations and the findings of compliance or non-compliance under the Guidelines. 40 CFR 230.54(a). These human use considerations encompass, among other things, uses and values of aquatic resources that are important to Tribes and local communities. For example, section 230.51 in subpart F describes considerations regarding potential impacts of dredged or fill material on recreational and commercial fisheries, consisting of “harvestable fish, crustaceans, shellfish, and other aquatic organisms.” *Id.* at 230.51(a). Section 230.52 includes considerations regarding the impact of dredged or fill material on water-related recreation, including harvesting of resources and non-consumptive activities such as canoeing on the water. Section 230.53 addresses potential impacts on aesthetic values of aquatic ecosystems and notes that: “The discharge of dredged or fill material can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, including inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area.” *Id.* at 230.53(b). Section 230.54 discusses considerations regarding “national and historical monuments, national seashores . . . and similar preserves” and where the discharge may “modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.” *Id.* at 230.54(b). Collectively or individually, significantly adverse effects of the discharge of pollutants on these human uses may contribute to the significant degradation of the waters of the United States. *Id.* at 230.10(c).

As with other aspects of the CWA 404(b)(1) Guidelines, Tribes and States have the option of adopting 40 CFR 230.50 through 230.54, but they are not required to do so. To demonstrate sufficient authority to apply and assure compliance with subpart F of the CWA 404(b)(1) Guidelines, a Tribe or State should include in its program description its process and permit review criteria for evaluating and addressing potential permit impacts on historic properties and properties with cultural significance. Such a process could include any agreements with and/or procedures for formal or informal coordination and communication with the State Historic Preservation Officer or Tribal Historic Preservation Office. The Tribe or State also could develop an agreement with the relevant State Historic Preservation Officer or Tribal Historic Preservation Office to establish a process to identify historic properties that may be impacted by the Tribe’s or State’s issuance of section 404 permits and a process for resolving adverse effects. Such an agreement could include the identification of relevant parties with an interest in potential impacts on historic properties (these could correspond to entities that would have a consultative role under the National Historic Preservation Act regulations), duties and responsibilities of the identified parties, and a description of the process to consider any impacts, including the determination and resolution of adverse effects on historic properties. Such an agreement could facilitate EPA’s review of a Tribal or State permit’s impacts on historic properties, consistent with EPA’s oversight of the permits, for which review has not been waived, and authorized program. *See* 40 CFR 233.31. The program description would contain any such agreement(s).

The foregoing, of course, are only examples, and there are likely other means by which a Tribe or State could demonstrate that it has sufficient authority to issue permits that comply and assure compliance with the CWA 404(b)(1) Guidelines. EPA will avoid unnecessarily limiting Tribes and States by imposing a single vehicle or approach for implementing the CWA 404(b)(1) Guidelines. EPA recommends that an assuming Tribe or State consider incorporating into its program description ways to identify and consider impacts to other human use characteristics, such as impacts to waters that support subsistence fishing by the local population or that may have significance for religious or treaty purposes. These could include, for

example, formalizing a process for coordinating with local communities to identify and understand how waters that may be affected by discharges of dredged or fill material are used for subsistence fishing, religious purposes, or other uses important to the local community. Such procedures would demonstrate the Tribe or State's ability to fulfill the intent of the human use characteristics provisions of the section 404(b)(1) Guidelines.

Some Tribes assert that compliance with the CWA 404(b)(1) Guidelines is not an adequate substitute for the input that Tribes can provide through consultation procedures of the National Historic Preservation Act. While the Federal consultation procedures under section 106 of the National Historic Preservation Act do not apply to permits issued by a Tribe or State,²⁶ the final rule expands upon existing opportunities for Tribal input. Section IV.F of this preamble provides detailed discussion on opportunities whereby Tribes may request that EPA review permits that may affect their Tribal rights or interests within or beyond reservation boundaries and Tribes that have status of treatment in a similar manner as a State (TAS) shall receive notice and an opportunity to provide recommendations as an "affected State" for purposes of 40 CFR 233.31. See section IV.F of this preamble. In addition, EPA review of Tribal or State permit applications may not be waived for "[d]ischarges within critical areas established under State or Federal law, including but not limited to . . . sites identified or proposed under the National Historic Preservation Act. . . ." 40 CFR 233.51(b)(6). Moreover, as discussed above, Tribal and State permits must assure compliance with all applicable statutory and regulatory requirements, including the section 404(b)(1) Guidelines as described above. Finally, assuming Tribes and States must provide for judicial review of Tribe- or State-issued permits, which provides another opportunity for interested parties to raise concerns about a permit's failure to comply with the 404(b)(1) Guidelines. See section IV.C.2 of this preamble.

3. No Less Stringent Than

a. Overview and What the Agency Is Finalizing

The Agency's regulations provide that Tribes and States may not impose requirements less stringent than Federal requirements. 40 CFR 233.1(d). While

Tribes and States have flexibility to determine how to best integrate sufficient authority into their programs, there are limits to this flexibility not explicitly spelled out in the prior regulations. Accordingly, the Agency proposed to codify its longstanding principle that a Tribe or State cannot comply with its obligation pursuant to section 510 of the CWA to impose requirements no less stringent than Federal requirements by making one requirement more stringent than federally required as a tradeoff for making another requirement less stringent. The Agency also proposed to clarify its interpretation that an assuming Tribe or State must demonstrate that it will at all times have authority to issue permits for all non-exempt discharges of dredged and fill material to all waters of the United States within its jurisdiction except for discharges to the subset of waters of the United States ("retained waters") over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). To clarify the role of Federal interpretive guidance in Tribal or State programs, such as the Corps' General Regulatory Policies in 33 CFR part 320 or Regulatory Guidance Letters, EPA further proposed to clarify that Tribes and States are not required to incorporate the Corps' or EPA's interpretive guidance into their CWA section 404 programs. Finally, EPA proposed to codify its long-held position that the Tribe or State is responsible for administering all portions of a CWA section 404(g) program. Specifically, where the CWA 404(b)(1) Guidelines or other regulations require that the District Engineer or the Corps of Engineers make certain decisions or take certain actions, the proposed rule provides that the Tribal or State agency will carry out those responsibilities for purposes of the assumed program. After reviewing public comments, the Agency is finalizing this approach as proposed.

b. Summary of Final Rule Rationale and Public Comment

Section 510 of the CWA provides: "[i]f an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State . . . may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent. . . ." 33 U.S.C. 1370. Consistent with CWA section 510, EPA's regulations at 40 CFR 233.1(d) require: "Any approved State Program

shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." See also 33 U.S.C. 1344(h)(1)(A)(i); 40 CFR 233.20(a), 233.23(a), 233.34(a).

Broadly stated, the goal of those portions of the CWA and its implementing regulations that govern Tribal and State assumption of the CWA section 404 program is to ensure that an assuming Tribe or State will issue permits that assure compliance with the CWA at least as stringently as would a permit for the same discharge if issued by the Corps. Section 404(h)(1)(A)(i) of the CWA and 40 CFR 233.1(d), 233.20(a), 233.23(a), and 233.34(a) expressly require that permits issued by an assuming Tribe or State must apply and assure compliance with the CWA 404(b)(1) Guidelines, as discussed in section IV.A.2 of this preamble. In addition, Tribes and States must demonstrate that their section 404 programs will cover at least the same discharges as the CWA and will issue permits that are not less stringent than other aspects of the CWA beyond the CWA 404(b)(1) Guidelines.

Commenters generally agreed that permits issued by Tribes or States may not be less stringent than a permit for the same discharge if issued by the Corps of Engineers. One commenter characterized this concept as establishing a strong Federal "floor" for Tribal and State permits. As with the CWA 404(b)(1) Guidelines, Tribes and States seeking to assume the section 404 program may choose but are not required to adopt verbatim or incorporate by reference relevant portions of the CWA or its implementing regulations. Where a Tribe or State chooses not to adopt or incorporate by reference portions of the CWA or its implementing regulations, the Tribal or State program description should describe how the Tribal or State program is no less stringent than those provisions.

1. A Tribe or State Cannot Comply With Its Obligation Pursuant to Section 510 of the CWA To Impose Requirements No Less Stringent Than Federal Requirements by Trading Off More Stringent Requirements for Less Stringent Requirements

Most commenters supported EPA's proposal to codify the principle prohibiting tradeoffs between more lenient and more stringent requirements. However, one commenter did not support EPA's proposed approach and expressed concern that

²⁶ See *Menominee Indian Tribe of Wisconsin v. Env't'l Protection Agency*, 947 F.3d 1065, 1073–74 (7th Cir. 2020).

the proposed approach would deprive Tribes and States of flexibility. The Agency agrees that Tribes and States should have flexibility to determine how best to ensure that their permits will apply and assure compliance with the CWA 404(b)(1) Guidelines and be no less stringent than Federal requirements. That said, EPA has long stated that flexibility does not extend to tradeoffs among requirements, as discussed, in the 1988 preamble to the CWA section 404 Tribal and State program regulations. *See* 53 FR 20764, 20766 (June 6, 1988).

EPA is finalizing its proposal to codify this longstanding principle prohibiting tradeoffs between more lenient and more stringent requirements in its section 404 Tribal and State program regulations. As noted above, this clarification does not represent a change in EPA's longstanding position. Additionally, this principle is also articulated in EPA's regulations governing the section 402 program. *See* 40 CFR 123.25(a), Note. EPA sees no reason not to provide similar clarity for section 404 programs.

2. An Assuming Tribe or State Must Regulate at Least All Non-Exempt Discharges to Navigable Waters Within Its Jurisdiction, Except for Discharges to Waters Retained by the Corps

In addition to codifying its longstanding principle against tradeoffs, EPA is clarifying that Tribes and States wishing to assume the section 404 program must demonstrate consistency with aspects of the CWA beyond the CWA 404(b)(1) Guidelines. While a Tribe or State may regulate discharges that are not covered by the CWA, a Tribal or State program must regulate *at least* all non-exempt discharges of dredged and fill material to all navigable waters as defined by CWA section 502(7) ("waters of the United States") within the Tribe's or State's jurisdiction except for discharges to the subset of retained waters. This means that a Tribal or State program may not exempt discharges other than those exempted pursuant to CWA section 404(f). Similarly, when a Tribe or State assumes administration of the CWA section 404 program, it assumes administrative authority to permit discharges to all waters of the United States within its jurisdiction except for the subset of retained waters.²⁷ *See* 33

U.S.C. 1344(g)(1). As noted earlier, EPA has final administrative authority over the scope of "waters of the United States." *See Civiletti Memorandum*.

The subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1) is identified in the Memorandum of Agreement between the assuming Tribe or State and the Corps which, among other things, includes a "description of waters of the United States within the State over which the Secretary retains jurisdiction." 40 CFR 233.14(b)(1). *See* section IV.B.2 of this preamble for further discussion on retained waters. To the extent the coverage of the CWA as defined by the term "waters of the United States"²⁸ changes following court decisions or rulemaking, assumption of the section 404 program by a Tribe or State cannot result in a situation in which neither the assuming Tribe or State nor the Corps has authority to issue a permit for discharges to a water of the United States. The requirement that Tribes or States at all times have authority to issue permits for all non-exempt discharges to all waters of the United States within their jurisdiction is therefore generally not governed by 40 CFR 233.16(b), which addresses the modification of Federal statutes or other regulations.

As with the CWA 404(b)(1) Guidelines (*see* section IV.A.2 of this preamble), Tribes and States seeking to assume the section 404 program need not adopt verbatim or incorporate by reference relevant portions of the CWA or its implementing regulations, though they may do so. EPA recommends that Tribes and States identify in the program description (40 CFR 233.10(b) and 233.11) and Attorney General Statement (40 CFR 233.10(c) and 233.12) those provisions of Tribal or State law that will ensure that the Tribe or State will at all times have sufficient authority to issue permits for non-exempt discharges to all waters of the United States within its jurisdiction except for discharges to the subset of waters of the United States over which the Corps retains administrative authority following assumption. A Tribal or State section 404 program may regulate discharges into Tribal or State waters in addition to the jurisdictional CWA waters as well as issue permits for discharges into waters retained by the Corps; however, the Corps remains the CWA section 404 permitting authority for retained waters.

3. Tribes and States May Adopt Federal Interpretive Guidance and the Corps' General Regulatory Policies, But Are Not Required To Do So

EPA also is clarifying here the role of Federal interpretive guidance in Tribal or State programs, such as the Corps' Regulatory Guidance Letters or other interpretive statements issued by the Corps and/or EPA. Nothing in the CWA or 40 CFR part 233 requires that Tribes or States wishing to assume the section 404 program formally adopt or incorporate into their programs Regulatory Guidance Letters or other formal interpretive statements issued by the Corps and/or EPA. Federal agency interpretive guidance may often be helpful in providing transparency, clarity, and consistency in implementation of the Federal program. However, it does not have the effect of legally binding regulation and may not necessarily be applicable, for example, where Tribal or State requirements are more stringent than Federal requirements or the guidance references a procedure not part of the Tribal or State program. Moreover, Federal agency interpretive guidance may evolve over time with changes in case law and other circumstances.

Accordingly, while assuming Tribes and States may consider relevant Federal agency interpretive guidance and may choose to adopt it to aid in program implementation, they are not required to formally adopt Federal agency interpretive guidance. EPA recommends that Tribes and States provide transparency by describing as part of the Tribal or State program description (40 CFR 233.10(b) and 233.11) if and how they will consider Federal agency interpretive guidance.

Several commenters asserted that, in order to issue permits that are not less stringent than permits that would be issued by the Corps for the same discharge, Tribes and States assuming the section 404 program must incorporate the procedural and substantive provisions of the Endangered Species Act, the National Historic Preservation Act, the National Environmental Protection Act and other statutes that apply generally to Federal actions, including to permits issued by the Corps under CWA section 404. Issuance of a permit by a Tribe or State pursuant to an assumed program under CWA section 404(g), however, is not subject to the requirements for Federal actions under those statutes. *See* H.R. No. 95–830 at 104 (1977) ("The conferees wish to emphasize that such a State program is one which is established under State law and which

²⁷ As noted in the 1988 preamble, "States may have a program that is *more . . . extensive* than what is required for an approvable program." 53 FR at 20764, 20766 (June 6, 1988) (emphasis added). As described elsewhere in this preamble, Tribes and States may not assume *less* than what is required under the CWA.

²⁸ *See* 33 U.S.C. 1311(a), 1362(7).

functions in lieu of the Federal program”); *See Chesapeake Bay Foundation v. Virginia State Water Control Bd.*, 453 F. Supp. 122 (E.D. Va. 1978). That said, while the Federal statutory procedural requirements may not apply directly to Tribal or State actions, CWA section 404(h)(1)(A)(i) requires that Tribal and State programs have authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines, including those provisions that limit permit issuance to the least environmentally damaging practicable alternative, prohibit permitting of a discharge that would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act, and require consideration of potential effects on human use characteristics, including “areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value.” *See* section IV.A.2 of this preamble for further discussion on compliance with the CWA 404(b)(1) Guidelines.

Tribal or State adoption of the Corps’ General Regulatory Policies (33 CFR part 320) (including the Corps’ “public interest review” at 33 CFR 320.4(a)) is also not required. The CWA makes no reference to the Corps’ General Regulatory Policies, which, by their own terms, apply to a range of the Corps’ regulatory authority, including, but not limited to, CWA section 404 (*see* 33 CFR 320.2). As described elsewhere, the substantive environmental criteria used to evaluate discharges of dredged and fill material under CWA section 404 are set forth in the CWA 404(b)(1) Guidelines. *See* 40 CFR 230.2. Tribes or States are free, however, to incorporate elements of the Corps’ General Regulatory Policies into their permitting procedures if they choose to do so.

4. Tribes and States That Assume the CWA Section 404 Program Are Responsible for Administering All Portions of the Section 404 Program

Finally, EPA is codifying its long-held position that the Tribe or State is responsible for administering all portions of a section 404(g) program. Certain regulations implementing CWA section 404 were drafted to refer to the authority of the Corps of Engineers without accounting for Tribal or State assumption of the section 404 program. EPA is clarifying that, when a Tribe or State assumes administration of the section 404 program, the Tribe or State becomes responsible for all of the actions under section 404 for which the

Corps would be responsible if it were to issue the permit. The rule clarifies that it is the assuming Tribe or State that is responsible for administering all sections of the approved section 404 program. *See* section IV.B.4 of this preamble for further discussion on mitigation.

EPA also clarifies here that only Tribal, State, or interstate agencies may assume administration of the section 404 program. While a Tribe or State may establish general permits for discharges of dredged or fill material for categories of similar activities that will cause only minimal adverse environmental effects individually or cumulatively, they may not delegate permitting responsibility to non-Tribal or non-State entities, such as counties or municipalities. 33 U.S.C. 1344(g)(1); 40 CFR 233.2 (definition of “State”).

B. Program Approval

1. Partial Program Assumption

a. Overview and What the Agency Is Finalizing

Under 40 CFR 233.1(b), assuming Tribes or States must have authority to regulate all non-exempt discharges to all waters of the United States within their borders except for the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). Although some States have expressed an interest in being able to assume the authority to issue section 404 permits for just a portion of the section 404 regulated activities, or a portion of the assumable waters within the Tribe’s or State’s jurisdiction, the Agency proposed to maintain its longstanding position that the statute does not authorize partial assumption. After considering public comments, EPA is finalizing its proposed approach to maintain the text at section 233.1(b) which clarifies that partial programs are not approvable under section 404.

b. Summary of Final Rule Rationale and Public Comment

In 1987, Congress added section 402(n) to the CWA, specifically authorizing EPA to approve partial Tribal and State NPDES permit programs that “cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program. . . .” That provision specifies the scope of partial State section 402 programs that may be approved. Congress did not amend CWA section 404 to add a parallel provision authorizing a Tribe or State to assume the authority to issue section

404 permits for just a portion of discharges into assumable waters. Given the absence of a provision in the section 404 program authorizing partial assumption parallel to the provision in the section 402 program, EPA maintains its longstanding interpretation that the best reading of the CWA “requir[es] State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)).” 53 FR 20764 (June 6, 1988). Because of the special status of Indian country, a lack of State authority to regulate activities on Indian lands will not cause the State’s program to be considered a partial program. *See id.*

In addition to concluding that the statute does not authorize partial assumption, EPA also determined that partial assumption would be extremely difficult to implement. Numerous States have expressed an interest in being able to assume the authority to issue section 404 permits for just a portion of the section 404 regulated activities, or a portion of the assumable waters within the Tribe’s or State’s jurisdiction. While some commenters supported the status quo, others supported some form of partial assumption, or encouraged the Agency to explore options to provide additional flexibility. One commenter noted that partial assumption in States with more stringent or protective section 404 programs could advance environmental protection, and another noted that partial assumption of program activities could allow for more Tribal oversight and input in the permitting process.

EPA carefully considered the comments received, evaluating potential approaches to partial assumption, but ultimately concluded that it would be difficult to implement. Partial assumption based on a size threshold for a project would be unworkable because the “footprint” of a project may change during the execution of the project, which could result in the shifting of jurisdiction between the Federal and the assumed program. This outcome could conceivably encourage permittees to increase the footprint or impacts of their proposed project in order to remain with the Corps for the permit review process. Partial assumption based on a geographic area would also be challenging to implement, because Tribes and States could potentially divide watersheds or create a checkerboard of authority that could create problems in determining jurisdiction, as well as mitigation and enforcement. Partial assumption based on type of waterbody would pose difficulties because it might require a waterbody-by-waterbody determination

to identify permitting authority, and a project might impact more than one waterbody, creating confusion as to whether the permitting authority is the Corps or the Tribe or State. Partial assumption that would allow for the assumption of certain aspects of the program, such as a Tribe or State taking on permitting but not enforcement, or vice versa, would cause unavoidable duplication of effort between the Tribe or State and EPA and the Corps. And partial assumption based on activity would pose challenges because the Agency was unable to devise a comprehensive and clear way to define potential activities. Dividing functions between the Federal and Tribal or State governments would also be confusing for the regulated public.

EPA also considered phased assumption of program responsibilities, whereby the Tribe or State would ultimately assume the full program, but in stages or phases. EPA considered this approach but concluded that implementing a phased approach would present all of the challenges listed above regarding identification of the permitting authority. Additionally, there are no tools available to the Agency to ensure that a Tribe or State continues to phase in all portions of the program, or to determine how much time should be allowed for the process; the only mechanism available to the Agency to address a failure to complete phasing-in the full program would be withdrawal of the entire program.

Tribes and States not interested in full assumption can already take on a major role in managing their aquatic resources and in the permitting process even without assuming the section 404 program. A Tribe or State may develop their own dredged or fill material permitting program. Alternatively, the Federal section 404 program provides mechanisms that allow for Tribal and State input in developing permits for specific activities or specific geographic areas within Tribal or State jurisdiction. In 1977, Congress amended section 404 to allow the Corps to issue certain types of general permits, including State Programmatic General Permits (SPGPs). SPGPs are general permits issued by the Corps that provide section 404 authorization for certain discharge activities if the permittee has secured a State permit for that same activity. Some States have worked with the Corps to develop SPGPs, which create permitting efficiencies for certain projects within the State. While the Corps is still the section 404 permitting authority for SPGPs, these permits give the Tribe or State the ability to be actively involved, as well as the opportunity to create

more stringent requirements than the Federal section 404 permitting program, without the burden of assuming and administering the section 404 program.

In sum, EPA has concluded that continuing to interpret the CWA to prohibit partial assumption reflects the best reading of the text of the CWA and will enable the most transparent and consistent implementation of the section 404 program across the nation. This approach provides the most clarity to the public and the regulated community as to which waters are being assumed and whether applicants need a Tribal or State permit or a Federal permit. Conversely, partial assumption would be more likely to cause confusion among interested parties and be more difficult to implement consistently across the country for the reasons discussed earlier in this section.

2. Retained Waters

a. Overview and What the Agency Is Finalizing

As discussed in section III.B.2 of this preamble, the Corps retains authority over certain waters and wetlands adjacent to those waters when a Tribe or State assumes permitting authority. States and Tribes have expressed to EPA the need for further clarification regarding which waters a Tribe or State may assume and which waters the Corps retains. The Agency is finalizing as proposed a procedure for determining the extent of waters over which the Corps would retain administrative authority following Tribal or State assumption of the section 404 program, with certain minor modifications based on comments received. Under the procedure, before the Tribe or State submits its assumption request to EPA, the Tribe or State must submit a request to EPA that the Corps identify the subset of waters of the United States that would remain subject to the Corps' section 404 administrative authority following assumption. The Tribe or State must submit one of the following documents with the request to show that it has taken concrete and substantial steps toward program assumption: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. Within seven days of receiving the request for the retained waters description, EPA will review and respond to the request. If the request

includes the required information, then EPA will transmit the request to the Corps. EPA will also notify members of the public of that transmission and invite input to the Corps and to the Tribe or State within a 60-day period that the Corps may consider in developing its description.

If the Corps notifies the Tribe or State and EPA within 30 days of receiving the request transmitted by EPA that it will provide the Tribe or State with a retained waters description, the Corps has 180 days from the receipt of the request to provide a retained waters description to the Tribe or State. The purpose of the 180-day period is to allow the Corps time and opportunity to follow the process at 40 CFR 233.11(i) to identify those waters over which the Corps will retain section 404 permitting authority while providing a timeframe within which the Tribe or State can expect to receive a retained waters description. If the Corps does not notify the Tribe or State and EPA within 30 days of receipt of the request that it intends to provide a retained waters description, the Tribe or State may prepare a retained waters description. Similarly, if the Corps had originally indicated that it would provide a retained waters description but does not provide one within 180 days of EPA's transmission to the Corps, the Tribe or State may develop the retained waters description using the same approach described above. Alternatively, the Tribe or State and the Corps may mutually agree to extend the period of time for the Corps to develop the list.

The most recently published list of RHA section 10 waters (*see* 33 CFR 329.16) would be the starting point for the retained waters description. The Corps, Tribe, or State would place waters of the United States, or reaches of these waters, from the RHA section 10 list into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. *See* 33 U.S.C. 1344(g)(1). To the extent feasible and to the extent that information is available, the Corps, Tribe, or State would add other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. *See id.* The Corps, Tribe, or State would not place RHA section 10 list waters in the retained waters description if, for example, they were historically used as a means to transport interstate or foreign commerce

and are no longer susceptible to use as such with reasonable improvement.

The description would also describe retained wetlands. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands “adjacent” to retained waters, as that term is defined in 40 CFR 120.2(c). A Tribe or State may choose to negotiate an agreement with the Corps to establish an administrative boundary through jurisdictional adjacent wetlands, landward of which the Tribe or State would assume administrative authority. If the Tribe or State and the Corps reach agreement on such a boundary, EPA may consider it when it is submitted with the program submission. As a default, however, the Corps would retain all wetlands adjacent to retained waters. The retained waters description does not need to include a specific list of adjacent wetlands or provide mapping or a description of the lateral extent of those wetlands.

As recognized in EPA’s regulations, in many cases, States lack authority to regulate activities in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that another jurisdiction has authority to regulate discharges into waters in Indian country. *See id.*

EPA is changing the regulatory provision stating that modifications to the extent of the retained waters description always constitute substantial revisions to a Tribal or State program. 40 CFR 233.16(d)(3) (2023). The new provision is more limited in scope: it states that removals of waters from the retained waters description, other than *de minimis* removals, are substantial revisions. In addition, revisions to an approved Tribal CWA section 404 program are substantial where they would add reservation areas to the scope of its approved program. EPA is also providing that the Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters as described in CWA section 404(g)(1) and therefore necessitate revisions to the retained waters description. The Tribe or State would incorporate the revisions that the Corps has identified, pursuant to the modification provisions agreed upon in the Memorandum of Agreement.

EPA is modifying the program description requirements to provide that the Tribal or State program will

encompass all waters of the United States not retained by the Corps at all times. 40 CFR 233.11(i)(6). EPA is also removing the term “traditionally” from the term “traditionally navigable waters” in the following provision: “[w]here a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notice and public hearings.” *Id.* at 233.14(b)(2).

b. Summary of Final Rule Rationale and Public Comments

Section 404(g) of the CWA authorizes Tribes and States to assume authority to administer the section 404 program in some, but not all, navigable waters within their jurisdiction. “Navigable waters” is defined at CWA section 502(7) as “waters of the United States, including the territorial seas.” The Corps retains administrative authority over a subset of these waters even after program assumption by a Tribe or State.²⁹ Specifically, section 404(g)(1) states that the Corps retains administrative authority over the subset of waters of the United States consisting of “. . . waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark . . . including wetlands adjacent thereto.” 33 U.S.C. 1344(g)(1). A Tribe or State assumes section 404 administrative authority over all waters of the United States within its jurisdiction that are not retained by the Corps.

EPA’s prior regulations require that the program description that is part of a Tribal or State assumption request include “[a] description of the waters of the United States within a State over which the State assumes jurisdiction

under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.” 40 CFR 233.11(h) (2023). In addition, the prior regulations state that the Memorandum of Agreement between a Tribe or State and the Corps required as part of the assumption request shall include a description of the waters of the United States within the Tribe or State for which the Corps will retain administrative authority. 40 CFR 233.14(b)(1) (2023).

Prior to this rule, EPA had not provided guidance on a process for identifying the subset of waters of the United States over which the Corps would retain administrative authority following Tribal or State assumption. Without a clear and practical process, individual States and the Corps districts have had to interpret the extent of retained waters and the meaning of “wetlands adjacent thereto” in the context of case-by-case development of Tribal and State program descriptions for prospective programs and the Memoranda of Agreement that are negotiated between the Corps and the State as part of a program submission. Tribes and States have indicated that confusion about how best to identify the extent of retained waters and adjacent wetlands has been a barrier to assumption and have asked EPA to provide clarity.

As discussed in section III.B of this preamble, EPA convened the Assumable Waters Subcommittee under the auspices of the NACEPT to provide advice and recommendations as to how EPA could best clarify the subset of waters of the United States over which the Corps retains administrative CWA section 404 authority when a Tribe or State assumes the section 404 program. NACEPT adopted the majority recommendation in the Subcommittee report and incorporated it into its recommendations provided to EPA in June 2017. Although at the time of the Subcommittee report, the Corps presented a separate view from the majority of the extent of retained waters and adjacent wetlands for which it would retain administrative authority, the Department of the Army subsequently sent a letter to the Corps supporting the majority recommendation as to the extent of retained waters and adjacent wetlands (though the letter did not define a specific administrative boundary for

²⁹ When a Tribe or State assumes administrative authority for the CWA section 404 program, it assumes authority to permit discharges of dredged and fill material to all “waters of the United States” within the meaning of CWA section 502(7) except for the subset of waters of the United States over which the Corps is required to retain administrative authority under Section 404(g). The scope of CWA jurisdiction is defined by CWA section 502(7) as “waters of the United States,” and is distinct from and broader than the scope of waters over which the Corps retains administrative authority following Tribal or State assumption of the section 404 program. This rule develops a process for identifying the subset of waters of the United States over which the Corps retains administrative authority following approval of a Tribal or State section 404 program. It does not define the broader set of “waters of the United States” within the scope of CWA section 502(7).

adjacent wetlands).³⁰ NACEPT's recommendations, based on the Subcommittee majority recommendation that was subsequently endorsed by the Corps, are discussed below.

i. Subcommittee's Recommendation

The Subcommittee majority recommended that for purposes of identifying the subset of waters of the United States over which the Corps would retain administrative authority following Tribal or State assumption of the CWA section 404 program, existing RHA section 10 lists³¹ be used "with two minor modifications: any waters that are on the section 10 lists based solely on historic use (e.g., historic fur trading routes) are not to be retained (based on the Congressional record and statute), and waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program." Final Report of the Assumable Waters Subcommittee at v.³² The Subcommittee also recognized that "waters may be added to Section 10 lists after a state or tribe assumes the program, and recommends in that case, such waters may also be added to lists of USACE-retained waters at that time." *Id.* The majority recommendation was based on its analysis of the text and legislative history of section 404(g), which is discussed in the Background description in section III of this preamble, in which the majority concluded that Congress intended that the Corps retain permitting authority over some RHA section 10 waters. *See id.* at 55–61 (Appendix F.) The majority thought this approach had the benefit of being clear and easy to implement. *See id.* at 17–20.

The Subcommittee majority also addressed the scope of retained adjacent wetlands. It recommended that the Corps retain administrative authority over all wetlands adjacent to retained waters landward to an administrative boundary agreed upon by the Tribe or State and the Corps. This boundary, the recommendation added, "could be negotiated at the state or tribal level . . . if no change were negotiated, a 300-foot national administrative default line

would be used." Final Report of the Assumable Waters Subcommittee at vi. The Subcommittee majority opinion noted that large wetland complexes can extend far from the retained water. *Id.* at 31. Without such an administrative line, the Subcommittee majority noted, assumption could lead to a confusing pattern of USACE and State or Tribal permitting authority across the landscape.

With regard to Tribal considerations during assumption of the section 404 program, the Subcommittee found that "Section 518 of the CWA, enacted as part of the 1987 amendments to the statute, authorizes the EPA to treat eligible Indian tribes in a manner similar to states ('treatment as a State' or TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs [including CWA section 404] and receiving grants under several CWA authorities (81 FR 30183, May 16, 2016)." *Id.* at 3. The Subcommittee majority recommended that "Tribal governments pursuing assumption of the 404 program will follow the same process as states, though it is expected that there will be some nuanced differences; for example, in addressing Tribal Indian Reservation boundaries" and that "[i]n a state-assumed program, states will generally not assume authority for administering the 404 program within Indian country; instead, such authority will generally be retained by the USACE unless the tribe itself is approved by EPA to assume the 404 program." *Id.*

The Subcommittee majority noted that its recommended approach is consistent with "the plain language of Section 404(g) and the legislative history. Congress clearly intended that states and tribes should play a significant role in the administration of Section 404—as they do in other CWA programs—anticipating that many states would assume the Section 404 program." *See id.* at 19.

ii. Final Rule Approach to Retained Waters

1. Contents of the Retained Waters Description

Taking into consideration the majority recommendation of the Subcommittee as well as stakeholder input on the proposed rule, the subset of waters of the United States over which the Corps would retain administrative authority would include the following:

—Waters of the United States, or reaches of those waters, from the RHA section 10 list(s) that are known to be presently used or susceptible to use in

their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;

—Other waters known by the Corps or identified by the Tribe or State as presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; and

—Retained wetlands that are adjacent to the foregoing waters.

As recognized in EPA's regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges. *See id.* The Memorandum of Agreement between the Corps and State must address any waters in Indian Country which are to be retained by the Corps upon program assumption by a State. EPA also notes that the Corps would retain jurisdiction over waters located in lands of exclusive Federal jurisdiction in relevant respects (e.g., certain national parks identified in 16 U.S.C. Chapter 1 as having lands of exclusive Federal jurisdiction, such as Denali National Park).

Some commenters supported this approach, outlined in the proposed rule. Others critiqued the Agency's reliance on the RHA section 10 lists as a starting point for identifying retained waters, stating that these lists can be out of date and often lack current information or supporting documentation. Some commenters suggested that RHA section 10 lists should only be relied upon if they have been comprehensively updated within the previous five years. Some commenters would require that the Corps review all judicial determinations involving the subject State to identify additional retained waters.

EPA recognizes that the available RHA section 10 lists may not cover all RHA section 10 waters in the Tribe's or State's jurisdiction and that they may not be updated to reflect current use and characteristics of listed waters. However, EPA agrees with the recommendation of the Assumable Waters Subcommittee that these lists provide a useful starting point for determining the scope of retained waters, given the clear indication in the

³⁰ R.D. James, Memorandum for Commanding General, U.S. Army Corps of Engineers: Clean Water Act Section 404(g)—Non-Assumable Waters (July 30, 2018).

³¹ The RHA section 10 lists are compiled and maintained by the Corps district offices for every State except Hawaii. 33 CFR 329.14 describes the process the Corps follows to make navigability determinations pursuant to the RHA.

³² Available at https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommittee_finalreport_05-2017_tag508_05312017_508.pdf.

legislative history that Congress intended the Corps to generally retain RHA section 10 waters, with some modifications, and that an approach that starts with existing lists will be clear and easy to implement. No commenters proposed implementable alternatives to the RHA section 10 lists as a starting point. Comprehensively reviewing and revising RHA section 10 lists is a multi-year, resource-intensive and relatively rare undertaking, so excluding from use those lists not comprehensively updated within the past five years would cause significant delays in assumption. However, to ensure the retained waters descriptions remain as current and accurate as is feasible, EPA has modified the final rule to provide that whenever RHA section 10 lists are updated, an orderly process exists for incorporating those changes, as appropriate, into a Tribe's or State's retained waters description. Specifically, EPA now requires that the Memorandum of Agreement between the Corps and the Tribe or State outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list that implicate the statutory scope of retained waters and the Tribe or State will incorporate those changes into its retained waters description.

With respect to the suggestion to require review of all judicial decisions related to navigability during the development of the retained waters description, EPA agrees that these should be viewed as resources during the development of the description, as well as information submitted by interested parties, navigability analyses the Corps has conducted since last updating its RHA section 10 list, and other sources of information. However, EPA is declining to define the sources of information for the development of the retained waters description in the regulations because it would be unnecessarily prescriptive and limit the flexibility of the Corps or the relevant Tribe or State.

Some commenters argued that the retained waters description must include waters that have been historically navigable, as historical navigability often indicates whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory criteria for retained waters in section 404(g). EPA agrees that historical navigability can sometimes indicate that a water is navigable in its natural condition or with reasonable improvement. Yet this is not always the case. Sometimes historically navigable waters have been modified—as a result

of dams, water diversions for irrigation, climate change, or other circumstances—and cannot be restored to navigability with reasonable improvements. EPA therefore retains the proposed rule approach, based on the statutory language and consistent with the recommendation of the Assumable Water Subcommittee, which would remove waters or reaches of waters that were historically navigable but that are not currently used as a means to transport interstate or foreign commerce in their natural condition or with reasonable improvement.

EPA also received comments stating that the starting point for the scope of the Corps-retained waters must be documented traditional navigable waters (TNWs) as opposed to RHA section 10 lists. The Corps' minority recommendation in the Assumable Waters Subcommittee Final Report advocated for this approach. *See* Final Report at 21–22. The majority rejected reliance on documented TNWs as a starting point on the basis that using the RHA section 10 lists is clearer and easier to implement as well as more consistent with the legislative history of section 404(g). *See id.* at 17. The majority explained that RHA section 10 lists are “well established, and can be relatively easily labeled on regional maps or GIS systems . . .” thereby allowing members of the public “to readily determine which agency is responsible for Section 404 regulation at a specific location.” *See id.* at 18. In contrast, the majority expressed concerns that the extent of documented TNWs is confusing and less transparent, as they are documented in “multiple regulations, guidance, and procedures,” rather than in one central, public location. *See id.* The majority also noted that because most TNWs have not yet been identified as such and thus lists of documented TNWs could easily and regularly increase, using RHA section 10 lists provides greater certainty and predictability regarding the scope of the Tribal or State program. *See id.* at 19. In addition, the majority viewed Congress as intending to retain Corps authority over RHA section 10 waters, with certain minor exceptions. *See id.* at 55–61; *see also* section III of this preamble. For all of the reasons that the Subcommittee cited, EPA has decided to establish RHA section 10 lists as a starting point for retained waters, rather than documented TNWs. EPA notes that ultimately the Department of the Army transmitted to the Corps its support for the majority recommendation's reliance on RHA section 10 lists. *See* section IV.B.2.b of this preamble.

The retained waters description would acknowledge that wetlands are to be retained if they are adjacent to Corps-retained waters. As noted above, the default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands “adjacent” to retained waters. Some Tribes and States may choose to negotiate with the Corps to establish an administrative boundary through jurisdictional adjacent wetlands, landward of which the Tribe or State would assume administrative authority. If they do so, EPA may consider that part of the program description when it is submitted with the program submission. The default approach, however, is that the Corps would retain all adjacent wetlands. A specific list of all retained adjacent wetlands is not required to be included in the retained waters description, because developing such a list would generally be impracticable at the time of program assumption.

EPA had proposed that Tribes or States and the Corps establish an administrative boundary through adjacent wetlands to delineate between retained and assumed wetlands, and that the default boundary be 300 feet from retained waters. Some commenters expressed support for this approach, stating that it would allow needed flexibility for Tribes, States, and the Corps to develop Tribal or State programs and that the proposal is authorized by the CWA. The significant majority of comments received during the public comment period, however, expressed concerns about an administrative boundary default approach, both with respect to implementation and legal authority.

Concerns expressed about implementation included the lack of a scientific basis for the 300-foot default boundary and the lack of a methodology for applying the default boundary. Some commenters pointed out that an administrative boundary would fragment the permitting in large wetlands complexes, leading to stakeholder confusion, and bifurcate the environmental review process, thereby making it difficult to ensure a holistic evaluation of impacts. These commenters stated that because an administrative boundary would sometimes require two permitting agencies to issue different permits for two parts of the same project, it would unnecessarily duplicate effort on the part of permittees, State agencies, and members of the public. Commenters further noted that it would also burden those seeking to challenge permits, who might need to litigate two separate

permits in two separate fora, potentially on different timelines depending on the State or Tribe's judicial review procedures. Commenters also argued that, because the scope of "adjacent wetlands" significantly narrowed following the Supreme Court's May 2023 decision in *Sackett v. EPA* and the Agency's subsequent August 29, 2023, rulemaking conforming the definition of "waters of the United States" to that case, 88 FR 3004, an administrative boundary is no longer necessary. EPA finds the practical concerns raised by commenters valid. Given the challenges involved in implementing the administrative boundary concept and the reduced need for it, as identified by commenters, EPA decided not to finalize the proposed approach.

Commenters also raised legal objections to the administrative boundary approach. These commenters stated that CWA section 404(g)(1) provides that adjacent wetlands may not be assumed by a State or Tribe and that EPA lacks the authority to approve an administrative boundary that would allow a State to assume authority over any part of wetlands that are adjacent to a retained water. Because EPA has decided not to finalize the administrative boundary proposal due to implementation concerns, addressing the scope of the Agency's legal authority to approve such a boundary is unnecessary. If a State or Tribe chooses to negotiate an administrative boundary with the Corps when developing an assumption request, and the parties reach agreement, EPA may consider issues related to the scope of their proposed program at that time.

A number of commenters asked that EPA provide more clarity as to the "universe of waters that would be retained," including the information and data that the Corps and State or Tribe would use to assess the scope of retained waters. As noted previously, however, these commenters did not generally provide specific suggestions as to how EPA could provide additional clarity. The approach EPA is outlining adopts the recommendation of the Assumable Waters Subcommittee, which spent several years assessing how EPA could best clarify the scope of retained waters.

Moreover, for the purposes of CWA section 404(g)(1), determining which waters are presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, as well as the scope of adjacent wetlands is, to some extent, inherently a case-specific process. While determining whether a water is

retained does not require compliance with the requirements for determining whether a water is subject to RHA section 10, and does not necessarily require a navigability study, the factors used to determine RHA section 10 jurisdiction may still be relevant to determining whether a water should be retained. As noted earlier, however, there are key distinctions between RHA section 10 waters and the scope of retained waters. Specifically, unlike RHA section 10 waters, Corps-retained waters do not include waters that are only used historically for the transport of interstate or foreign commerce but do include adjacent wetlands and, when a State is assuming the program, waters subject to Tribal authority.

EPA's approach to determining the retained waters description reflects its attempt to balance the competing priorities of providing an efficient process for program assumption versus guaranteeing a fully comprehensive and precise description. When a Tribe or State is preparing to request assumption, the Corps or assuming Tribe or State may not know all waters that are presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce at the time of assumption. However, requiring a comprehensive assessment of every water within the Tribe's or State's jurisdiction at the time of assumption to determine if they should be retained pursuant to the parenthetical in CWA section 404(g)(1) could pose significant practical and budgetary challenges. Depending on the number of waters within the Tribe's or State's jurisdiction, developing a comprehensive retained waters description could take many years and reduce the Corps' ability to carry out its regulatory obligations. EPA attempts to strike a balance by using the RHA section 10 list as a starting point and by stating that the retained waters description must encompass waters "known" by the Corps, Tribe, or State to meet the statutory criteria.

Further, as discussed in section IV.B.2.b.ii.2 of this preamble below, EPA has added an opportunity for public input. EPA is confident that geographic information systems technology and navigation charts, review of judicial decisions, public input, past jurisdictional determinations, and other sources of information should enable the Corps, Tribe, or State to take significant steps in identifying waters in the Tribe's or State's jurisdiction that should be included in the retained waters description. As discussed further below,

moreover, EPA's regulation allows for the retained waters description and the Memorandum of Agreement between the Corps and Tribe or State to be modified if additional waters are identified after assumption, or if waters included in the description no longer meet the statutory criteria.

2. Procedures for Developing the Retained Waters Description

EPA is facilitating clarity and efficiency in the program assumption process by establishing defined timeframes for the development of the retained waters description. Before a Tribe or State provides an assumption request submission to EPA, the Tribal leader, State Governor, or Tribal or State Director must submit a request to EPA that the Corps identify the subset of waters of the United States over which the Corps would retain administrative authority. The Tribe or State must submit the request with specific additional information that should accompany the request to show that the Tribe or State has taken concrete and substantial steps toward program assumption. One of the following must be included with the Tribe's or State's request that the Corps identify which waters would be retained: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. Within seven days of receiving the request for the retained waters description, EPA will review and respond to the request. If the request includes the required information, then EPA will transmit the request to the Corps. This requirement is intended to provide assurance to the Corps that developing a retained waters description for purposes of program assumption is a worthwhile expenditure of its time and resources.

One commenter opposed the requirement that a Tribe or State provide supporting documentation for its request, stating that knowing the scope of assumed waters is a foundational, and preliminary, piece of information that States need before taking concrete and substantial steps toward assumption. EPA recognizes the importance of understanding the scope of assumed waters to Tribes and States before they consider assumption. EPA seeks to balance the desire of Tribes and States to assess the scope of a potential program prior to embarking on such a program, however, with the desire to

avoid unnecessarily imposing workload burdens on the Corps. If EPA did not impose such a prerequisite, the Corps could be asked to embark upon lengthy assessments of the scope of retained waters at the request of State environmental agency staff, for example, only to find out after having expended significant resources that the State legislature or governor has no intention of pursuing program assumption. EPA is therefore finalizing its requirement that a Tribe or State document it has taken concrete and substantial steps toward program assumption before submitting its request for a retained waters description.

In addition to seeking to facilitate the clarity and efficiency of the program assumption process, EPA also seeks to increase public participation and transparency. To that end, EPA is providing that, upon transmitting a request for a retained waters description to the Corps, the Agency will also post a public notice of that transmission on its website and notify members of the public known to be interested in these matters of that transmission, inviting public input to the Corps as well as the State or Tribe on the scope of the retained waters description within a 60-day period. The Corps (or the Tribe or State if the Corps declines to define the description) may consider submitted information in developing its description. If the Corps were to develop the description, the Tribe or State may provide information to the Corps during that 60-day period. Similarly, if the Tribe or State were to develop the list, the Corps may provide information to the Tribe or State before the end of that 60-day period. Regardless of which entity develops the retained waters description, the Corps and Tribe or State will likely maintain regular communication regarding its development. Yet providing data at the beginning of the description development process will ensure that it can be adequately considered.

This public notice and input provision responds to some commenters' requests for additional opportunities for public participation in the development of the retained waters description, while also retaining the efficiency in the description development process that other commenters requested. EPA is not establishing a public notice and comment period on the final retained waters description distinct from the other procedural steps, as that would lengthen the time period for seeking assumption and impose a substantial burden on the Corps, the assuming State or Tribe, and EPA. A 60-day public

input period, however, would increase public participation in the process of determining which waters the Corps would retain and the Tribe or State would assume, without delaying the assumption process. The Corps (or the Tribe or State) would not be obligated to respond directly to this input but could consider it in compiling its description of retained waters.

Members of the public have another opportunity to provide comment on the retained waters description when reviewing the Tribe's or State's program submission. Some commenters requested a separate public notice and comment process specifically if a State takes on the development of the retained waters description. EPA expects that the public input opportunity offered when EPA transmits a request for a retained waters description to the Corps will be sufficient to provide the Tribe or State with information to assist in developing the description. Moreover, a Tribe or State may provide opportunities for public engagement as it develops its program submission, which would again allow members of the public to provide input on the retained waters description.

If the Corps notifies the Tribe or State and EPA within 30 days of receipt of the request transmitted by EPA that it intends to provide a retained waters description, the Corps would have 180 days from the receipt of the request transmitted by EPA to develop the description. During the 180-day period the Corps would be able to review the current RHA section 10 list(s); place waters of the United States or reaches of those waters from the RHA section 10 list into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; and to the extent feasible and to the extent that information is available, add other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

If the Corps does not notify the Tribe or State and EPA within 30 days of receipt of the request transmitted by EPA that it intends to provide a retained waters description, the Tribe or State may prepare a retained waters description using the same approach outlined above for the Corps. Similarly, if the Corps had originally indicated that it would provide a retained waters

description but does not provide one within 180 days of EPA's transmission to the Corps, the Tribe or State may develop the retained waters description using the same approach described above. Alternatively, the Tribe or State and the Corps may also mutually agree to provide the Corps additional time to provide a retained waters description.

EPA received a number of comments on the time frame and coordination process outlined in the proposed rule, which it is finalizing in this rule. Some commenters stated that the Corps should be allowed one year to develop a retained waters description to allow sufficient time to conduct the assessments needed to compile a complete description, particularly given that some RHA section 10 lists may be outdated. Some commenters also stated that under no circumstances should a Tribe or State have the opportunity to develop a retained waters description, contending that States lack the authority and expertise to make these determinations. Other commenters stated that 180 days was too long a period to require a State or Tribe to wait prior to finalizing their program submission, and that Congress did not intend States and Tribes to have to wait for this length of time.

EPA decided to finalize its proposed approach of allowing the Corps 180 days to develop a list, which it views as striking a balance between the desire of States and Tribes to understand the scope of a potential program as quickly as possible, and the time the Corps needs to complete the resource-intensive process of assessing those waters that meet the statutory criteria to be retained. Moreover, in response to those commenters who urged EPA to allow the Corps additional time, EPA added a provision that would extend the 180-day time frame if the requesting Tribe or State agrees with the Corps on an extension. In response to the commenters that stated that Tribes or States may never develop a retained waters description, EPA views this rule as providing ample opportunity and encouragement to the Corps to develop the description. However, allowing a Tribe or State opportunity to develop a list if the Corps chooses not to do so is a backstop that is consistent with and helps to implement the statute's intent of facilitating Tribal and State assumption. Nothing in the CWA prohibits the Tribe or State from developing a retained waters description. The Act requires that the Tribe or State submit a description of assumed waters, and it is reasonable for the Agency to allow a Tribe or State to submit such a description for EPA

approval with their program request, if the Corps declines to develop a retained waters description.

EPA disagrees with those commenters who expressed concerns that allowing the Corps 180 days to develop a retained waters description would unduly hamper Tribal or State efforts to develop a program submission. In EPA's experience, States that have considered seeking assumption typically spend at least several years preparing their submissions. Allowing the Corps to spend 180 days developing the description (or more, if an extension is jointly agreed upon) would therefore be unlikely to impede Tribal or State efforts. Moreover, the Corps may need 180 days to allocate staff to this project and conduct the reviews and analyses needed to determine which waters meet the statutory criteria to be retained by the Corps.

The Subcommittee majority recommended that identification of the subset of waters of the United States over which the Corps would retain administrative authority be a collaborative process. EPA anticipates that, when a Tribe or State seeks assumption, the Tribe or State, the Corps, and EPA will engage collaboratively throughout the development of this description of retained waters to be submitted with the program request package for review.

Even if the Corps does not provide a retained waters description to the Tribe or State, the Corps may provide relevant information to the Tribe or State at any time during the Tribe's or State's development of the retained waters description. In addition, the Corps would have two formal opportunities to review the list of retained waters that is produced by the Tribe or State. First, the Memorandum of Agreement between the Corps and the Tribe or State includes a description of retained waters, and thus the Corps would have the opportunity to review the description of retained waters during the drafting process for that memorandum and before signing that memorandum. Second, the Corps would have the opportunity to review and provide comments on the Tribe's or State's program submission materials, which includes the description of retained waters, after the Tribe or State submits a program request to EPA. Similarly, if the Corps provides a retained waters description to the Tribe or State, the Tribe or State would presumably review it to ensure that the retained waters description reflects waters presently used or susceptible to use in their natural condition or by reasonable improvement as a means to

transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, as well as wetlands that are adjacent to the foregoing waters, to the extent feasible and to the extent that scope of waters is known.

The Subcommittee majority recommended that EPA and the Corps establish a clear dispute resolution procedure to be followed if the Tribe or State and the Corps were not able to complete the retained waters description. Because EPA believes that the proposed approach lays out a clear process for establishing the description, EPA is not specifying such a dispute resolution procedure by regulation. See section IV.E.1 of this preamble for further discussion on dispute resolution. EPA encourages Tribes and States seeking to assume the section 404 program to work collaboratively with the Corps to resolve any issues, and EPA may participate in these discussions to advise and facilitate development of the description.

EPA's process, similar to the one described by the Subcommittee majority, is clear and practical, is based on available and relatively stable and predictable information, and is able to be implemented efficiently at the time a Tribe or State seeks assumption. It is also consistent with the text and history of section 404(g), which reflects Congress' intent that the Corps generally retain permitting authority over certain RHA section 10 waters. See section III.A of this preamble. Because the Agency's approach, consistent with the Subcommittee majority's recommendation, effectuates the language and history of section 404(g) and achieves Congress' goal of providing an implementable approach for assumption, generally speaking, a retained waters description that uses this approach will satisfy the statutory criteria for retained waters. However, the Regional Administrator retains the ultimate authority to determine whether to approve a Tribal or State program. As this approach does not conflict with the approved extent of the Michigan and New Jersey programs, no changes to their existing program scope would be required.

3. Modifying the Extent of Retained Waters

EPA is revising the provision in the prior regulations that currently states that modifications that affect the area of jurisdiction (such as modifications to the retained waters description) always constitute substantial revisions to a Tribal or State program. The prior regulations provide that EPA may

approve non-substantial revisions by letter, but require additional procedures, including public notice, inter-agency consultation, and **Federal Register** publication, for substantial revisions. 40 CFR 233.16(d)(2)–(4) (2023). EPA is modifying this provision to provide that all removals, except *de minimis* removals, from the retained waters description are “substantive,” and therefore trigger the notice requirements for “substantive” program changes.” In addition, changes in geographic scope of an approved Tribal CWA section 404 program that would add reservation areas to the scope of its approved program are substantial program revisions.

EPA had proposed removing the provision stating that modifications affecting the area of jurisdiction always constitute substantial revisions, though also providing that changes in geographic scope of an approved Tribal CWA section 404 program that would add reservation areas to the scope of its approved program are substantial program revisions. The proposed change was based on EPA's experience that retained waters descriptions sometimes require minor tweaks (such as minor modifications to the head of navigation of a particular waterbody) and that requiring a full **Federal Register** notice for such changes is unnecessarily burdensome. Commenters expressed concern, however, that pursuant to the proposed revision waters could be reassigned to State jurisdiction without any public notice or opportunity to comment. These commenters therefore asked that all removals from the retained waters description be viewed as substantial revisions. EPA is accepting this recommendation and finalizing this approach, with the qualification that *de minimis* removals are not substantial. Examples of *de minimis* removals may include a reduction in the length of a retained portion of a waterbody by a hundred feet prompted by a new navigability study or changes resulting from a water infrastructure project, or the removal from the retained waters description of an oxbow lake that sedimentation has severed from a Corps-retained river. EPA thinks this approach will achieve EPA's goal of removing unnecessarily burdensome procedures while providing transparency for interested parties.

While development of the retained waters description involves collaboration between the Corps and the Tribe or State, the Corps remains the agency with sole responsibility for maintaining and modifying any RHA section 10 list. The Subcommittee

majority recognized that the Corps may add waters to RHA section 10 lists after a Tribe or State assumes the program. The Subcommittee majority recommended that in such cases, Tribes or States may revise their retained waters descriptions to add these waters, if consistent with CWA section 404(g)(1). As discussed above, an RHA section 10 list will not necessarily be co-extensive with the retained waters description and changes to RHA section 10 lists do not always warrant changes to the retained waters description. For example, if the Corps adds to its RHA section 10 list a water which was historically used in interstate or foreign commerce but is no longer used or susceptible to use for that purpose, that water would not be added to the retained waters description.

If, however, the Corps were to add waters to its RHA section 10 list that are used or susceptible to use in interstate or foreign commerce, the relevant Tribe or State would add these waters to the retained waters description. To provide a predictable and transparent procedure for such modifications, and to address commenters' concerns that many RHA section 10 lists are not currently up to date, the final rule provides that the Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters. Pursuant to the Memorandum of Agreement, the Tribe or State would incorporate the changes the Corps has identified as implicating the scope of retained waters into its retained waters description.

Under the final rule, EPA would have discretion to determine whether additions to the area of jurisdiction, which includes the extent of retained waters, are substantial or non-substantial. EPA may then decide whether to approve the modification to the retained waters description consistent with the procedures in 40 CFR 233.16.

This rule clarifies that changes in geographic scope of an approved Tribal CWA section 404 program that would add reservation areas to the scope of its approved program are substantial program revisions. Where a Tribe seeks to include additional reservation areas within the scope of its approved program, the Regional Administrator must determine that the Tribe meets the TAS eligibility criteria for the additional areas and waters. The substantial modification process involves circulating notice to "those persons

known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS." 40 CFR 233.16(d)(3). In the case of a change in geographic scope of a Tribal program, known interested persons would typically include representatives of Tribes, States, and other Federal entities located contiguous to the reservation of the Tribe which is applying for TAS. *See, e.g.,* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 FR 64876, 64884 (December 12, 1991). This clarification is necessary because as discussed above, additions that affect the area of jurisdiction are not always substantial. However, revising a Tribal program to add new reservation land and waters of the United States on that land is substantial because it requires a determination that the Tribe meets the TAS eligibility criteria for such areas, pursuant to 40 CFR part 233, subpart G.

EPA is further amending the procedures associated with approval of program revisions to require EPA to notify the Corps of all approvals of program modifications, whether they are substantial or non-substantial. EPA is also requiring that other Federal agencies be notified of these program modification approvals as appropriate.

4. Additional Clarification

EPA is removing the term "traditionally" from the term "traditionally navigable waters" in the following provision: "Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notices and public hearings." 40 CFR part 233.14(b)(2). EPA is removing the term "traditionally" to align the reference to retained waters with the rest of this preamble and regulations, which refer to retained waters using the statutory language in the section 404(g) parenthetical, and do not refer to retained waters as "traditionally" or "traditional navigable waters." "Traditional navigable waters" are defined in the definition of "waters of the United States" and are not addressed by this rule. *See* 40 CFR part 120.2(a)(1)(i).

3. Program Assumption Requirements

a. Overview and What the Agency Is Finalizing

The Agency proposed changes to better harmonize its program approval requirements with program requirements in other sections of the CFR. To assume the section 404 program, a Tribe or State must be able to demonstrate that it can meet the requirements for permitting, program operation, compliance evaluation and enforcement, and administer a program that is consistent with section 404. EPA is revising the requirements for the program descriptions that Tribes and States submit to EPA when they request approval to assume the section 404 program. First, the revisions clarify that the description of the funding and staff devoted to program administration and compliance evaluation and enforcement must demonstrate that the Tribe or State is able to carry out the existing regulatory requirements for permit review, program operation, and compliance evaluation and enforcement programs, provided in 40 CFR part 233 subparts C through E. In order to do so, the Tribe or State must provide in the program description staff position descriptions and qualifications, program budget and funding mechanisms, and any other information a Tribe, State, or EPA considers relevant. The revisions ensure that when a Tribe or State submits a request to assume the section 404 program, its program submission would demonstrate the Tribe or State has the resources necessary to ensure that the permit decisions comply with permit requirements in 40 CFR part 233 subpart C, as applicable; that its permitting operations would comply with the program operation requirements of 40 CFR part 233 subpart D, as applicable; and that its compliance evaluation and enforcement operations would comply with the compliance evaluation and enforcement requirements of 40 CFR part 233 subpart E, as applicable.

EPA is also revising the requirement that currently provides that if more than one State agency is responsible for the administration of the program, the program description shall address the responsibilities of each agency and how the agencies intend to coordinate administration, compliance, enforcement, and evaluation of the program. This rule adds that the program description must address additional program budget and funding mechanisms for each of these agencies, and how the agencies intend to coordinate program funding.

Similarly, the Agency is revising the requirement that the Tribe or State program description include “[a] description of the scope and structure of the State’s program. . . . [which] should include [the] extent of [the] State’s jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria.” 40 CFR part 233.11(a) (2023). EPA is clarifying that this description “must” address all of the listed elements in 233.11(a). The rule is also clarifying that the description must provide sufficient information to demonstrate that the criteria are sufficient to meet the permit requirements in 40 CFR 233 subpart C. These revisions do not substantively change the requirements for permit review, program operation, and compliance evaluation and enforcement programs. Rather, they ensure that Tribes or States provide EPA with sufficient information to ensure that Tribal or State programs would be able to meet these requirements.

Finally, EPA is revising the program description requirement that if more than one Tribal or State agency would be administering the program, the program description shall address inter-agency coordination. The revision clarifies that the description of inter-agency coordination must include coordination on enforcement and compliance.

b. Summary of Final Rule Rationale and Public Comment

CWA section 404(h) provides that, before approving a Tribe’s or State’s section 404 program, EPA shall determine whether the Tribe or State has the authority to administer the program, including to issue permits that comply with the CWA 404(b)(1) Guidelines, to provide for public notice and opportunity for comment on permit applications, and to abate violations of the permit or permit program. *See* 33 U.S.C. 1344(h)(1)(A), (C), (G). Section 404(h) refers to a Tribe’s or State’s “authority,” but legal authority would be meaningless without the capacity to implement it. Clarifying that EPA must ensure that Tribes and States have the resources and programs in place to implement their authority best carries out section 404(h).

EPA’s existing regulations effectuate section 404(h) by imposing program requirements for permitting, program operation, and compliance evaluation and enforcement set forth in 40 CFR part 233 subparts C through E to administer a program that is consistent with section 404. A program that lacks the resources to meet these

requirements would not be able to carry out its statutory and regulatory obligations. This rule would not change these existing requirements; rather, it would ensure that the program submission provides information necessary to determine that Tribes and States can meet them.

In the 1988 preamble to the section 404 State program regulations, EPA stated that the program description Tribes and States must submit to EPA “should provide the information needed to determine if the State has sufficient manpower to adequately administer a good program.” 53 FR 20764, 20766 (June 6, 1988). However, 40 CFR part 233 subpart B, which contains the requirements for program approval, does not explicitly state that Tribes and States must demonstrate that they have sufficient resources to meet the requirements for permit issuance, program operation, and compliance and enforcement outlined in subparts C through E. The regulations require that the program description contain “a description” of available funding and manpower (*i.e.*, staffing),³³ 40 CFR 233.11(d) (2023), but did not clearly state that the available funding and staffing must be sufficient to meet the requirements of subparts C through E. In addition, the regulations provide that the program description must include “a description” of the Tribe’s or State’s compliance evaluation and enforcement programs, including a description of how the Tribe or State will coordinate its enforcement strategy with the Corps and EPA, 40 CFR 233.11(g) (2023), but did not clearly state that the Tribe’s or State’s compliance evaluation and enforcement programs must be sufficient to meet the requirements for section 404 program compliance evaluation and enforcement in subpart E. In the absence of these clarifications, the regulations did not provide sufficient guidance as to what kind of demonstration is needed by Tribes and States as they develop their programs. This revision would clarify the subpart B descriptions Tribes or States must submit, consistent with the goal of this rulemaking, to provide more clarity on the program assumption process for Tribes and States. *See* section III.B of this preamble. The purpose of subpart B is to require Tribes and States to demonstrate that they in fact have the capacity to carry out subparts C through E, pursuant to the original intent of the

current regulations, and these changes would better reflect that intent.

This rule requires the program description to identify position descriptions and qualifications as well as budget and funding mechanisms for all responsible Tribal or State agencies because this information is critical to understanding whether a Tribe or State will be able to administer subparts C through E. EPA must be able to determine that the Tribe or State will have sufficient qualified staff and a reliable and sufficient funding mechanism that will be commensurate with the responsibilities it seeks to assume. Given the importance of these elements, Tribes and States should have staffing and budget information readily available, and providing it in the program description should not impose a significant new burden.

Some commenters opposed these revisions, as presented in the proposed rule, arguing that such requirements could result in unnecessary delays or confuse Tribes or States preparing assumption submissions. These commenters also stated that such revisions are unnecessary. For example, one commenter argued that to the extent EPA were to find, for example, staffing levels described in the program description insufficient, the 120-day review period for program submissions would not provide time for a Tribe or State to increase those levels. EPA disagrees with these commenters and has decided to finalize these revisions for the reasons discussed above. In response to the commenter that said that information about staffing levels would not aid EPA, EPA thinks that requiring transparency about staffing levels will encourage Tribes and States to ensure that their staffing levels will be sufficient to carry out their program. Without adequate staff to draft protective permits and inspect and review dredged and fill activity, it is not possible for a program to comply with CWA requirements. For example, EPA cannot assess a Tribe’s or State’s ability to administer CWA section 404 if it does not know whether the Tribe or State will have two permit writers or twenty. Moreover, EPA typically provides extensive technical support to Tribes and States that are preparing program submissions, and Tribes and States may discuss staffing levels with EPA at any time prior to their program submission.

Many commenters supported the revisions in this section. Some asked EPA to require additional information from Tribes or States. One suggested addition was to require budget and funding information for all Tribal or State agencies with program

³³ In this revision, EPA is replacing the term “manpower” with “staffing” and will use the term “staffing” throughout this preamble.

administration responsibilities, not just the lead agency. This suggested requirement is consistent with the budget and funding information EPA proposed to require, and simply addresses a potential ambiguity by clarifying that the budget and funding information EPA requests applies to all Tribal or State agencies with a role in the section 404 program, not just the lead agency. EPA is therefore adopting this suggested requirement in the final rule.

Other program description requirements that commenters asked EPA to finalize include, but are not limited to: Tribes or States seeking to reallocate existing resources must describe the duties that existing staff will no longer perform and the skills and expertise staff have that apply to reallocated tasks; Tribal or State budget descriptions must account for all aspects of the section 404 program, including administrative work, human resources, information technology, training, guidance, leadership, enforcement, compliance, scientific personnel, on-site activities and legal personnel; and Tribes or States must demonstrate that any existing CWA-authorized programs are adequately funded and staffed. EPA considered requiring some or all of the suggested information of Tribes and States, but ultimately concluded that requiring this level of detail is unnecessary. EPA will not always need each of these pieces of information to determine whether a program submission meets the requirements of the CWA. Codifying information requirements with this degree of specificity could limit flexibility on the part of Tribes or States and EPA to design and approve program descriptions reflecting their particular circumstances. However, EPA views this suggested information as helpful guidance to Tribes or States as they assess how best to demonstrate that they have the capacity to administer the section 404 program. Tribes and States are welcome to submit this type of information, and if they do so, it will likely aid EPA's review of the program submission.

EPA recommends that Tribes and States provide other information to the extent it is necessary to demonstrate that they will be able to carry out subparts C through E. Some commenters suggested that if a Tribal or State program submission commits to conduct the same activities as the Corps but with a lower budget or fewer staff people, the submission must provide detailed documentation demonstrating how they will be able to successfully administer the section 404 program. In

fact, one commenter noted that Tribes or States should allocate more money to assumption than the Corps in the first few years of assumption, given the additional costs of starting a program. To the extent Tribes or States can compare resource levels with the Corps', EPA agrees with the commenter that this information would be useful, and strongly encourages Tribes and States to provide such comparisons. EPA is not codifying this requirement, however, as differences in administrative structures may render a direct comparison between Tribe or State funding or staff and Corps funding or staff infeasible. For example, a Corps district may not be able to identify the number of staff focused solely on section 404 permitting or on a single State, if its staff administers the section 404 regulatory program as well as RHA section 10 or other types of permitting programs, and/or if the staff manages permitting for a number of States. The difficulties with direct comparisons could be compounded in States that include multiple Corps districts. An alternative approach could compare the average number of different types of section 404 permits (*i.e.*, individual versus general permits) Corps staff handle in a district to the average number of permits the Tribe or State has or anticipates its staff will handle in an assumed program.

The rule does not prescribe a particular metric that Tribes or States must use to ensure sufficient funding, staffing, or compliance evaluation and enforcement programs. It also does not prescribe the specific position descriptions and qualifications a Tribe or State must have, a minimum budget, or a particular type of funding mechanism. The rule therefore retains a certain amount of flexibility for Tribes and States, recognizing that the section 404 program needs of different Tribes and States can differ. Tribal or State agencies likely have varying procedures for determining sufficient staff and funding levels and may choose to organize their programs in different ways. Furthermore, the necessary section 404 program budget may differ depending on the anticipated workload in the particular Tribe or State, such as the number of permits typically sought, the extent and types of aquatic resources assumed, and the types of compensatory mitigation mechanisms used. In adding clarification to better carry out the requirements of 40 CFR 233.11, this revision does not reopen those requirements.

EPA's clarification, that as part of the program description, the Tribe or State must demonstrate that its permit review criteria are sufficient to carry out the

permitting requirements of 40 CFR part 233 subpart C, has the same goal as the program revisions described above: it would harmonize the requirements for the program description with the requirements for program operation, and facilitate EPA's ability to ensure that Tribal and State permits will comply with the CWA 404(b)(1) Guidelines.

Finally, requiring that the description of Tribal and State agency coordination on program administration must address enforcement and compliance will enable EPA to ensure the Tribe or State can comply with the requirements of 40 CFR part 233 subpart E, which prescribes the enforcement and compliance requirements for assumed programs.

4. Mitigation

a. Overview and what is the Agency finalizing?

The CWA and EPA's implementing regulations provide that every permit issued by a Tribe or State must apply and ensure compliance with the guidelines established under CWA section 404(b)(1).³⁴ 33 U.S.C. 1344(h)(1)(A)(i); 40 CFR 233.20(a), 233.23(c)(9) (2023). Under CWA 404(b)(1) Guidelines, impacts to waters of the United States should be avoided and minimized to the maximum extent practicable before considering compensatory mitigation.³⁵ 40 CFR 230.10(a), (d). In 2008, the Corps and EPA issued joint regulations³⁶ requiring performance standards and establishing criteria for all types of compensatory mitigation including: (1) on- and off-site permittee-responsible compensatory mitigation, (2) mitigation banks, and (3) in-lieu fee programs, to "offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to

³⁴ See section IV.A.2 of this preamble for a discussion on how a Tribe or State can demonstrate that it has the authority to issue permits that apply and assure compliance with aspects of the CWA 404(b)(1) Guidelines other than compensatory mitigation.

³⁵ The term *compensatory mitigation* means "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 40 CFR 230.92.

³⁶ "Compensatory Mitigation for Losses of Aquatic Resources" 73 FR 19594 (April 10, 2008). (Commonly referred to or known as the "2008 Mitigation Rule"). The 2008 Mitigation Rule was adopted into both EPA and the Corps regulations. See 33 CFR 325.1 and 332.1 through 332.8 and 40 CFR 230.91 through 230.98. The Agency refers to EPA's regulations located at 40 CFR 230.91–98 as subpart J of the 404(b)(1) Guidelines throughout this final rule.

section 404 of the Clean Water Act.” 40 CFR 230.91(a)(1).

The prior regulations reaffirmed that all permits issued by Tribal and State programs must accord with the requirements of the Act or regulations thereunder. 40 CFR 233.1(d), 233.20(a) (2023). As previously described in section IV.A.2 of this preamble, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps. EPA further explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide “a certain amount of flexibility,” consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980).

While 40 CFR 233.1(d) of the prior regulations reemphasized that approved Tribe and State programs “may impose more stringent requirements” but “may not impose any less stringent requirements for any purpose,” the regulations did not provide any detail as to how a Tribe or State can demonstrate and ensure compliance with the substantive criteria and requirements of subpart J of the 404(b)(1) Guidelines, as subpart J was developed more than a decade after the Tribal and State section 404 program regulations were revised in 1988. Additionally, the language used in subpart J of the 404(b)(1) Guidelines focuses on Federal concerns regarding permits issued by the Corps; for example, it references the “DA [Department of the Army] permits” and the “district engineer” and does not refer to or account for Tribe- or State-issued permits. *See* 73 FR 19650. These Corps-related references have created confusion. As a result, States have requested clarity on how a Tribe or State can demonstrate that it has authority to issue permits that apply and assure compliance with the substantive criteria for compensatory mitigation set forth in subpart J of the CWA 404(b)(1) Guidelines. States have also requested clarification about the respective roles and responsibilities of the Tribe or State and Federal agencies in connection with compensatory mitigation for impacts to assumed waters.

With respect to subpart J of the 404(b)(1) Guidelines, EPA recognized some terminology and discussion refers to the Corps as the permitting authority. EPA proposed modifying section 233.1(e) to clarify that references to the Corps as the permitting authority (such as references to the “District Engineer”

or “DA Permits”) are to be considered as applying to the Tribal or State permitting agency or decision maker as appropriate. The final rule codifies this proposed approach. 40 CFR 233.1(e).

Secondly, EPA proposed a new provision codifying its interpretation that the Tribe’s or State’s approach may deviate from the specific requirements to the extent necessary to reflect Tribal or State administration of the program as opposed to the Corps’ administration, but that these programs may not be less stringent than the substantive criteria of subpart J. Furthermore, the new provision requires Tribes or States to submit in their program description the Tribe’s or State’s proposed approach to ensuring that all permits they issue will apply and ensure compliance with the substantive criteria for compensatory mitigation consistent with the requirements of subpart J of the CWA 404(b)(1) Guidelines at 40 CFR part 230. EPA is finalizing what was proposed without modification in section 233.11(k).

Finally, EPA proposed to add a new provision to section 233.50 to address EPA’s oversight responsibilities where Tribe or State programs are establishing third-party compensation mechanisms (*i.e.*, mitigation banks or in-lieu fee programs) as part of their section 404 program.³⁷ The proposed process also intended to incorporate input from other relevant agencies, which is analogous to the way the Interagency Review Team (IRT) that oversees mitigation for Corps-issued permits incorporates input from other relevant agencies. *See, e.g.*, 33 U.S.C. 1344(g), (h); 40 CFR 233.20(b) (“No permit shall be issued . . . [w]hen the Regional Administrator has objected to issuance of the permit . . .”); 40 CFR part 233 generally; 40 CFR 230.98(b) (describing Interagency Review Team procedures). The Agency also proposed to revise the section title for section 233.50 to read “Review of and objection to State permits and review of compensatory mitigation instruments.” This revision was intended to reflect the Agency’s role in reviewing Tribal or State compensatory mitigation instruments.

The new provision (*i.e.*, section 233.50(k)) outlines a process which requires Tribes or States to transmit a copy of each draft instrument to EPA, the Corps, the U.S. Fish and Wildlife

Service, and the National Marine Fisheries Service for review prior to approving the final instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. In the event that EPA has commented that the instrument is not consistent with the 404(b)(1) Guidelines (see section 233.11(k)), the Tribe or State shall not approve the final compensatory mitigation instrument until EPA notifies the Director that the final instrument is consistent with the Guidelines. EPA is finalizing the proposed process along with specific time frames for receiving comments from the reviewing agencies in section 233.50(k).

b. Summary of Final Rule Rationale and Public Comment

i. Clarifying Authority

The final rule, consistent with the proposal, clarifies in the new provision 233.1(e) that when a Tribe or State assumes the section 404 program, references to the Corps as the permitting authority (such as references to the “District Engineer” or “DA Permits”) in subpart J are to be considered as applying to and being implemented by the Tribal or State permitting agency or decision maker. EPA received no comments on this issue.

ii. Ensuring Consistency and Compliance With Subpart J

The new provision 40 CFR 233.11(k) accomplishes three objectives. First, the new provision requires that Tribes or States submit in their program description their approach to ensure that all permits issued will satisfy and be consistent with the substantive standards and criteria of the compensatory mitigation set out in subpart J. This description allows EPA to evaluate whether the Tribe’s or State’s approach can implement a compensatory mitigation program consistent with the requirements of the CWA. Second, the new provision at section 233.11(k) clarifies that the Tribe’s or State’s approach may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribal or State administration of the program. For example, a Tribal or State program may choose to provide for mitigation in the form of banks and permittee responsible compensatory mitigation but may choose not to establish an in-lieu fee program. Lastly, the new provision at section 233.11(k) codifies EPA’s interpretation that Tribal and State section 404 programs must issue permits that are no less stringent

³⁷ This requirement does not include permittee-responsible mitigation plans as those would be reviewed as part of the permit conditions. If the Tribe or State uses permittee-responsible mitigation, the mitigation plan would be reviewed as part of the permit process. After approval, all specifications generally would be presented as permit conditions.

than and consistent with the substantive criteria for compensatory mitigation described in 40 CFR part 230, subpart J. The new provision is consistent with CWA section 404(h)(1)(a), 40 CFR 233.1(e), and 40 CFR 233.20(a).

Commenters were divided on the Agency's proposed approach to this new provision. Commenters opposing the Agency's proposed approach asked the Agency to require Tribes and States to adopt verbatim or by reference the requirements of subpart J of the section 404(b)(1) Guidelines. These commenters asserted that verbatim adoption or incorporation by reference of the mitigation requirements set forth in subpart J would ensure consistency with the 404(b)(1) Guidelines and "promote consistency and ease for the EPA, permittees and citizens." Commenters supporting the proposed approach (*i.e.*, allowing Tribal and State programs to deviate from the substantive criteria of subpart J) asserted that Tribes and States are in a better position to make decisions and design appropriate mitigation approaches for their Tribe or State than the Corps. Some commenters requested that EPA provide clearer direction on its expectations for resource mitigation, including banking and in-lieu fee proposals, greater specificity as to the standards EPA will use to review an applicant's proposed mitigation program, and require additional requirements in mitigation proposals.

The Agency considered these comments and decided to finalize the proposed approach for several reasons. First, while nothing in this rule prohibits Tribes or States from adopting or incorporating the CWA 404(b)(1) Guidelines, requiring Tribes and States to adopt or incorporate the CWA 404(b)(1) Guidelines, including subpart J, would conflict with the leeway Congress provided to Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps. Recognizing that a CWA section 404 permit may be required for a variety of discharges into a wide range of aquatic ecosystems, EPA explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide "a certain amount of flexibility," consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980). Similarly, as described in section IV.A.2 of this preamble, requiring Tribes or States to adopt or incorporate subpart J would

complicate efforts by Tribes and States to impose more stringent requirements as part of their CWA section 404 programs. *See* section IV.A.2 of this preamble for further discussion on 404(b)(1) Guidelines.

Commenters noted that mitigation requirements are tiered (or hierarchical) and insisted EPA should not allow State programs to "pick and choose" between the allowable forms of mitigation (*e.g.*, permittee responsible, mitigation banks, and in-lieu fees). A commenter stated that State programs which "do not provide for all and follow the established hierarchy for their use would have less stringent compensatory mitigation requirements as compared to the federal program." EPA disagrees with this commenter. Tribes and States may not impose requirements less stringent than Federal requirements. Accordingly, Tribes and States must follow the hierarchical approach laid out in subpart J of the 404(b)(1) Guidelines. *See* 40 CFR 230.93(b). But following this approach does not require the establishment of all three mechanisms listed in the hierarchy. Rather, Tribes and States, like the Corps, must apply the hierarchy to available mechanisms to determine the appropriate type of compensatory mitigation.

iii. Third Party Compensatory Mitigation Instrument Oversight and Approval

EPA is finalizing the proposed process, which will implement the Agency's oversight responsibilities of third-party compensatory mitigation instrument approvals (*i.e.*, mitigation banks and in-lieu fee programs), as well as provide opportunities for other agencies to review and comment on third-party compensatory instruments prior to approval. 40 CFR 233.50(k). Under the final process, a Tribe or State must provide EPA, the Corps, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service an opportunity to review and comment on any draft compensatory mitigation instruments before the Tribe or State may establish the proposed instrument. The Tribe or State may also commit in their program description to include Tribal or State resource agencies in the circulation of draft instruments for approval. If EPA comments that the instrument fails to apply or ensure compliance with the section 404(b)(1) Guidelines, the Tribe or State may not approve the final compensatory mitigation instrument until they address EPA's comments and EPA notifies it that the final instrument ensures compliance with this approach.

The Agency expects this instrument review process would be familiar to Tribes and States because it is modeled on, and similar to, the procedures for EPA review of permits, but does not replicate them. This process also facilitates input from other relevant agencies, similar to how an Interagency Review Team provides input to the Corps from other relevant Federal and State agencies on compensatory mitigation instruments. *See, e.g.*, 33 U.S.C. 1344(g), (h); 40 CFR 233.20(b) ("No permit shall be issued . . . [w]hen the Regional Administrator has objected to issuance of the permit . . ."); 40 CFR part 233 generally; 40 CFR 230.98(b) (describing Interagency Review Team procedures). Overall, the Agency believes this review process provides sufficient oversight for Tribal or State compensatory mitigation instruments and provides opportunity for multiple agencies to provide input on the draft compensatory instrument before it is approved. The Agency believes the final requirements outlined in the new provision 233.50(k) strike a balance between Federal oversight responsibility of draft compensatory mitigation instruments while allowing Tribes and States flexibility to solicit input from additional resource agencies.

No commenters opposed the proposed approach. However, one commenter cautioned EPA not to implement a rigid process that would limit Tribes' or States' flexibility in designing their own compensatory mitigation approach. EPA believes that this provision provides such flexibility.

One commenter requested that the Agency expand the list of mitigation instrument reviewers to include relevant Tribal and State agencies (*e.g.*, Tribal- or State-level fish and wildlife services) to the list. The Agency agrees with the commenter and believes that additional reviews from relevant resource agencies would be advantageous by providing local expertise and helping assess the applicability of the mitigation instrument (*e.g.*, including but not limited to the structure of the instrument, design of the proposed projects, proposed loss and benefits, and evaluation of successful instrument), thereby promoting positive outcomes for environmental protections.

The Agency is not requiring circulation to "relevant Tribal or State agencies" because the criteria for "relevancy" is vague. What constitutes a "relevant" agency is susceptible to differing interpretations, especially as Tribes and States organize their authorities under differing or even multiple agencies (*e.g.*, some regulate

wetlands under the State Department of Lands, others regulate them under the State water quality agency). Therefore, imposing mandatory circulation to this category of agencies would create confusion and implementation challenges for the Tribal or State authority. Furthermore, the Agency believes the new provision at section 233.50(k) provides Tribes and States the opportunity to identify and commit to additional instrument reviews from other Tribal or State agencies in their program description. The new provision also allows a Tribe or State to invite other resource agencies not identified in their program description to participate in draft instrument review on a case-by-case basis.

The Agency received one comment requesting that EPA provide clearer direction on its expectations for resource mitigation, including banking and in-lieu fee proposals, and greater specificity as to the standards EPA will use to review an applicant's proposed mitigation program. The commenter also asked that EPA require additional requirements in mitigation proposals. EPA is not reopening the section 404(b)(1) Guidelines in this rule and does not have the authority to impose substantive mitigation requirements on Tribes and States that are more stringent than the mitigation requirements in the section 404(b)(1) Guidelines.

5. Effective Date for Approved Programs

a. What is the Agency finalizing?

Section 404(h) of the CWA addresses the transfer of permitting authority and pending permit applications from the Corps to the Tribe or State following EPA notice of program approval but does not specify an effective date. The prior regulations provided that the transfer of permitting authority could only take effect after notice of EPA's program approval appeared in the **Federal Register**. 40 CFR 233.15(h) (2023). Several States that have contemplated assumption of the section 404 program indicated that a transition period between EPA's approval decision and the date of transfer of responsibility from the Corps to the State would enable them to more effectively prepare for the transition, including securing and allocating the necessary resources to successfully implement the assumed section 404 permitting program if their program is approved.

EPA proposed to establish a presumptive effective date for program assumption of 30 days from the date of publication of the notice of EPA's program approval in the **Federal Register**. The proposal also provided

that if requested and supported by a Tribe or State in its request to assume the program, EPA may specify a later effective date, not to exceed 120 days from the date of notice in the **Federal Register**. A Tribe or State which seeks a later transfer date must provide a sufficient explanation of its need for the additional time as part of its program submission. In all cases, that effective date must be set forth in the Memorandum of Agreement between a Tribe or State and EPA required by 40 CFR 233.14(b)(2) and published in the **Federal Register**. EPA also proposed to require that decisions to approve Tribal and State programs and revisions be posted on EPA's website in addition to publication in the **Federal Register**. After reviewing public comments, the Agency is finalizing its approach as proposed with one modification to allow Tribes or States and EPA to establish a later effective date not to exceed 180 days from the date of notice in the **Federal Register**.

b. Summary of Final Rule Rationale and Public Comments

Section 404(h)(4) of the CWA provides that "[a]fter the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action." 33 U.S.C. 1344(h)(4). Once the State has received those permit applications, and signals to the Corps that it is ready to assume permitting activity, permitting responsibility should transfer. *Id.* at 1344(h)(2). Thus, the administrative process envisioned by Congress is that EPA receives a program request, reviews and approves or denies the program request, then notifies the parties of an approval decision, after which the Corps begins to transfer existing permitting materials. The contrast between the specific time frames the statute provides for EPA's approval of a program and the absence of a time frame for the transfer of permit applications from the Corps suggests that Congress intended some flexibility in the transition to Tribal or State program implementation. However, the fact that the statute describes the transfer of permits as the immediate next step following program approval indicates that Congress intended the transfer to happen relatively quickly.

EPA proposed to modify the regulatory text to clarify when and how

the section 404 program transfers to the Tribe or State following EPA's approval, and that the presumptive date of transfer would be 30 days from the date of notice of program approval in the **Federal Register**, but that Tribes and States that satisfactorily demonstrate a need for more than 30 days to assume and be prepared to fully administer the program could request an effective date of up to 120 days from the date of notice. EPA also proposed that if a Tribe or State requests to assume administration of the program more than 30 days after EPA's approval, the program description must include a description and schedule of the actions that will be taken following EPA approval for the Tribe or State to begin administering the program.

A number of commenters supported EPA's proposal to allow for more than 30 days for program transfer. Most of these commenters, however, requested that the maximum time be longer than EPA's proposed maximum of 120 days, or not specifically limited. These commenters agreed that some Tribes and States, especially smaller ones, may need more time to effectively prepare for program implementation, such as training staff, to successfully implement the assumed section 404 permitting program if their program is approved. One commenter stated that no more than 120 days should be needed if a Tribe or State were sufficiently prepared to assume the program.

EPA finds that a short, clearly defined period of time between program approval and the Tribe or State's assumption of program administration benefits the public and regulated community by providing advance notice of the date of program transfer and supports the smooth transition of program functions. However, EPA agrees that extending the maximum period of time to 180 days could reduce the burden for some Tribes and States, without significantly increasing the uncertainty that might arise from lengthier transition periods.

The final rule allows the effective date to be more than 30 days following approval (though no more than 180 days), when a Tribe or State identifies specific circumstances which support the need for additional time. If the Tribe or State takes advantage of this option to delay the effective date, the Tribe or State's program description should set forth the steps it will take upon program approval, such as specifying the timeline for any assignment and training of staff and ensuring program funding is accessible by the effective date. Generally speaking, a Tribe or State should not wait until EPA approves its

program before initiating hiring and training processes for staff that are committed in its program description and the Tribe or State should be prepared to implement the final steps soon after program approval.

The Agency is finalizing the requirement that the Memorandum of Agreement between a Tribe or State and EPA include the effective date for transfer of the program from the Corps to the Tribe or State, identified as the number of days following the date of publication of program approval in the **Federal Register**. This will provide for the efficient development and administration of the Tribal or State program, while also making the process more predictable for the regulated community and the public. As with the prior regulations, the Corps will continue to process permit applications up until the effective date, but they will also use the time between approval and the effective date to begin transferring permits under review. The Tribe or State would not be authorized to process these permits until the effective date of program transfer. The Tribe or State and the Corps will include procedures for transferring pending section 404 permit applications and other relevant information to the Tribe or State in their Memorandum of Agreement. 40 CFR 233.14(b)(2).

C. Program Operations

1. Five-Year Permits and Long-Term Projects

a. Overview and What the Agency Is Finalizing

Congress limited CWA section 404 permits issued by Tribes or States that assume the section 404 program to five years in duration. 33 U.S.C. 1344(h)(1)(A)(ii).³⁸ The Agency codified this limitation in the permit conditions section of the prior section 404 Tribal and State program regulations. 40 CFR 233.23(b) (2023). However, certain projects by their nature cannot be completed within five years and therefore need more than one five-year permit. Examples of these long-term projects include some residential or commercial developments, linear projects such as transportation corridors, and energy or mining projects. The Agency is concerned that if applicants with long-term projects only submit information about activities

that will occur during one five-year period of their project in their permit application, the permitting agency and members of the public will not have sufficient information to assess the scope of the entire project, or cumulative impacts of the entire project.

To minimize unnecessary effort and paperwork, and provide the Tribe or State and the public with information that can assist with the successful permitting of long-term projects, the Agency proposed that applicants for projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application must submit a 404(b)(1) analysis for the full scope and term of the project with the application for the first five-year permit and modify the 404(b)(1) analysis, as necessary, for subsequent five-year permits. The proposed rule preamble discussed the criteria that the Tribe or State must consider when determining whether the 404(b)(1) analysis needs to be modified. 88 FR 55303. If there has been a change in circumstance related to an authorized activity following approval of the previous five-year permit, the applicant must modify the 404(b)(1) analysis for subsequent five-year permits. If there have been no changes in circumstances related to an authorized activity following approval of the previous five-year permit, the applicant's new permit application may rely upon the most recent 404(b)(1) analysis. Consistent with CWA requirements, the proposal also required that a new permit application must be submitted for projects that exceed a five-year schedule (e.g., based on construction plans), and all aspects of the permit application, public notice, and Tribal or State review requirements set forth in 40 CFR 233.30, 233.32, and 233.34, respectively, apply. To avoid a stoppage in work, the proposal required that an applicant seeking a new five-year permit should apply for the new permit at least 180 days prior to the expiration of the current permit.

In response to public comments, the Agency is revising its proposed approach to require that the permit application and public notice for a subsequent five-year permit application must indicate whether the 404(b)(1) analysis has been updated and that the Tribe or State must provide a written explanation if it does not require an updated 404(b)(1) analysis for a subsequent five-year permit(s). Additionally, EPA is authorizing the Tribe or State to grant permission to submit an application less than 180 days prior to the expiration of the

current permit but no later than the permit expiration date.

b. Summary of Final Rule Rationale and Public Comments

i. Permitting Long-Term Projects

The Agency is finalizing a process for permitting long-term projects in waters assumed by a Tribal or State section 404 program that is consistent with the statutory limitation that permits not exceed five years in duration,³⁹ yet increases predictability for permittees and provides sufficient information for the Tribe or State to consider the full scope of a project's impacts to the aquatic environment. When applying for a permit to discharge dredged or fill material associated with projects⁴⁰ with a planned construction schedule which may extend beyond the five-year permit period, applicants must submit an analysis that demonstrates compliance with the 404(b)(1) Guidelines showing how the complete long-term project complies with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines when they submit the application for the first five-year permit. The 404(b)(1) analysis must provide information demonstrating that the project meets each element of the CWA 404(b)(1) Guidelines for the full term of the project.⁴¹ For example, under this approach, an applicant seeking permit coverage for a 15-year, multi-phase housing development project would provide information about all phases of the project, covering its full 15-year term, in its permit application. If this project were anticipated to involve the construction of two hundred homes in years 0–5, two hundred homes in years 5–10, and two hundred homes in years

³⁹ 33 U.S.C. 1344(h)(1)(A)(ii).

⁴⁰ Per 40 CFR 233.30(b)(5), all activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

⁴¹ This information includes, but is not limited to: (i) information describing the purpose, scope, and timeline for the entire project; (ii) an alternatives analysis for the entire project; (iii) information sufficient to demonstrate appropriate and practicable steps that will be taken to avoid and minimize impacts from the entire project; (iv) information sufficient to demonstrate that the project will not cause or contribute to significant degradation of waters of the United States, including factual determinations, evaluations, and tests for the entire project; (v) an assessment of cumulative and secondary effects of the entire project; (vi) information sufficient to demonstrate that the project will not violate applicable state water quality standards or toxic effluent standards, jeopardize the continued existence of federally listed species or adversely modify or destroy critical habitat, or violate protections for marine sanctuaries designated under the Marine Protection, Research, and Sanctuaries Act of 1972; and (vii) a description of compensatory mitigation proposed to offset all unavoidable impacts associated with the entire project. See generally 40 CFR part 230.

³⁸ Corps-issued individual permits are not limited to five years. See 33 CFR 325.6(b), (c) (authorizing certain types of permits for an "indefinite duration" or else a "limited duration" but with no five-year limitation period). General permits issued by the Corps are limited to five years. See 33 U.S.C. 1344(e)(2).

10–15, the permit application would provide information about the construction of all six hundred homes.

Some commenters supported the proposed rule approach without modification. Several commenters supported the proposed rule approach requiring an applicant to submit a 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period but recommended modifying the proposed rule approach to require an automatic update to the 404(b)(1) analysis at least every five-year permit cycle. According to these commenters, projects may change as they move forward and even small changes may have an impact on water quality, as well as on Tribal rights and resources. Some of these commenters supported a requirement that a written explanation be provided in the event the permitting authority does not require an updated section 404(b)(1) analysis.

EPA has evaluated these comments and concluded that an automatic update to the 404(b)(1) analysis every five-year permitting cycle is unnecessary. Instead, for subsequent five-year permits, EPA is requiring that Tribes or States provide a written explanation if they do not determine that a “change in circumstance” has occurred requiring an updated 404(b)(1) analysis. Adding this requirement provides transparency and ensures the Tribe or State engages in a meaningful analysis of why there has not been a “change in circumstance.” EPA believes this approach strikes the right balance of providing more regulatory certainty for subsequent five-year permits, while also ensuring that the scope of impacts associated with a complete project is factored into the permitting decision for each five-year permit.

One commenter asked EPA to require that sufficient information related to planned impacts for future permitting phases be included in an initial permit application. The rule modifies previous language in 40 CFR 233.30(b)(5), which stated that “[a]ll activities which the applicant plans to undertake which are reasonably related to the same project *must* be included in the same permit application.” (emphasis added). The final rule expands upon this provision and requires, “[f]or projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application, the application for both the first and subsequent five-year permits must include an analysis demonstrating that each element of the 404(b)(1) Guidelines is met, consistent with 40 CFR part 230, for the full term of the project.” The final rule also requires that, “[a]pplicants for

subsequent five-year permits must update the 404(b)(1) Guidelines analysis if there has been a change in circumstance related to the project following approval of the previous five-year permit.”

Some commenters opposed any regulatory changes related to long-term projects. One commenter argued that requiring a comprehensive 404(b)(1) analysis would present a barrier to State assumption and questioned the legality of that approach. EPA disagrees with this commenter. Each State that has assumed the section 404 program has at times expressed interest in allowing for a full project analysis at the time of the first permit application and allowing expediciencies in subsequent rounds of permitting for the same project, as a means of both ensuring comprehensive water quality protections and protecting permit applicants against wasted financial resources. As a legal matter, requiring an analysis of the full project scope is consistent with section 404(b)(1)(A), which provides that Tribes and States must have the authority to issue permits which apply and assure compliance with the 404(b)(1) Guidelines. The Guidelines, in turn, require an evaluation of the potential for adverse impacts on the aquatic ecosystems posed by dredged or fill material discharge activities. 40 CFR 230.10.

This approach is consistent with the Agency’s long-standing position that activities related to the same project should not be split into multiple permits, which can undermine efforts to ensure a complete alternatives analysis, an accurate accounting of all cumulative impacts, an appropriate mitigation plan, and that the public is sufficiently on notice of forthcoming dredged and fill activities. See 40 CFR 233.30(b)(5) (2023). This approach is also similar to the Corps’ requirement that all activities that are reasonably related to the same project be included in the same permit application. 33 CFR 325.1(d)(2). Providing information about all phases of the project does not authorize dredged and fill activity beyond the five-year permit term. Moreover, unless there has been a change in circumstance related to an authorized activity, the same information should be provided in subsequent applications for later stages of the long-term project, such as applications seeking authorization for activity in years 6–10 of the project, years 11–15 of the project, and so forth. Additionally, this approach will improve environmental protections by ensuring that the scope of impacts associated with a complete project is

factored into the permitting decision for each five-year permit.

This approach will also help ensure consistency in permitting decisions associated with the project, thereby providing the applicant with more regulatory certainty than without such a plan. Evaluating the impacts of only the first stage of a long-term project does not make business sense. For example, if a permitting authority evaluating a second- or third-round permit for a mine’s construction or operation were to deny the permit based on those previously unevaluated impacts, the investments made during the first round or two of permit coverage would have been wasted. Foregoing an initial long-term plan would therefore be extremely inefficient.

The issuance of Tribal or State section 404 permits for projects that exceed a five-year schedule only authorizes discharges occurring in the five-year period identified in the permit. Permittees for long-term projects must submit a new permit application for each subsequent five-year permit term. The issuance of a subsequent five-year permit for the same project does not constitute a continuance or modification of the previous permit. Nothing in the final rule affects the process for continuing or modifying permits set forth in an approved Tribal or State section 404 program.

The Agency recognizes that some permittees may expect that a project will be completed within the five-year permit term but ultimately the project takes longer. The Tribe or State administering the section 404 program should make reasonable efforts to verify that all activities that are reasonably related to the same project are included in the same permit and to evaluate whether a project’s schedule extends beyond five years at the time of the initial five-year permit application.

In the event a project anticipated to be completed within five years is not completed during that time, the applicant must apply for a new five-year permit. To avoid a stoppage in work, the Agency is requiring that an applicant seeking a new five-year permit must apply for the new permit at least 180 days prior to the expiration of the current permit to allow sufficient time for the application to be processed. However, consistent with other CWA programs which have a similar 180-day advance application requirement (e.g., 40 CFR 122.21(d)), upon special request the Tribe or State may grant permission to reapply less than 180 days prior to the expiration of the current permit but no later than the permit expiration date. This approach provides time for a

public comment period and any required EPA review of the new permit application.

This final rule approach to five-year permits presents both environmental and financial advantages. It promotes environmental protections by ensuring that the scope of impacts associated with a complete project are factored into the permitting decision for each five-year permit. Tribal or State review of a 404(b)(1) analysis for a five-year permit does not constitute pre-approval of subsequent five-year permits for the project and there is no guarantee that an applicant for a long-term project will receive all of the five-year permits needed to complete the project. That said, including a 404(b)(1) analysis for the full scope of the project with the application for the first five-year permit and modification of the 404(b)(1) analysis, as necessary, for subsequent five-year permits will help ensure consistency in permitting decisions associated with the project, thereby providing the applicant with more regulatory certainty than without such a plan.

ii. Criteria for Modification of 404(b)(1) Analyses

The Agency recognizes that changes in circumstances related to an authorized activity may occur over time. For example, plans for subsequent phases of a long-term project may lack detail at the time an applicant submits a 404(b)(1) analysis for the first five-year permit and adjustments to the description of the project may therefore be required. If there has been a change in circumstance related to an authorized activity following approval of the previous five-year permit, the Agency is finalizing as proposed that the applicant must modify the 404(b)(1) analysis for subsequent five-year permits. A change in circumstance related to the authorized activity includes, but is not limited to, the following:

- Change in project purpose;
- Change in project boundary;
- Change in scope of waters impacted;
- Change in secondary or cumulative impacts;
- Change affecting compensatory mitigation;
- Change in site conditions, including new alternatives or opportunities for minimization of impacts;
- Change in environmental conditions, including the presence or new listing of threatened or endangered species or critical habitat; or
- Change to applicable statutes, regulations, or guidance.

If there have been no changes in circumstances related to an authorized

activity following approval of the previous five-year permit, the applicant's new permit application may rely upon the most recent 404(b)(1) analysis. As discussed above, the permit application and public notice for a subsequent five-year permit application must indicate whether the 404(b)(1) analysis has been updated. A Tribe or State may require that a 404(b)(1) analysis be updated based on a change in circumstances, either on their own motion, at the request of Federal agency reviewers providing comments via EPA or at the request of the public. Federal agency reviewers or members of the public who submit such a request must provide information supporting a change in circumstances for the Tribe or State to consider the request. A change in circumstances may be significant enough that the project no longer meets conditions for approval. Other factors may also weigh in favor of permit denial, such as an applicant's non-compliance with the previous permit. If the Tribe or State does not require an update to the 404(b)(1) analysis, it must provide a detailed written explanation in the record of decision for the permit based on the "change in circumstance" factors listed above and any additional factors identified in the Tribe or State's program description. The Tribe or State must provide this detailed written explanation for not requiring an update to the 404(b)(1) analysis regardless of whether it received a request from Federal agency reviewers or the public.

iii. Clarification Regarding Long-Term Projects

The Agency is finalizing as proposed a clarification that all aspects of the permit application, public notice, and Tribal or State review requirements set forth in 40 CFR 233.30, 233.32, and 233.34, respectively, apply to each permit application, including for projects that exceed a five-year schedule. Such clarification will help ensure that applicants, Tribes, and States comply with the five-year permit limitation set forth in CWA section 404(h)(1)(A)(ii). EPA expects that the permit application process for permits after the initial five-year permit application will be easier and simpler because the applicant and Tribe or State will have already analyzed the full project.

All public notices for long-term permits must satisfy the public notice requirements in 40 CFR 233.32(d). In addition, the scope of information the Tribe or State may consider when reviewing a permit application may not be limited for any application, including applications for each five-year permit of

a project that takes more than five years to complete. Nor may a Tribe or State limit the scope of comments the public may submit in response to the public notice, or public hearing if a hearing is held, to impacts arising from one five-year permit of a long-term project as opposed to impacts from the entirety of the long-term project.

2. Judicial Review and Rights of Appeal

a. Overview and What the Agency Is Finalizing

The prior regulations require the program description to describe the Tribe's or State's judicial review procedure but did not contain an explicit corresponding substantive requirement for Tribal or State programs. The Agency proposed to codify a substantive requirement to match the prior descriptive requirement. After considering comments urging EPA to ensure that States facilitate public participation in the permitting process, EPA is finalizing a provision that would require States seeking to assume the section 404 program to provide an opportunity for judicial review in State court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. EPA did not propose any judicial review requirement relevant to Tribes in the regulatory text. In a change from proposal, EPA is codifying a requirement that Tribes must provide a commensurate form of citizen recourse for applicants and others affected by Tribe-issued permits.

b. Summary of Final Rule Rationale and Public Comment

This provision gives meaning to the existing regulatory requirement that State program descriptions describe their judicial review procedures. *See* 40 CFR 233.11(b). EPA interprets the existing requirement that States provide "a description of the State's . . . judicial review . . . procedures" to suggest that States must authorize judicial review. The new substantive requirement that States allow for judicial review sufficient to provide for, encourage, and assist public participation in the permitting process makes explicit that States must have authorities in place to form the basis for the existing description requirement.

The provision also carries out the requirement that States have the authority to "abate violations of the . . . permit program" through "ways and means of enforcement." 33 U.S.C. 1344(g). Potential violations of the permit program may include State

permitting actions, such as the issuance of a permit that does not assure compliance with the section 404(b)(1) Guidelines or that has not provided public notice and an opportunity for a hearing. See 33 U.S.C. 1344(h)(1)(A)(i), (h)(1)(C). One of the most effective ways to abate such violations is to allow members of the public to challenge them. Given that EPA has limited resources to expend on oversight of State permitting actions, citizen challenges are a critical complementary tool for abating violations of the permit program.

The judicial review provision also gives meaning to the requirement that States must have adequate authority to ensure that the public “receive[s] notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.” 33 U.S.C. 1344(h)(1)(C). As EPA explained in promulgating a requirement for judicial review in the section 402 program, the United States Court of Appeals for the Fourth Circuit has agreed that “[t]he comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him.” Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 FR 20972 (May 8, 1996), *codified at* 40 CFR 123.30, *citing Com. of Virginia v. Browner*, 80 F.3d 869, 879 (4th Cir. 1996).

Without the possibility of judicial review by citizens, public participation before a State administrative agency could become less meaningful. See also 33 U.S.C. 1251(e) (“Public participation in the . . . enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.”); A Legislative History of the Water Pollution Control Act Amendments of 1972, Comm. Print No. 1, 93d Cong., 1st Sess. at 1490 (“The scrutiny of the public . . . is extremely important in insuring . . . a high level of performance by all levels of government and discharge sources.”).

Finally, the proposed approach is consistent with the CWA’s requirement that States issue permits that “apply, and assure compliance with, any applicable requirements” of section 404, 33 U.S.C. 1344(h)(1)(A)(i); and the regulatory provision providing that “[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of

this part.” 40 CFR 233.1(e). As citizens are authorized to challenge the issuance of section 404 permits when the Federal Government administers the program, challenges must also be authorized when a State has assumed the program in order to assure compliance with the applicable requirements of section 404 and to ensure that the State program is not less stringent than the Federal program. Permitting authorities are likely to be particularly careful to address citizens’ input and ensure that issued permits comply with CWA requirements if such permits may be challenged by such citizens. Therefore, ensuring that States provide an opportunity for judicial review helps to ensure compliance with section 404 and all requirements of the CWA. Any of the provisions in 404(g) cited above as authority for the judicial review provision would be independently sufficient to justify finalizing this provision.

EPA proposed the language that it is codifying in this rule, except for the regulatory requirement that Tribes provide a commensurate form of citizen recourse for those affected by permitting decisions. The proposal had also stated that a State would meet the required judicial review standard if it allowed an opportunity for judicial review that is the same as that available to obtain judicial review in Federal court of a federally issued NPDES permit. Further, the proposal stated that a State would not meet this standard if it either narrowly restricted the class of persons who could challenge the approval or denial of permits (such as by limiting standing to people who would suffer pecuniary injury from the permitting decision or to people who own property close to the discharge or receiving waters) or if the State required the losing party to pay attorneys’ fees notwithstanding the merit of its position. See 88 FR 55326.

A number of commenters expressed support for the proposed provision. Some commenters asked that EPA establish broader or more detailed limitations on restrictions or disincentives to judicial review. These commenters emphasized the importance of ensuring that the public has access to courts and discussed the significant chilling effects of State limitations on citizen suit challenges, such as fee-shifting provisions that make the “loser pay” (whether in full, in part, or at the judge’s discretion) and requirements to exhaust administrative remedies that can deplete prospective plaintiffs’ resources before they even initiate a State court challenge. These commenters asked EPA to prohibit

certain requirements more clearly, including any form of fee-shifting and excessive administrative exhaustion requirements.

Other commenters expressed concerns about the proposed rule provision, stating that it would be a significant impediment, if not a complete barrier, to States seeking assumption. These commenters also argued that, as a legal matter, nothing in the CWA authorizes EPA to require judicial review opportunities for section 404 permits. They stated that while Congress does provide for judicial review by any interested person of EPA’s issuance or denial of section 402 permits pursuant to CWA section 509(b)(1), it is silent with respect to judicial review of section 404 permits. This omission, in the commenters’ view, indicates that Congress intentionally did not require a heightened level of review for section 404 permits.

EPA has finalized the requirement that States must provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. 40 CFR 233.24. The final requirement is shorter than the proposed requirement and does not specifically detail various examples of unacceptable barriers to judicial review. As noted above, it simply codifies the substantive corollary to the existing program description requirement that States describe their judicial review procedures. EPA disagrees with the commenters that stated EPA lacks authority to impose this requirement. As discussed above, the final requirement is consistent with the CWA’s requirements for public participation in the permitting process and that State programs comply with all requirements of section 404, as well as the regulatory requirement that State programs be no less stringent than the Federal section 404 program. EPA expects that States will have the authority and experience to implement this requirement because it is similar to the section 402 requirement that States authorize judicial review.

EPA removed from the final rule the examples of the ways in which States can demonstrate that they provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. Commenters made clear that States can either facilitate or impede judicial review of State-issued permits in a wide variety of ways. Specifically listing just a few of those examples in the regulations would be under-inclusive, but a longer and more prescriptive list

risks intruding into the operations of State courts and State civil procedure, areas traditionally subject to State control. EPA will therefore evaluate State judicial review provisions as part of program submissions on a case-by-case basis to determine whether they provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. Finally, in omitting the explicit requirement that States provide judicial review opportunities commensurate with those available for section 402 permits under CWA section 509(b), the provision no longer implicates the commenters' argument that it conflicts with Congress' intentional omission of section 404 permits from the scope of section 509(b) review.

EPA would also look to the State Attorney General's statement to certify that the laws of the State meet the requirements of the regulation. *See* 40 CFR 233.12. States with expansive judicial review opportunities, such as those that allow standing to challenge permits on the part of interested citizens and citizen groups, and that do not require parties who lose lawsuits brought in good faith to pay other parties' legal fees, should meet the regulatory judicial review requirement. As with the section 402 regulations, the provision applies to final actions with respect to modification, revocation and reissuance, and termination of permits, as well as the initial approval or denial of permits.

The final rule approach for the section 404 State program regulations effectuates EPA's policy interest in deferring to State administration of authorized section 404 programs in the same way that EPA defers to State administration of section 402 programs. *See* 61 FR 20974 (May 8, 1996). EPA supports State assumption of the section 404 program and is just as committed to ensuring robust opportunity for citizen participation in that program. In authorizing State programs to act in lieu of the Federal Government, EPA must ensure that the implementation of the State program will be procedurally fair and consistent with the intent of the CWA. This rule provides additional assurance of State program adequacy and fairness by ensuring opportunities for judicial review.

In the proposed rule, EPA stated that the judicial review requirement did not apply to Tribes and did not include any requirement relevant to Tribes in the regulatory text. The preamble to the proposed rule explained that Tribes would need to provide appropriate

recourse for citizens seeking to challenge Tribal permitting actions. One commenter requested clarity on the type of recourse Tribes would need to provide. A few commenters raised concerns that EPA was arbitrarily treating Tribes differently from States. These commenters stated that EPA's concern that requiring Tribes to waive sovereign immunity to judicial review of permitting decisions would disincentivize Tribal assumption applies equally to States. One commenter argued that disappointed permittees or other affected persons would have no recourse from unlawful permitting actions on the part of assuming Tribes if EPA did not require some form of recourse.

In response to these commenters, EPA is codifying the requirement that Tribes must provide a commensurate level of citizen recourse to the judicial review opportunities States must provide for those seeking to challenge permitting actions. Consistent with the requirement applicable to States, it should be sufficient to provide for, encourage, and assist public participation in the permitting process. EPA is not specifying precisely what form this recourse must take, given the diverse forms that Tribal decision-making entities may take. If a Tribe has a judicial system analogous to a State judiciary, the Tribe must provide for judicial review of section 404 permits. If, instead, a Tribe uses another type of decision-making entity to address disputes, that entity must be able to hear permit challenges. Requiring Tribes to provide for citizen recourse commensurate with the judicial review opportunities required of States provides more clarity than the proposal offered and ensures that persons affected by Tribal permitting actions will have recourse.

EPA's decision not to specifically require all Tribal section 404 programs to provide for judicial review of Tribal permitting actions is consistent with EPA's approach in the section 402 judicial review provision that "[t]his requirement does not apply to Indian Tribes" as well as EPA's decision not to require Tribes to provide for judicial review in the same manner as States for purposes of the Clean Air Act Title V Operating Permits Program. *See* 40 CFR 123.30; Indian Tribes: Air Quality Planning and Management, 63 FR 7254, 7261–62 (February 12, 1998); 40 CFR 49.4(p). While EPA does not, as a general matter, think that Tribal procedures should be less rigorous with respect to public participation than State procedures, a specific requirement that Tribes provide judicial review as

the sole option for citizen recourse would raise issues regarding Federal Indian policy and law.

In promulgating the Clean Air Act Tribal rule, EPA recognized that while many Tribes have distinct judicial systems analogous to State judicial systems, some well-qualified Tribes may not have a distinct judiciary and may use non-judicial mechanisms for citizen recourse. *See* 63 FR 7261–62 (February 12, 1998). EPA considered that requiring Tribes to waive sovereign immunity to judicial review of permitting decisions would be a significant disincentive to Tribes to assume the Clean Air Act Title V program. *See id.* EPA recognizes the importance of encouraging Tribal implementation of environmental programs and avoiding creating unnecessary barriers to assumption. In this rule, EPA seeks to strike a balance by ensuring that citizen recourse is available in any approved Tribal section 404 program commensurate with the judicial review opportunities required of State programs, while not restricting qualified Tribes to a single judicial option that may not fit existing Tribal governmental structures. EPA would consider whether commensurate citizen recourse has been provided in the context of reviewing Tribal program applications.

Finally, EPA encourages Tribes and States to establish an administrative process for the review and appeal of permit decisions pursuant to their approved section 404 programs and to describe any such process in the program description. These procedures can conserve resources on the part of permittees, stakeholders, and permitting agencies, by resolving permitting disagreements without the need for litigation in court. EPA is not requiring or prohibiting any specific administrative review procedures, however, because the Agency recognizes that existing Tribal and State administrative procedures may differ across the country.

D. Compliance Evaluation and Enforcement

1. Overview and What the Agency Is Finalizing

The CWA provides for criminal liability based on simple negligence. EPA has determined that the prior regulations describing the *mens rea* applicable to Tribal and State programs at 40 CFR 123.27(a)(3)(ii) and 40 CFR 233.41(a)(3)(ii) do not clearly articulate the best interpretation of the statute. After reviewing public comments, EPA is revising its criminal enforcement requirements in 40 CFR 123.27 and 40

CFR 233.41 to provide that Tribes and States that administer the CWA section 402 NPDES permitting program or the CWA section 404 dredged and fill permitting program, or that seek approval to do so, are required to authorize prosecution based on a *mens rea*, or criminal intent, of any form of negligence, which may include gross negligence.

2. Summary of Final Rule Rationale and Public Comment

The prior regulations describing the *mens rea* applicable to Tribal and State programs at 40 CFR 123.27(a)(3)(ii) and 40 CFR 233.41(a)(3)(ii) do not clearly articulate the best interpretation of the statute. EPA interprets the CWA to authorize the approval of Tribal or State section 402 or 404 programs that allow for prosecution based on a *mens rea* of any form of negligence, including gross negligence. These regulatory revisions more clearly articulate this interpretation.

These amendments provide clarity for Tribes and States that have been approved to administer or seek to obtain EPA's approval to administer their own section 402 or 404 programs under the CWA. EPA anticipates that States that already administer these CWA programs will not need to change their legal authority. Instead, these regulatory clarifications will generally assure approved States that existing negligence *mens rea* authorities comport with the *mens rea* applicable to Tribal and State CWA sections 402 and 404 programs. Additionally, these revisions provide those Tribes and States seeking to administer CWA sections 402 and 404 programs with clarity regarding the legal authorities required for approval by EPA.

a. Background

The CWA provides that Tribes and States seeking approval for a permitting program under CWA section 402 or CWA section 404 must demonstrate adequate authority “[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” 33 U.S.C. 1342(b)(7) and 1344(h)(1)(G). EPA's regulations currently provide that a Tribal or State agency administering a program under CWA section 402 must provide for criminal fines to be levied “against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement.” 40 CFR 123.27(a)(3)(ii). Similarly, pursuant to EPA's current regulations any Tribal or State agency

administering a section 404 program must have authority to seek criminal fines against any person who “willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued in section 404” 40 CFR 233.41(a)(3)(ii).⁴²

The regulations implementing both statutory programs also provide that the “burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.” 40 CFR 123.27(b)(2); 40 CFR 233.41(b)(2). The implementing regulations for CWA section 402 include a note, not present in the CWA section 404 implementing regulations, which states, “[f]or example, this requirement is not met if State law includes mental state as an element of proof for civil violations.” 40 CFR 123.27(b)(2).

In contrast to the statutory language of CWA sections 402 and 404, section 309(c), the general criminal enforcement section of the CWA specifically authorizes misdemeanor criminal liability for violations of federally issued or State-issued section 402 and 404 permits in subsection (c)(1) and a range of penalties for “[n]egligent violations” of specified provisions. It also authorizes felony liability and a higher range of penalties for “knowing violations” of the CWA in subsection (c)(2). Beginning in 1999, four Federal courts of appeal determined that criminal negligence under CWA section 309(c)(1) is “ordinary negligence” rather than gross negligence or any other form of negligence. *U.S. v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999); *U.S. v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005); *U.S. v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012); *U.S. v. Maury*, 695 F.3d 227, 259 (3d Cir. 2012).⁴³ These courts

⁴² Under the section 402 program, EPA's regulations provide that “[t]o the extent that an Indian Tribe is precluded from asserting criminal enforcement authority as required under § 123.27, the Federal Government will exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region, shall develop a procedure by which the Tribal agency will refer potential criminal violations to the Regional Administrator, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the Tribe is incapable of exercising the enforcement requirements of § 123.27. This agreement shall be incorporated into a joint or separate Memorandum of Agreement with the EPA Region, as appropriate.” 40 CFR 123.34. The section 404 regulations contain a nearly identical provision at 40 CFR 233.41(f).

⁴³ Simple negligence is a failure to use care as a reasonably prudent and careful person would use under similar circumstances. As relevant here, it is used interchangeably with “ordinary negligence.”

did not address whether this provision implicates Tribal or State programs administering CWA section 402 or 404 programs.

On September 10, 2020, the Ninth Circuit Court of Appeals issued an unpublished decision that granted in part and denied in part a petition by the Idaho Conservation League for review of EPA's approval of Idaho's NPDES permitting program. *Idaho Conservation League v. U.S. EPA*, 820 Fed. Appx. 627 (9th Cir. 2020). The League challenged EPA's approval of Idaho's program in part on the grounds that Idaho lacks authority to bring enforcement actions based on a simple negligence *mens rea*, which the League alleged EPA's regulations require. Relying on the Ninth Circuit case law noted above, which holds that EPA's criminal enforcement actions are subject to a simple negligence standard, the court determined that EPA violated its regulations in approving a program authorizing a *mens rea* of gross negligence because it is “‘greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action’” 40 CFR 123.27(b)(2).” While the court recognized that “a State program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action,” citing EPA's Consolidated Permit Regulations, 45 FR 33290, 33382 (May 19, 1980), the court nevertheless held that EPA's current regulations at 40 CFR 123.27(b)(2) require a “state plan to employ a *mens rea* standard ‘no greater than’ simple negligence, such as strict liability or simple negligence.” *Idaho Conservation League*, 820 Fed. Appx. at 628.

b. Statutory and Regulatory Framework

The general enforcement provisions of the CWA section 309(c)(1), 33 U.S.C. 1319(c)(1), as interpreted by the courts, authorize criminal prosecutions of violations of section 402 and 404 permits committed with a simple negligence *mens rea*. However, the CWA does not state that Tribal or State section 402 or 404 programs must demonstrate such authority as a criterion for program approval to Tribal or State. The CWA provides a list of the authorities Tribes and States must have in order to qualify for section 402 or 404

See, e.g., *U.S. v. Maury*, 695 F.3d 227, 260 (“we are now confronted with a slowly expanding body of law from our sister circuits which indicates that simple or ordinary negligence may be the appropriate standard of *mens rea* under § 1319(c)(1).”) Gross negligence is sometimes defined as the extreme indifference to or reckless disregard for the safety of others.

program approval, respectively, and authority to prosecute criminal violations committed with a simple negligence *mens rea* is not on either list. Rather, with respect to enforcement authorities, the CWA requires that EPA “shall approve” a Tribe or State’s submission to administer a section 402 or 404 program if it demonstrates that it has authority to “abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” 33 U.S.C. 1342(b)(7); 1344(h)(1)(G). For the reasons described herein, EPA has concluded that the best reading of these statutory provisions is that they do not establish specific *mens rea* requirements for Tribal and State section 404 programs.

In addressing the criminal enforcement requirements for State programs, Congress did not require Tribes and States to have identical enforcement authority to EPA’s. Congress did not use the words “all applicable,” “same,” or any phrase specific to any *mens rea* standard, let alone the Federal standard, as it did in other parts of CWA sections 404(h) or 402(b). See 33 U.S.C. 1344(h), 1342(b). When “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (internal quotations omitted). In contrast to the broad authority that CWA sections 404(h)(1)(G) and 402(b)(7) provide to determine whether Tribes and States have demonstrated adequate authority to abate violations, other aspects of Tribal and State programs are explicitly required to have authority that is equivalent to or more stringent than EPA’s authority.

For example, States must have the authority “[t]o inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.” 33 U.S.C. 1344(h)(1)(B); 1342(b)(2)(B). Similarly, CWA section 404(h)(1)(B) requires Tribe- or State-issued permits to “apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title.” 33 U.S.C. 1344(h)(1)(A)(i); and CWA section 402(b)(1)(A) requires Tribes and States to issue permits in compliance with “sections 1311, 1312, 1316, 1317, and 1343 of this title.” 33 U.S.C. 1342(b)(1)(A). By contrast, the more general language used to require

Tribes and States to demonstrate adequate authority to abate violations indicates that Congress intended to allow for some flexibility in EPA’s ability to approve Tribal and State approaches to certain aspects of criminal enforcement. See 33 U.S.C. 1342 (b)(7). EPA proposed to clarify that CWA sections 402 and 404 allow for approved Tribal and State programs to have a somewhat different approach to criminal enforcement than the Federal Government’s approach, namely, that Tribal and State programs do not need authority to prosecute based on a simple negligence *mens rea*. However, the proposed approach required that Tribes and States be able to implement the text of section 309(c), requiring authority to prosecute crimes committed with some form of negligence.

Some commenters on the proposed rule agreed with EPA’s interpretation of the statute. Other commenters disagreed, arguing that the simple negligence criminal prosecution authority in CWA section 309(c) applies to Tribal and State programs. These commenters stated that CWA section 309(c) establishes misdemeanor criminal liability for anyone who violates a CWA section 402 or 404 permit issued by EPA or a State with a *mens rea* of simple negligence. According to the commenters, nothing in CWA section 309 limits this authority to EPA as opposed to State programs.

EPA disagrees with commenters’ arguments that the CWA does not authorize EPA to approve Tribal or State programs that lack authority to prosecute criminal violations committed with a simple negligence *mens rea*. While EPA acknowledges that CWA section 309(c)(1) does mention negligent violations of State permits, that provision provides authority for *Federal* prosecutions, including enforcement of State permit requirements; it does not require or address *State or Tribal* enforcement programs or the standard for approval or assumption for Tribal and State programs. Moreover, when section 309(c)(1) is read alongside sections 402(b) and 404(h)(1), which set forth the requirements for Tribal and State programs, the more specific Tribal and State requirements in sections 402(b) and 404(h)(1) prevail over the CWA’s general enforcement provision in section 309(c). See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.”) (internal citations omitted.) As described above, the general language used to describe the criminal enforcement authorities Tribe and States

must have indicates Congressional intent to allow greater flexibility for Tribes and States in the criminal enforcement context than they have, for example, in permitting and inspections. This provides appropriate “respect” for “state autonomy in the criminal sector.” *NRDC v. U.S. EPA*, 859 F.2d 156, 180–181 (D.C. Cir. 1988).

Some commenters argued that executive branch agencies may not modify criminal intent standards absent express Congressional authorization. Modifying Congressionally authorized criminal liability standards, in the commenters’ view, is not a power left to the executive branch. EPA disagrees with the premise of this comment; as discussed above, Congress did not mandate that Tribes and States have authority to prosecute criminal violations committed with a simple negligence *mens rea*, so this rule does not modify Congressionally established standards, which continue to apply to Federal enforcement.

EPA’s interpretation that it has the flexibility to approve Tribal or State programs with the authority to prosecute violations committed with a *mens rea* of any form of negligence is consistent with case law. In *NRDC v. U.S. EPA*, the petitioner challenged the validity of 40 CFR 123.27(a)(3) on the theory that it did not require States to have the same maximum criminal penalties as the Federal program. 859 F.2d 156 (D.C. Cir. 1988). The court reasoned that the petitioner’s argument involved a “logical infirmity” because it “presume[d] an unexpressed congressional intent that state requirements must mirror the Federal ones,” which is “inconsistent with the elements of the statutory scheme limiting operation of the provisions to enforcement efforts at the national level and explicitly empowering the Administrator to set the prerequisites for state plans.” *Id.* at 180 (discussing 33 U.S.C. 1314(i)(2)(C)). The D.C. Circuit recognized EPA’s “broad [] discretion to respect state autonomy in the criminal sector” and that the regulations “reflect the balancing of uniformity and state autonomy contemplated by the Act.” *Id.* at 180–81. The court declined to “disturb this ‘reasonable accommodation of manifestly competing interests,’” and upheld the agency’s penalty regulations. *Id.* at 181 (internal citations omitted).

EPA’s interpretation is also consistent with the Ninth Circuit’s decision in *Akiak Native Community v. EPA*, where that court declined to require that States have authority to impose administrative penalties identical to Federal authority. See *Akiak Native Community*, 625 F.3d

1162, 1171–72 (9th Cir. 2010). In that case, the petitioner argued that the State of Alaska did not have adequate authority to abate violations because the State had to initiate a legal proceeding to assess civil penalties, whereas EPA could do so administratively. *Id.* at 1171. The Court held that because “[t]here is no requirement in the CWA . . . that state officials have the authority to impose an administrative penalty” and “[t]he language of the statute says nothing about administrative penalties,” “there is no reason to conclude that Alaska lacks adequate enforcement authorities.” *Id.* 1171–72.

Some commenters argued that the *NRDC* and *Akiak Native Comm’ty* cases are inapposite. Because the *NRDC* case involved penalties and *Akiak Native Comm’ty* was about enforcement mechanisms, they argue neither of these cases bears on criminal intent standards. Commenters also stated that *NRDC* is distinguishable because the court relied on an express Congressional amendment authorizing EPA to allow for certain Tribal and State program departures from CWA statutory civil enforcement monetary penalties, and the CWA contains no such amendment regarding *mens rea*. In their view, the absence of a similar Congressional authorization for the Administrator to depart from criminal liability standards applicable to Tribal and State programs shows that Congress did not grant the Administrator such authority.

Commenters also noted that *NRDC* decision ignored CWA section 402(a)(3), which provides that EPA’s permit program “shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.” 33 U.S.C. 1342(a)(3). These commenters view this language as prohibiting Tribes or States from implementing a program that is any less stringent than a federally run program, including a program lacking authority to prosecute criminal violations committed with a simple negligence *mens rea*. Commenters state that the fact that neither the plaintiffs in that case nor D.C. Circuit considered section 402(a)(3) renders the *NRDC* precedent less persuasive.

Finally, commenters stated that the court in *NRDC* emphasized the importance of State programs being “administered in such a manner that . . . [approval will] provide a much more effective program” than the Federal Government would otherwise administer. 859 F.2d at 175. Commenters emphasized that this language reflects the court’s view that

Congress wanted to create more protective State programs.

EPA disagrees with the commenters stating that *NRDC* and *Akiak Native Comm’ty* do not support the Agency’s view of its authority. These cases hold that EPA may approve State programs if these programs lack certain enforcement authorities that the CWA provides to EPA; this precedent is highly germane to these revisions, even if the precise authorities at issue in those cases were not criminal intent standards. EPA also disagrees that *NRDC* is distinguishable because it did not address CWA section 402(a)(3). The fact that neither the plaintiffs nor the court addressed section 402(a)(3) may merely indicate that they did not find that provision relevant. Nor does EPA. Section 402(a)(3) applies to the terms, conditions, requirements, and permits of a State permit program; the criminal negligence *mens rea* that States are authorized to prosecute is none of these. Section 402(a)(3) is most clearly read to address the permitting process, not the state of mind of criminal violators. Moreover, clearly this provision would not implicate section 404 permits.

As to the 1987 amendments to the CWA, which noted that Tribal and State programs do not need to have the same maximum allowable penalty amount as EPA (see Water Quality Act of 1987, Title III, § 313(b)(2), Public Law 100–4, 101 Stat. 45), the D.C. Circuit in *NRDC* characterized the amendment as simply “confirmation of the broad authority the Administrator already enjoyed in crafting state program requirements.” *NRDC*, 859 F.2d at 180 (emphasis added). In other words, this amendment is additional evidence in support of the Court’s interpretation of the statutory structure that, regardless of the amendment, allows EPA certain flexibility in determining which of its criminal enforcement authorities Tribes and States must adopt if they wish to administer CWA permitting programs.

Finally, EPA agrees with commenters and the D.C. Circuit in *NRDC* about the importance of effective and protective State programs. In this rule EPA is maintaining and strengthening many provisions to help achieve this goal. Specifically with respect to criminal enforcement, EPA views the other requirements for Tribal and State enforcement authority in 40 CFR 123.26, 123.27 and 233.41 as sufficient to ensure that Tribes and States operate compliance and enforcement programs that satisfy the language and purpose of CWA 402(b)(7) and 404(h)(1)(G) to “abate violations of the permit or the permit program, including civil and criminal penalties and other ways and

means of enforcement.” These other provisions require, among other things, that a Tribe or State must maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions, engage in inspections and information gathering, and have the authority to sue to enjoin or seek penalties for violations of sections 402 and 404. As discussed in section IV.B.3 of this preamble, EPA’s modifications to program assumption requirements would further buttress the requirements of 40 CFR 233.41.

EPA has previously argued that Tribes and States do not need authority to prosecute criminal violations based on a simple negligence *mens rea*, including in *Idaho Conservation League*. Yet to the extent EPA’s interpretation is viewed as different from any earlier interpretations of CWA sections 402 and 404 and implementing regulations, EPA has ample authority to change its interpretation to adopt the best reading of the statute. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”) (citations omitted).

Though under this rule EPA is not requiring Tribes or States to have the same criminal intent standard that courts have interpreted EPA to have, the Tribal or State standard would still be based on the term “negligence” in the text of CWA section 309(c). Allowing Tribes or States flexibility in the degree of negligence for which they are authorized to bring criminal cases balances the CWA’s priorities of allowing for Tribal or State autonomy with adherence to the purposes of the Act. As noted above, neither CWA section 402(b)(7) nor CWA section 404(h)(1)(G) requires States to abate violations in the same manner as required under CWA section 309(c). The absence of any citation to CWA section 309(c) in CWA sections 402(b) and 404(h) indicates that some degree of variability may be permitted between Federal and Tribal or State approaches to criminal enforcement.

This variability does not detract from the obligation for Tribes and States to operate meaningful programs to abate permit program violations, including through penalties and other ways and means of criminal enforcement, and consistent with the regulatory requirements for Tribal and State criminal enforcement authority. See 33 U.S.C. 1342(b)(7), 1344(h)(1)(G); 40 CFR 233.41. Furthermore, Tribes and States may certainly continue to authorize criminal prosecutions based on a simple

negligence *mens rea*. Tribes or States with that authority may describe it in their program submissions to demonstrate the adequacy of their criminal enforcement programs.

This regulatory clarification reflects EPA's experience in approving and overseeing CWA State programs for over thirty years. Many States administering or seeking to administer the programs do not currently have authority to prosecute based on a simple negligence *mens rea*, and indeed, they may have statutory or other legal barriers to such standards. EPA is unaware of any concrete evidence indicating that the absence of a simple negligence *mens rea* for criminal violations has served as a bar to effective State criminal enforcement programs, and the requirement to have such a standard could dissuade Tribes and States from seeking to administer these programs in the future or potentially motivate States to return their approved programs to EPA. Clarifying that Tribes and States do not need authority to prosecute based on a simple negligence *mens rea* in their criminal enforcement programs therefore advances the purposes of CWA sections 402(b) and 404(g) to balance the need for uniformity with Tribal and State autonomy, *see NRDC*, 859 F.2d at 181 (D.C. Cir. 1988), and to encourage Tribes and States to seek to administer the CWA section 402 or 404 programs consistent with section 101(b) of the statute.

This rule does not change the standard applicable to EPA's criminal enforcement of the CWA. Under CWA section 309, EPA retains its civil and criminal enforcement authority, including where Tribes and States administer permit programs. Notwithstanding Tribe or State *mens rea* authorities, Federal prosecutions are governed by the *mens rea* standards that Congress wrote into the statute in 1987, including that misdemeanor penalties apply to violations resulting from simple negligence and that felony penalties apply to violations resulting from knowing conduct.

Consistent with the CWA's requirement that Tribes and States administering CWA sections 402 or 404 permitting programs have the authority to abate civil and criminal violations, EPA is adding language to 40 CFR 123.27(a) and 233.41(a)(3) indicating that Tribes and States must have the authority to "establish violations," as well as "to assess or sue to recover civil penalties and to seek criminal penalties," which these provisions already state. This new language simply confirms EPA's interpretation of the effect of its current regulations. EPA is

also removing the term "appropriate" from the current references to the degree of knowledge or intent necessary to provide when bringing an action under the "appropriate Act" from the CWA sections 402 and 404 regulations, as these regulations only refer to actions under the CWA and no other statute. Therefore, the term "appropriate" is unnecessary. Finally, in 40 CFR 123.27(a)(3) and 233.41(a)(3), which currently require Tribes and States to have the authority to assess or sue to recover "civil penalties and to seek criminal remedies," EPA is replacing the word "remedies" with "penalties," as "penalties" is a more precise description of the type of relief sought in criminal enforcement actions. None of the changes described in this paragraph are intended to change the substantive effect of the regulations.

E. Federal Oversight

1. Dispute Resolution

a. Overview and What the Agency Is Finalizing

The Agency recognizes that Tribes or States seeking to assume administration of the section 404 permitting program may encounter disputes or disagreements when developing a program or administering an approved section 404 program. For example, Tribes and States could encounter disputes with permittees or other affected parties regarding permitting decisions, as well as disagreements with Federal agencies that could arise in the assumption process or program implementation concerning issues such as the appropriate permitting authority or conditions to avoid or minimize impacts to historic properties, threatened or endangered species, or critical habitat. Specifically, such disputes may occur during the development of the retained waters description, development of a transfer plan for permits currently under review by the Corps, through efforts to address endangered species and historic properties during permit review, and in determining whether a discharge affects another State, as well as in other situations. However, while the prior regulations provided several mechanisms for resolving certain types of disagreements (*e.g.*, addressing EPA's comments, conditions, or objections to potential Tribal or State permits), the prior regulations did not provide a general dispute resolution mechanism or clarify EPA's role in such disputes. Several Tribes and States have requested that EPA help resolve disputes encountered between

themselves and other States, Tribes, or the Federal Government.

The Agency proposed to add a general provision to the purpose and scope section at section 233.1 that would clarify EPA's role in facilitating the resolution of potential disputes between the Federal agencies and the Tribe or State seeking to assume and/or administer a section 404 program. 88 FR 55323. The proposed rule would also provide for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or on a case-by-case basis. The provision reaffirms, however, that any dispute resolution or elevation process described in the regulations or in the Tribal or State Memoranda of Agreement must be followed. After reviewing public comments, the Agency is finalizing the dispute resolution provision as proposed at section 233.1(f).

b. Summary of Final Rule Rationale and Public Comment.

The Agency sees facilitating resolution of disputes as critical to establishing and sustaining viable Tribal and State section 404 permitting programs. EPA's engagement as a third party in such discussions can help to resolve impasses and ensure the program is administered consistent with CWA requirements. In this rule, EPA seeks to elucidate its role in resolving such disputes. Rather than attempt to articulate in the regulations all potential areas where a dispute may arise, EPA is adding a general provision to section 233.1 to affirm that EPA may facilitate resolution to potential disputes between the Tribe or State and Federal agencies and provide for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or resolved on a case-by-case basis through discussions convened by EPA. EPA views this clarification as consistent with its program approval and oversight authority in CWA sections 404(h)–(j).

Commenters generally supported this clarification of EPA's role in assisting in the resolution of disputes. Some commenters raised concerns that EPA does not articulate any specific "mechanism or final authority," and asked that EPA articulate specific procedures to be included in the Memorandum of Agreement. Another commenter generally encouraged flexibility. One commenter objected to the proposal, arguing that it is not needed. After reviewing public comments, EPA is finalizing the general dispute resolution as proposed, as it provides requested clarity on EPA's role

while maintaining flexibility in the form such assistance may take. EPA is declining to define a specific mechanism or procedures for dispute resolution to accommodate differing Tribal and State program structures and account for the individual circumstances and complexities of a potential disagreement.

Flexibility is also important in light of the various scenarios in which EPA may help facilitate resolution of disputes that may arise between a Tribe or State and other Tribes or States or Federal agencies as they seek to assume and administer a section 404 permit program. For example, EPA may assist in resolving issues raised about the scope of retained waters or situations where the Tribe or State may disagree with the Corps about whether a proposed project would result in discharges to assumed or retained waters. As EPA is responsible for approving the jurisdictional scope of a Tribal or State section 404 program, EPA can help resolve such disputes. Potential disagreements could also arise in other aspects of section 404 programs, including proper approaches to joint project permitting, administration of a compensatory mitigation program (such as mitigation banking or in-lieu fee programs), the determination as to whether a particular permit application implicates a discharge into waters of the United States, and program conditions to avoid or minimize impacts to threatened or endangered federally listed species or historic properties.

Nothing in this new dispute resolution provision alters existing provisions addressing the Agency's review of and objection to State permits located at section 233.50. Congress authorized EPA to serve an oversight role for Tribal and State section 404 programs. EPA's authority encompasses the coordination of Federal comments on draft Tribal or State-issued permits and the ability to review, comment on, or object to these draft permits. 40 CFR 233.50. In this role, EPA, as a practical matter, works to resolve differences between Tribes or States and Federal agencies, particularly when reviewing draft permits. The regulations also establish processes whereby a Tribe or State may address EPA's comments, conditions, or objections to potential Tribal or State permits. *Id.*

2. Withdrawal Provisions

a. Overview and What the Agency Is Finalizing

Section 404(i) provides for EPA to withdraw assumed programs that are

not administered in accordance with the requirements of the Act. 33 U.S.C. 1344(i). The prior regulations, promulgated in 1992, set out a formal adjudicatory process for the withdrawal proceedings. The Agency proposed to simplify the process used by the Agency when withdrawing an assumed section 404 program from a previously authorized Tribe or State. 88 FR 55310. The proposed process at section 233.53 provided that if the Regional Administrator finds that a Tribe or State is not administering the assumed program consistent with the requirements of the CWA and 40 CFR part 233, then the Regional Administrator shall inform the Tribe or State as to the alleged noncompliance and give the Tribe or State 30 days to demonstrate compliance. If compliance is demonstrated within those 30 days, then the Regional Administrator will so notify the Tribe or State and take no further action. If the Tribe or State fails to adequately demonstrate compliance within 30 days, the EPA Administrator will schedule a public hearing to discuss withdrawal of the Tribal or State program. Notice of the hearing will be widely disseminated and will identify the Administrator's concerns. The hearing will be held no less than 30 days and no more than 60 days after publication of the notice of the hearing and all interested parties will have the opportunity to make written or oral presentations. If, after the hearing, the Administrator finds that the Tribe or State is not in compliance, the Administrator will notify the Tribe or State of the specific deficiencies in the Tribal or State program and the necessary remedial actions. The Tribe or State will have 90 days to carry out the required remedial actions to return to compliance or the Administrator will withdraw program approval. If the Tribe or State completes the remedial action within the allotted time, or EPA concludes after the hearing that the Tribe or State is in compliance, the Tribe or State will be notified and the withdrawal proceeding concluded. Where the Administrator determines that the assumed program should be withdrawn, that decision will be published in the **Federal Register**, the Corps will resume permit decision-making under section 404 in all waters of the United States in the affected Tribe or State, and any provision in the CFR addressing that Tribe's or State's assumption will be rescinded.

After reviewing public comments, the Agency is finalizing the approach as proposed, with one revision to require EPA to decide whether to proceed with

withdrawal within 90 days after the conclusion of the hearing process. This final rule approach replaces the adjudicatory hearing process with a public notice and hearing process modeled on the procedures for withdrawal of the Underground Injection Control program as discussed below.

b. Summary of Final Rule Rationale and Public Comments

The previous section 404 Tribal and State program regulations, promulgated in 1992, set out a formal adjudicatory process for the withdrawal proceedings. This formal adjudication process is not required by the statute and its length and complexity impose an unnecessary resource burden and other challenges for the Agency, Tribes and States, and stakeholders. The Agency proposed a streamlined process that is both easier to understand and to administer and encourages participation by interested parties. The process is modeled on the withdrawal procedures for Tribal and State Underground Injection Control programs at 40 CFR 145.34 and revised to accommodate the requirements of section 404. EPA views the Underground Injection Control program's approach as more transparent and efficient than the prior section 404 program withdrawal procedures.

EPA requested comments on all aspects of the revision. Multiple commenters supported the proposed approach as providing a more meaningful backstop to ensure that Tribal or State programs address water pollution consistent with the requirements of section 404. Some commenters opposed the proposed approach, stating that the text of the statute indicates that Congress supports State assumption and intended withdrawal to be an extended adjudicatory process providing maximum due process to the State. These commenters expressed concern that an "easy out" would undermine the stability of program approval and could lead to economic waste of the substantial investments States make in their programs. These commenters also noted that a streamlined withdrawal process could disincentivize Tribal and State assumption generally.

EPA has decided to finalize the proposed approach. As commenters in support of the proposed revision noted, the final rule allows EPA to respond quickly where there are concerns regarding Tribal or State compliance with the assumed program. By eliminating the adjudicatory requirements, it allows both EPA and the Tribe or State to focus on the

substantive requirements of the program. In response to commenters' concerns, the substantive requirements of the final rule are comparable to the prior one but will enhance efficiency of the withdrawal process and better align with EPA's section 404 program approval procedures. Nothing in the CWA requires the Agency to maintain inefficient and burdensome procedures for their own sake. Enhancing administrability does not mean that EPA intends to take program withdrawal lightly, and EPA's experience with both CWA and Underground Injection Control programs reflects that this process has been carefully and rarely used. Consistent with EPA's longstanding practice, the Agency will first seek to resolve program concerns and help enable Tribes and States to administer the section 404 program consistent with the requirements of the CWA and its implementing regulations. EPA is committed to working with Tribes and States through mechanisms such as annual program report reviews, informal program reviews, and formal program reviews to identify program challenges and recommended steps for resolution.

Several commenters asked that EPA add a deadline by which time EPA must decide whether to proceed with withdrawal after the conclusion of the hearing process. These commenters suggested a deadline of no more than 60 days. EPA considered this suggestion and concluded that a deadline for decision would add predictability to the withdrawal process and avoid leaving the relevant Tribe or State and stakeholders in a lengthy state of uncertainty as to whether the Tribe or State will continue to administer the program. However, EPA decided to provide the Agency 90 days to make this decision, rather than 60 days, to allow sufficient time for consideration of concerns raised and the Tribe or State's capacity to address these concerns. The final rule therefore provides for a 90-day mandatory time frame for EPA to make its decision after the conclusion of the hearing process.

3. Program Reporting

a. Overview and What the Agency Is Finalizing

EPA's prior section 404 Tribal and State program regulations require the Tribe or State to provide a self-assessment in an annual report, which must include, among other information, "an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters" and numbers of permits issued

and enforcement actions taken. 40 CFR 233.52(b) (2023). The annual report is meant to provide a robust overview of the Tribe's or State's program and implementation and support continuous improvement such that EPA can ensure the program remains consistent with the Act and these regulations. However, some of the self-assessment requirements for the annual report in the prior regulation lacked the necessary details for a Tribe or State to know EPA's expectations for the annual report.

EPA proposed several revisions at section 233.52(b) to clarify information not previously explicitly required, including specific metrics about compensatory mitigation, program resources and staffing, and a discussion as to how issues identified in the previous annual report or other problems the program has encountered have been resolved. 88 FR 55311. Additionally, the Agency proposed to add the word "final" between "Regional Administrator's" and "comments" in 40 CFR 233.52(e) to acknowledge that some discussion may occur between the Tribe or State and EPA as the annual report is being finalized. Finally, the Agency also proposed to require that the Director make the final annual report publicly available. After reviewing public comments, the Agency is finalizing these revisions as proposed, with one non-substantive revision to replace "as well as" with "and" in the series of items the State must evaluate in the draft annual report located at section 233.52(b).

b. Summary of Final Rule Rationale and Public Comment

EPA requested comment on all aspects of the proposed revision to the annual report requirements. EPA received few comments on this provision. The majority of comments were general in nature, expressing support for the added clarity in the proposal. One commenter opposed the additional requirements, stating that they would increase the burden on States to assume and implement the program. EPA considered these comments and has decided to finalize the regulatory text as proposed, because it adds clarity to what Tribes and States are expected to provide, giving them clear expectations for the annual report and reducing the need for follow-up questions from the Agency as it conducts its program oversight. EPA therefore thinks the revisions will assist Tribes and States, rather than burdening them.

A few commenters requested that EPA require additional reporting about the

costs of administering the program and litigation involving the Tribal or State program. The Agency finds that the proposed requirement to document "resources and staffing" will be sufficient to provide information EPA needs about program budgets. In addition, EPA decided that it does not need a litigation update in order to fulfill its oversight obligations; information already required about unauthorized activities and enforcement actions taken should, as a general matter, provide the litigation-related information most relevant to EPA's oversight. To the extent EPA decides that it needs litigation information on a case-by-case basis, that information would be easy to research or request of the Tribe or State. Thus, the Agency finds it unnecessary to modify the proposed text in light of these comments.

The final rule clarifies and updates the requirements for a Tribe's or State's annual reporting by clarifying that it must identify implementation challenges along with solutions to address the challenges, that evaluations of the program components must include any quantitative reporting, and that it must provide specific metrics related to compensatory mitigation, resources, and staffing. EPA expects these revisions will support a more streamlined process for the State's annual report submittal, EPA's comments and approval, and the State's final report publication. The clarifications will also ensure transparency as to the state of Tribal and State programs and facilitate annual discussions between the Tribe or State and EPA about program implementation and challenges. For EPA, the revisions will improve the Agency's ability to ensure that program operation is consistent with the Act.

Existing programs may make minor revisions to address this change. For example, the 2011 Memorandum of Agreement between Michigan and EPA lists requirements of the annual reports, but the list does not specifically include compensatory mitigation or resources and staffing, which are included in the final regulatory text. The 2011 Michigan EPA Memorandum of Agreement list does not preclude the State reporting other information; however, the Memorandum of Agreement list could be updated to reference section 233.52(b) or match the updated regulatory text. The New Jersey and EPA Memorandum of Agreement includes annual reporting requirements, but references section 233.52(b) rather than listing the requirements, so it may not require distinct updates.

F. Eligible Indian Tribes

a. Overview and What the Agency Is Finalizing

Prior to issuing a permit, a Tribe or State with an approved section 404 program must provide notice to another Tribe or State if a proposed discharge may affect the biological, chemical, or physical integrity of the other Tribal or State waters and provide an opportunity for the Tribe or State to submit written comments and suggest permit conditions. 40 CFR 233.31; *see* 33 U.S.C. 1344(h)(1)(C), (E). If recommendations from the State whose waters may be affected are not accepted by the Tribe or State issuing the permit, the Tribe or State issuing the section 404 permit must notify the affected State and EPA of its decision not to accept the recommendations and reasons for doing so. 40 CFR 233.31(a); *see* 33 U.S.C. 1341(1)(E). EPA's regulation at 40 CFR 233.2 defines the term "State" to include an Indian Tribe which meets the eligibility requirements for a Tribe to assume the section 404 program. Accordingly, these provisions could be read to limit the coordination requirement in section 233.31 to only those affected Tribes that meet the requirements for section 404 program assumption. To date, no Tribe has applied for eligibility to assume the section 404 program, and many Tribes lack the resources to assume the program. However, nearly half of federally recognized Tribes have been approved for TAS for other CWA provisions (*i.e.*, TAS for CWA section 106, section 319, and sections 303(c) and 401) and may have relevant water quality information that could inform the permitting decisions of Tribes or States administering a section 404 program.

In the proposal, the Agency considered three ways to further facilitate Tribal engagement in permitting decisions that may affect Tribal resources. First, the Agency proposed to expand the aforementioned coordination requirement to include affected Tribes that have been approved by EPA for TAS for any CWA provision, as opposed to only Tribes with TAS to assume the section 404 program. Second, the Agency proposed a new TAS opportunity solely for the purpose of receiving a heightened comment opportunity on section 404 permits proposed by other Tribes or States that may affect the biological, chemical, or physical integrity of their reservation waters. Finally, the Agency proposed to provide an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests, even if

Federal review has been waived. After reviewing public comments, the Agency is finalizing all three changes as proposed. These revisions are consistent with EPA's authority under CWA sections 404 and 518, as well as the Federal trust relationship and responsibilities to federally recognized Tribes, the policies underlying CWA section 518, and EPA's policies to facilitate Tribal opportunities to actively engage in managing their waters and resources.

In addition to the approaches summarized above to facilitate Tribal engagement in permitting decisions, EPA is also clarifying that when Tribes seek to administer the program in areas where they have not already assumed the section 404 program, Tribes must demonstrate that they meet the TAS criteria for those additional areas. This is a non-substantive clarification because subpart G already provides a process whereby Tribes seeking to assume the section 404 program address the TAS criteria, and this provision would simply clarify that the same TAS application applies if Tribes seek to add a new area to their program.

b. Summary of Final Rule Rationale and Public Comment

i. Enabling Tribes With TAS for Any CWA Provision To Comment as an Affected State

As discussed above, 40 CFR 233.31(a) currently affords specific consideration of comments and suggested permit conditions on draft permits by an affected State and provides an avenue of review if a Tribe or State with an assumed program chooses not to accept the suggested permit conditions. Under the current regulatory definition of "State"—which includes Tribes that have obtained TAS for purposes of assuming the section 404 program—no Tribes are presently eligible to be considered an affected State, as no Tribes have yet obtained TAS status for purposes of assuming the section 404 program.

Section 518 of the CWA authorizes EPA to treat eligible federally recognized Tribes in a similar manner as a State for purposes of implementing and managing various environmental functions under the statute. The requirements for TAS are established in CWA section 518 and are reflected in EPA regulations for various CWA provisions. Generally, the Tribes must be federally recognized, have a governing body that carries out substantial governmental duties and powers, seek to carry out functions pertaining to the management and

protection of reservation water resources, and be capable of carrying out the functions of the particular provision at issue. 33 U.S.C. 1377(e). Of the 574 federally recognized Tribes, over 285 have been granted TAS status for one or more CWA provisions.⁴⁴

The Agency proposed to revise the coordination requirements at section 233.31 to expressly provide that Tribes that have already been approved for TAS by EPA to administer any other CWA programs, such as a water quality standards (WQS) program under CWA section 303(c), or have been approved for TAS for any other CWA purpose, such as receiving section 106 grants to establish and administer programs for the prevention, reduction, and elimination of water pollution, should also have the opportunity to comment on draft permits in the same manner as affected States.

Most commenters supported effective coordination with Tribes on permits that may affect Tribal aquatic resources. EPA agrees with these commenters and finds this provision at 233.31 will enable more Tribes whose waters may be affected by a dredge or fill project to comment on permits to be issued by a Tribe or State in the same manner as other affected States. A Tribe or State with an approved section 404 program will also have to provide an opportunity for Tribes with TAS for any CWA provision to submit written comments within the public comment period and suggest permit conditions as provided in section 233.31(a) of the regulations. As finalized, Tribes and States with an approved section 404 program must consider comments from Tribes with TAS for any CWA provision whose reservation waters may be affected by a proposed discharge. If the recommendations are not accepted by the approved Tribe or State program, the approved Tribe or State program would have to notify the affected Tribe and EPA of its decision not to accept the recommendations and its reasons for not doing so. EPA would then have time to comment upon, object to, or make recommendations regarding the Tribal concerns set forth in the original comment. This is the same opportunity and process provided to affected States.

⁴⁴ EPA maintains a website that lists all Tribes approved for TAS, which is updated bi-annually. Tribes with TAS for regulatory programs and administrative functions can be found at <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>; Tribes with TAS for section 106 grants can be found at <https://www.epa.gov/water-pollution-control-section-106-grants/tribal-grants-under-section-106-clean-water-act>; Tribes with TAS for section 319 grants can be found at <https://www.epa.gov/nps/current-tribal-ss319-grant-information>.

Some commenters asked EPA to codify specific timelines and notification requirements to ensure such coordination occurs. EPA is declining to mandate a specific process. Rather, EPA has determined that individual Tribes and States should have the flexibility to establish the procedures and coordination approaches that work best for them. EPA encourages States to work together with Tribes whose reservation waters may be affected by a proposed discharge prior to proposal of the relevant permit. Such efforts will improve permitting, protect interests, and build relationships. For example, existing State section 404 programs are already coordinating with affected Tribes per their Memorandum of Agreement with EPA.

Some commenters expressed concern that this provision creates a new authority allowing for Tribes to engage in State permitting in a way that could result in confusion, while another commenter suggested that such opportunity be limited to Tribes with TAS for water quality standards and section 401 certification. EPA disagrees with these commenters. First, EPA disagrees that this provision will result in confusion. Under CWA sections 404 and 518 and EPA's existing regulations, Tribes were already afforded the enhanced opportunity to provide comment as an affected State through the TAS process for section 404. Second, EPA views any Tribe that has TAS status for any CWA purpose as both capable of participating in matters that may affect the chemical, physical, or biological integrity of reservation waters through the enhanced opportunity for comment, and as an appropriate entity to be afforded that opportunity. By receiving TAS for another provision of the CWA, a Tribe has already demonstrated they have met the TAS requirements as articulated in section 518 of the Act and that they are engaged in water quality protection activities under the Act. Accordingly, EPA concludes that Tribes that have already been approved for TAS by EPA to administer other CWA program(s) are capable of commenting on draft permits in the same manner as affected States and are relevant entities to provide input regarding the potential effects on their reservation waters of Tribal and State 404 permitting.

ii. Providing TAS Opportunity Specifically for the Ability To Comment as an Affected State

EPA is finalizing as proposed a process whereby Tribes may apply for TAS for the sole purpose of commenting on Tribe- or State-issued CWA section

404 permits in the same manner as an affected State. Tribes that obtain TAS for this purpose would benefit from the same notification requirements that apply to any other commenting affected "State." This rule enables Tribes that have neither assumed the section 404 program nor have obtained TAS for other CWA programs to obtain TAS solely to provide input on section 404 permits that may affect their reservation waters.

This approach is similar to approaches taken in other EPA programs. For example, the Agency's regulations under the Clean Air Act provide opportunities for interested Tribes to seek TAS authorization for distinct severable elements of programs under that statute. *See* 40 CFR 49.7(c). Under that authority, EPA has authorized TAS for the procedural comment opportunity provided in connection with issuance of certain permits by upwind permitting authorities, without requiring those Tribes to seek authorization for the entire relevant program. *See* 42 U.S.C. 7661d(a)(2). Nothing in the language of section 404 precludes creating this new TAS opportunity. This provision would relate solely to the coordination requirements set forth in section 233.31(a). The opportunity to provide comments and suggest permit conditions established in CWA sections 404(h)(1)(C) and (E) and 40 CFR 233.31 do not require any exercise of regulatory authority by the affected Tribe. Due to the limited nature of TAS solely for purposes of commenting as an affected State, EPA anticipates that the application burden on interested Tribes would, in most circumstances, be minimal and that the process for review of Tribal applications would be straightforward. As with other TAS applications, interested Tribes would submit relevant information demonstrating that they meet the TAS eligibility criteria to the appropriate Regional Administrator, who would process the application in a timely manner. Because, as described above, commenting in the same manner as an affected State does not involve any exercise of regulatory authority by the applicant Tribe, no issues regarding Tribal regulatory authority should be raised or decided in this limited TAS context. In this sense, TAS applications for this purpose would be similar to TAS applications for the purpose of receiving grants, a process that many Tribes have undergone and with which EPA has substantial experience. Similarly, Tribes interested in this TAS opportunity would need to demonstrate

their capability solely for the limited purpose of submitting comments as an affected Tribe. These Tribes would not need to demonstrate capability to administer an assumed section 404 program.

Many commenters supported this provision to fill gaps and facilitate Tribal engagement in permitting that may affect their waters within Indian Country. EPA agrees with these commenters and is finalizing the process as proposed to eliminate unnecessary barriers to Tribal engagement in the 404 process as contemplated by CWA section 518. Some commenters raised a concern that EPA lacks authority to create new Tribal authorities. However, EPA is not creating a new Tribal authority. The CWA and section 404 program regulations already provide Tribes the ability to obtain TAS for the section 404 program and to comment as an affected State. 33 U.S.C. 1377(e). As discussed above, Tribes do not need to have the authorities and resources to fully administer a section 404 program, including issuing permits and enforcing violations, in order to comment as an affected State. Such a requirement would be unnecessarily burdensome with no benefit to Tribes or the environment. Thus, EPA is finalizing this provision to obtain TAS for the sole purpose of commenting on Tribe or State issued section 404 permits.

One commenter suggested that specifically enabling Tribes to request to review all permits within a specified geographic area, including areas outside of reservation land, as the most efficient way of ensuring Tribal engagement in the permit issuance process for areas with cultural and ecological significance. Tribes are free to submit such requests to the permitting authority, and EPA encourages Tribes and States to provide for notifications of permitting in such areas through mechanisms established in regulation, a Memorandum of Understanding, or through the State Historic Preservation Officer and Tribal Historic Preservation Office. EPA is not adding any regulatory revisions on this point as such requests are most efficiently addressed on a case-by-case basis.

Some commenters raised concerns that this provision would allow any Tribe to comment on any permit issued by any State. As stated above, any member of the public, including Tribes, may already comment on any draft permit. This provision simply provides an additional mechanism for eligible Tribes to engage in the same heightened comment process on draft permits that is already available to States and to

Tribes that obtain TAS for the purpose of assuming the section 404 program. Tribes obtaining TAS for this limited purpose would be able to comment in the same manner as affected States on only those permits that may affect the biological, chemical, or physical integrity of the Tribe's waters. Providing a mechanism to obtain TAS for this limited commenting opportunity is consistent with CWA sections 404 and 518, as well as the Federal trust responsibility to federally recognized Tribes and EPA's various Tribal policies seeking to facilitate Tribal opportunities to actively engage in managing their waters and resources and to eliminate unnecessary barriers to such Tribal involvement.

Lastly, some commenters argued that this provision provides Tribes with an opportunity to comment on permits that does not exist in the Federal section 404 program. As discussed above, 40 CFR 233.31(a) already afforded specific consideration of comments and suggested permit conditions on draft permits by an affected State, which includes Tribes that have obtained TAS for purposes of assuming the section 404 program. This final rule merely provides that Tribes may apply for TAS for the sole purpose of commenting on Tribe- or State-issued CWA section 404 permits in the same manner as an affected State. Moreover, under the Corps' administration as well as Tribal or State program administration, any entity may comment on any draft permit.

Some commenters asked EPA to conduct outreach to inform Tribes about the opportunity to apply for TAS for the sole purpose of commenting on 404 permits. EPA agrees that such outreach would be useful and intends to work with Tribes and States to develop implementation tools and conduct outreach informing Tribes, States, and others about this rule, including the opportunity to apply for TAS to comment on 404 permits.

iii. Opportunity for Tribes To Request EPA Review of Permits That May Affect Tribal Rights or Interests

EPA is also revising section 233.51 to codify an opportunity for Tribes to request EPA review of permits potentially affecting Tribal rights or interests. These may include rights or interests both inside and outside of a Tribe's reservation and would facilitate EPA's review of permits that have the potential to impact waters of significance to Tribes. The revisions to section 233.51 enable Tribes to request EPA's review of permits that may affect both rights reserved through treaties,

statutes, or executive orders, as well as Tribal interests in resources that may not be reflected in Federal law, such as those with historical or cultural significance to Tribes. Section 233.51 applies whenever a Tribe asserts that issuance of a particular permit potentially affects its rights or resources; however, EPA's review of a permit pursuant to section 233.51 would not constitute a recognition by EPA that any particular Tribe holds reserved rights.⁴⁵

EPA anticipates that this provision will help address Tribal concerns about the loss of Federal consultation opportunities when permitting authority transfers from the Corps to a Tribe or State. Additionally, this provision will allow coordination on potential impacts to Tribal rights and resources not covered by any other commenting option discussed above in sections IV.F.b.i and IV.F.b.ii of this preamble. Given the TAS provisions discussed above, EPA anticipates that Tribes will use this opportunity in limited circumstances.

Under this provision, a Tribe may notify EPA within 20 days of public notice of a permit application that the application potentially affects Tribal rights or interests, including those beyond reservation boundaries, even if Federal review has been waived. If a Tribe does so, EPA will request the public notice and will proceed in accordance with section 233.50, including providing a copy of the public notice and other information needed for review of the application to the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. Pursuant to section 233.50, if EPA objects to a draft permit, the issuing Tribe or State may not issue the permit unless it has taken steps required by EPA to eliminate the objection. Once EPA removes its objection, EPA may send a copy of the letter removing EPA's objections to a permit at a Tribe's request or pursuant to a prior agreement with the Tribe (or other stakeholders).

Several commenters supported the proposed provision, noting it helps to fill a gap and provide Tribes a mechanism to help ensure an

opportunity to raise concerns regarding potential impacts to Tribal aquatic and cultural resources outside of their reservations. Some commenters expressed concern that there is no reliable instrument for coordinating with States assuming the section 404 program regarding potential impacts on historical and cultural sites or Tribal natural resource rights located outside of reservation lands. These commenters referenced the Federal trust responsibility to Federally recognized Tribes, which forms an important element of the Tribal-federal relationship but which does not apply to States that assume the section 404 program, as well as other aspects of federal law. Additionally, some commenters raised concerns over resource limitations and that following assumption a Tribe would need to take on the burden of reviewing all permit applications statewide for those that may affect Tribal resources. EPA encourages Tribes to work with Tribes and States with approved section 404 programs to develop mechanisms (e.g., Memoranda of Understanding) for notifying Tribes at appropriate times, and EPA may participate in such discussions to aid in coordination efforts, if appropriate.

This rule does not affect other mechanisms that require Tribal and State permitting authorities to protect Tribal interests. For example, CWA section 404 permits for discharges must comply with all applicable State water quality standards (including standards in a downstream jurisdiction) in effect under the CWA. *See* 33 U.S.C. 1311(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). To the extent designated uses require consideration of cultural or traditional uses of water that may be important to Tribes, Tribal or State section 404 programs must consider those during the permitting process.

A few commenters raised a concern that this provision creates an opportunity to comment on permits beyond Indian Country that does not currently exist when the Corps is the permitting authority. As noted above, any member of the public is currently able to comment on any draft permit, and EPA has the authority to review and comment on any draft permit. *See* 33 U.S.C. 1344(h)(1)(C), (j). In addition, the scope of the Corps' Federal section 404 program is outside the scope of this rulemaking. Regardless of the scope of the Corps' engagement with Tribal stakeholders, facilitating Tribal engagement in permitting decisions that affect Tribal resources is a priority to EPA. In its oversight role, EPA is able to review and object to permits; this

⁴⁵ On May 2, 2024, EPA published a final rule entitled "Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights." 89 FR 35717 (May 2, 2024). That rule amends EPA's water quality standards regulation, 40 CFR part 131 *et seq.*, to, in pertinent part, define "Tribal reserved rights" for WQS purposes as "any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders." 89 FR 35717. The Tribal Reserved Rights rulemaking does not affect section 233.51 of this section 404 rulemaking, nor does anything in this section 404 rulemaking depend on the Tribal Reserved Rights rulemaking.

provision provides an additional way to inform the Agency as it determines whether to review and object to a potential permit.

G. Impacts to Existing Programs

This preamble section identifies parts of this rule that may affect existing State-assumed section 404 programs by requiring them to modify their procedures or potentially expand the scope of their authority. Whether these changes would require revisions to existing State-assumed programs depends on the existing authority of the States that have assumed the program and their implementation procedures, as well as the interpretation of these authorities and processes by State Attorneys General or State courts. These States may already have some or all of the authority or procedures in place that these provisions require. States that do not have the authority required to administer the provisions of the final rule would need to submit a program revision for EPA approval after issuance of the rule in accordance with 40 CFR part 233.16.

Final rule provisions that could affect existing programs include a provision ensuring opportunity for judicial review of agency decisions (section IV.C.2 of this preamble), updates to the compensatory mitigation requirements for Tribal and State section 404 programs (section IV.B.4 of this preamble), and a revised approach to addressing the five-year limit on permits (section IV.C.1 of this preamble). In addition, clarification as to how Tribes and States can demonstrate that their programs are no less stringent than the Federal section 404 program (section IV.A.3 of this preamble), modification of the conflict of interest prohibition (section IV.A.1 of this preamble), and updated annual reporting requirements (section IV.E.3 of this preamble) may affect existing State programs.

EPA recognizes that “[w]hen an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913 (2020) (citations and internal quotation marks omitted.) EPA does not view the regulatory changes as undermining serious reliance interests that outweigh the benefits of these changes. EPA’s regulations contain detailed procedures for revising an approved section 404 program. 40 CFR part 233.16. States seeking approval would therefore be well aware that program revisions may be necessary following assumption.

Moreover, the program revision regulations specifically address revisions needed as a result of a change to the section 404 regulations, or to any other applicable statutory or regulatory provision. *Id.* at 233.16(b). The regulations allow Tribes and States one year to make such revisions, or two years if statutory changes are required. *Id.* The 1–2-year revision period supplements the lengthy preliminary period for proposing and finalizing this rule and soliciting and responding to public comments. Tribes and States therefore should anticipate the potential need to revise their programs based on Federal regulatory revisions following assumption. Finally, nothing in CWA section 404 suggests that EPA’s approval of a Tribal or State program terminates the Agency’s ability to update relevant regulations when necessary to effectively administer the Act. The Agency does not think Congress would have intended approvals to carry such a drastic consequence without saying so.

H. Technical Revisions

In addition to revising 40 CFR part 233, EPA is also finalizing technical edits to clarify that the 40 CFR part 124 regulations do not apply to Tribal or State section 404 programs. Specifically, EPA is making targeted revisions and deletions to specific provisions of the regulations at 40 CFR parts 124.1 through 124.3, 124.5, 124.6, 124.8, 124.10 through 124.12, and 124.17 to remove any references to 40 CFR part 233. Prior to 1988, the State section 404 program regulations included references to 40 CFR part 124, which contains consolidated permitting regulations for a variety of programs that EPA administers. *See* 49 FR 39012 (October 2, 1984). The preamble to the 1988 section 404 Tribal and State program regulation clearly stated that the 40 CFR part 124 regulations no longer apply to Tribal or State section 404 programs and announced the Agency’s intention to publish technical edits in the future. 53 FR 20764 (June 6, 1988) (“It is the agency’s intent that 40 CFR part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the future.”). Although the Agency modified 40 CFR part 233 to remove all references to part 124 in 1988, the Agency did not provide conforming edits to 40 CFR part 124 to remove references to 40 CFR part 233. This rule removes the outdated references to 40 CFR part 233 in part 124. The removal of these references has no substantive impact on the section 404 assumption process or on Tribal or State section 404 programs. They also do not implicate or affect aspects of the

part 124 regulations addressing other EPA permit programs, including the Resource Conservation and Recovery Act (RCRA), Underground Injection Control, and NPDES programs.

EPA is also revising the definitions located at 40 CFR part 233.2 for consistency and clarity. EPA is defining “Indian lands” consistent with the Agency’s long-standing interpretation of “Indian lands” as synonymous with “Indian country” as defined at 18 U.S.C. 1151. *See e.g.*, 40 CFR part 144.3 (defining “Indian lands” as “Indian country” as defined at 18 U.S.C. 1151); 40 CFR part 258.2 (adopting the definition of 18 U.S.C. 1151 for “Indian lands”); U.S. EPA, Underground Injection Control Program: Federally-Administered Programs, 49 FR 45292, 45294 (November 15, 1984) (defining “Indian lands” as used in EPA’s Safe Drinking Water Act Underground Injection Control Program regulations as “Indian country,” explaining that “EPA believes this definition is most consistent with the concept of Indian lands as the Agency has used it in regulations and [Underground Injection Control] program approvals to date.”); *Wash. Dep’t of Ecology v. EPA*, 752 F.2d 1465, 1467 n.1 (9th Cir. 1985) (noting EPA’s position that “Indian lands” is “synonymous with ‘Indian country’, which is defined at 18 U.S.C. 1151”). EPA is also revising the definition of “State 404 program” or “State program” to clarify that Tribes and interstate agencies may also have an approved program. The Agency is removing the “(p)” associated with the cross-reference to 40 CFR part 233.2 in the definition of “State 404 program” or “State program” as the definitions in 40 CFR part 233.2 are no longer listed by letter. Finally, EPA is clarifying the definition for “State regulated waters” in 40 CFR part 232 by replacing the in-text description of retained waters with a reference to the relevant regulatory text at 40 CFR part 233.11(i).

EPA is also finalizing several technical edits throughout 40 CFR part 233 to update cross-references, ensure consistent use of terminology, and facilitate efficient program operation. First, EPA is updating section 233.10(a) and section 233.16(d)(2) to include the term “Tribal leader” where the term “Governor” is referenced. Second, EPA is also removing the use of the masculine pronouns “he” and “his” throughout 40 CFR part 233 and replacing them with “they,” “their,” “the Administrator,” “the Regional Administrator,” or “Director” as appropriate. The purpose of changing masculine pronouns or terms to neutral pronouns and other neutral terms is to

acknowledge the diversity of people who may hold the positions of “the Administrator,” “the Regional Administrator,” “Director,” and program staff. Third, EPA is changing references to assumption “application” to terms including “request to assume,” “program submission,” or “assumption request materials” to more clearly distinguish between permit applications and requests to assume the program throughout the regulations. Fourth, EPA is revising section 233.1(b) to remove the term “individual” from the reference to “State permits,” as States may also regulate discharges using general permits. Fifth, the Agency is changing the “Note” in section 233.1(c) to become section 233.1(d) and adding a cross-reference to the process to identify retained waters and the retained waters description at 233.11(i). Section 233.1(d) will be renumbered as 233.1(e). Sixth, EPA is clarifying in section 233.14(b)(3) that when a State intends to administer general permits issued by the Secretary, any Tribal or State conditions and/or certifications of those general permits transfer when the Tribe or State assumes the program. Seventh, EPA is also adding an effective date for the approved non-substantial program revisions in the letter from the Regional Administrator to the Governor requirement in section 233.16(d)(2). Finally, EPA is also clarifying in section 233.53(a)(1) that when the Tribe or State notifies the Administrator and the Secretary of its intent to voluntarily transfer program responsibilities back to the Secretary, the Tribe or State must also submit the transition plan. The Agency is adding the words “no less than” before the advance notice requirement to clarify that Tribes and States may provide more than 180 days’ notice of intent to transfer the program. An extended transition time would allow the Tribe or State, the Corps, and EPA to discuss any gaps in the plan and ensure a smooth transition from the Tribe or State to the Corps’ administration of the program. The rule requires that files associated with ongoing investigations, compliance orders, and enforcement actions be provided to the Secretary to ensure compliance with these orders and minimize disruptions in administration of section 404 programs. The Agency requested comment on whether to revise the regulations to clarify that electronic mail is an acceptable method of transmitting public notices or documents, in addition to mail. Instead of changing, for example, the word “mail” to “send” throughout the regulations, the Agency wishes to clarify

that that both electronic mail and mail are acceptable methods of transmitting public notices or documents.

I. Incorporation by Reference

Currently, 40 CFR part 233.70 incorporates by reference Michigan’s regulatory and statutory authorities applicable to the State’s approved CWA section 404 program, and 40 CFR part 233.71 incorporates by reference New Jersey’s regulatory and statutory authorities applicable to the State’s approved CWA section 404 program. EPA codified in regulation the approval of the Michigan program on October 2, 1984 (49 FR 38947) and the New Jersey program on March 2, 1994 (59 FR 9933). EPA is updating the incorporation by reference of the Michigan laws in the State’s approved CWA section 404 program as follows:

- The Michigan Administrative Procedures Act of 1969, MCL § 24–201, *et seq.*, in effect as of February 13, 2024 (addresses the effect, processing, promulgation, publication and inspection of State agency determinations, guidelines and rules);
- The Natural Resources and Environmental Protection Act 451 of 1994:
 - Part 31 Water Resources Protection, MCL § 324.31 *et seq.*, in effect as of September 29, 2023 (provides regulatory authority and describes Michigan’s water quality provisions);
 - Part 301 Inland Lakes and Streams, MCL § 324.301 *et seq.*, in effect as of October 20, 2021 (provides authority for Michigan’s inland lakes and streams rules and regulations for the streams and inland lakes portion of the water resources permitting and enforcement program);
 - Part 303 Wetland Protection, MCL § 324.303 *et seq.*, in effect as of April 27, 2019 (provides authority for Michigan’s wetlands rules and regulations for the wetlands portion of the water resources permitting and enforcement program);
 - Part 307 Inland Lake Levels, MCL § 324.307 *et seq.*, in effect as of October 16, 2020 (provides authority for Michigan regulating water levels in inland lakes);
 - Part 315 Dam Safety, MCL § 324.315 *et seq.*, in effect as of September 10, 2004 (provides authority for Michigan regulating dam safety);
 - Part 323 Great Lakes Shorelands Protection and Management, MCL § 324.323 *et seq.*, in effect as of October 20, 2021 (allows the State to issue permit and violation fees); and
 - Part 325 Great Lakes Submerged Lands, MCL § 324.325 *et seq.*, in effect as of October 20, 2021 (provides for and

describes regulating activities in Great Lakes Submerged Lands).

Additionally, EPA is incorporating the most recent versions of Michigan Administrative Code, Department of Environmental Quality, as follows:

- Land and Water Management:
 - Great Lakes Shorelands, R 281.21 through R 281.26 inclusive, in effect as of 2000;
 - Wetlands Protection, R 281.921 through R 281.925 inclusive, in effect as of 2006;
 - Wetland Mitigation Banking, R 281.951 through R 281.961 inclusive, in effect as of 1997;
 - Dam Safety, R 281.1301 through R 281.1313 inclusive, in effect as of 1993; and
- Water Resources Division, Inland Lakes and Streams, R 281.811 through R 281.846 inclusive, in effect as of 2015.

This material contains Michigan’s rules for shoreline protection, inland lakes and streams, wetlands protection, wetland mitigation banking, and dam safety. EPA is updating the name of the implementing State agency to reflect that the current agency implementing the approved Michigan assumed program is the Michigan Department of Environment, Great Lakes, and Energy rather than the Department of Natural Resources in section 233.70. EPA is also updating the description of EPA and Michigan Memorandum of Agreement in section 233.70(c)(1) to reflect the current Memorandum, signed in 2011.

EPA is updating the incorporation by reference of the New Jersey state laws in the State’s approved CWA section 404 program as follows: Freshwater Wetlands Protection Act, New Jersey Statutes Annotated, Title 13: Conservation and Development—Parks and Reservations; Chapter 9B: Freshwater Wetlands, N.J.S.A. 13:9B–1 *et seq.*, effective as of December 23, 1993 (provides the New Jersey Department of Environmental Protection with the authority to regulate and permit activities in freshwater wetlands). Additionally, EPA is incorporating the most recent version of the Freshwater Wetlands Protection Act Rules as follows: Freshwater Wetlands Protection Act Rules, New Jersey Administrative Code, N.J.A.C. 7:7A, amended November 7, 2022 (contains regulations to implement the Freshwater Wetlands Protection Act).

Materials that have been incorporated by reference are reasonably made available to interested parties. Copies of materials incorporated by reference may be obtained or inspected at EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004

(telephone number: 202-566-1744); or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Copies of the materials incorporated by reference for Michigan's program can also be accessed at www.legislature.mi.gov/ and www.michigan.gov/lara/bureau-list/moahr/admin-rules; at the Water Division, Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604 (telephone number: 800-621-8431); or at the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933 (telephone number: 800-662-9278). Copies of the materials incorporated by reference for New Jersey's program can also be accessed at www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj; at the Library of the Region 2 Regional Office, Ted Weiss Federal Building, 290 Broadway, New York, NY 10007; or at the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625 (telephone number: 609-777-3373). EPA is updating the docket location and EPA Region 2 Regional Office location cited at 40 CFR part 233.71(b) to reflect their current addresses.

J. Severability

The purpose of this section is to clarify EPA's intent with respect to the severability of provisions of the final rule. Each provision and interpretation in this rule is capable of operating independently. Once effective, if any provision or interpretation in this rule were to be determined by judicial review or operation of law to be invalid, that partial invalidation would not render the remainder of this rule invalid. Likewise, if the application of any aspect of this rule to a particular circumstance were determined to be invalid, the Agency intends that the rule would remain applicable to all other circumstances. None of the provisions in this rule depend upon any other for effectiveness. Taking as examples the provisions listed at the beginning of this preamble, if the new "conflict of interest" revisions were deemed invalid, the absence of those revisions would in no way affect or undermine the rationale for or the operation of the provisions addressing compliance with the 404(b)(1) Guidelines or being "no less stringent than" Federal requirements. Similarly, taking an example from the end of this preamble, if the Agency's provisions addressing Tribal engagement were deemed invalid, the new program reporting requirements would retain their utility.

V. Statutory and Executive Order Reviews

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

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

This action is a "significant regulatory action" as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866 review is available in the docket for this action. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, the Economic Analysis for the Final Rule, is available in the docket for this action (Docket ID No. EPA-HQ-OW-2020-0276) and is briefly summarized below.

The Economic Analysis for the Final Rule is qualitative in nature due to numerous data limitations and uncertainties regarding the potential impacts resulting from the final rule. See Section VI of the Economic Analysis for the Final Rule for further discussion on data limitations and uncertainties. Section IV of the Economic Analysis for the Final Rule summarizes the incremental and cumulative costs and benefits of the final rule for different interested parties, including Tribes, States, permittees, and EPA. Benefits of the final rule are mainly positive impacts resulting from clarification of assumption procedures and substantive requirements. These benefits accrue to Tribes, States, permittee, Federal agencies, and the public. Tribes, States, permittees, and Federal agencies may experience both incremental costs and cost savings as a result of the final rule.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rulemaking have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 0220.17. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized below. The information collection requirements are not enforceable until OMB approves them.

The type and frequency of information requested varies by

respondent group and activity. For this information collection, EPA classified respondents into one of four categories: (1) States or Tribes seeking program assumption; (2) States or Tribes with an approved program and administering the program; (3) Permittees; and (4) Tribes seeking TAS for the sole purpose of commenting as an affected State. The ICR does not require the collection of any information of a confidential nature or status.

Respondents/affected entities: States or Tribes seeking program assumption; States or Tribes with an approved program and administering the program; Permittees; and Tribes seeking TAS for the sole purpose of commenting as an affected State.

Respondents' obligation to respond: Voluntary (States or Tribes seeking program assumption); Required for program operation and maintenance (States or Tribes with an approved program and administering the program); Required to submit an application to obtain a section 404 permit (Permittee); Voluntary (Tribes seeking TAS for the sole purpose of commenting as an affected State).

Estimated number of respondents: 1 State over 3 years (seeking program assumption); 3 States/year (with an approved program and administering the program, except for program modification); 2 States over 3 years (modifications to an approved program); 1,693 Permittees/year for 3 approved programs; 1 Tribe/year over 3 years (seeking TAS for the sole purpose of commenting as an affected State).

Frequency of response: Once (States or Tribes seeking program assumption); Variable (for States or Tribes with an approved program and administering the program); for each permit application (for Permittees); once (for Tribes seeking TAS for the sole purpose of commenting as an affected State).

Total estimated burden to respondents: 130,725 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost to respondents: \$6,972,139 (per year), includes \$930,831 annualized capital and start-up costs and \$6,041,308 program operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the

approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this final rule will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Section 404(g) of the CWA allows for Tribes and States to assume the section 404 permitting program, and the final rule clarifies assumption requirements for Tribes and States to ensure compliance with CWA 404(b)(1) Guidelines. Without the final rule, entities (both large and small) would still have to comply with the CWA 404(b)(1) Guidelines, regardless of whether the Tribe or State assumes the section 404 program or not and regardless of the changes in the final rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of \$100 million (annually adjusted for inflation) or more (in 1995 dollars) as described in UMRA, 2 U.S.C. 1531–38, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any State, local, or Tribal governments or the private sector. See the Economic Analysis for the Final Rule in the docket for this action for further discussion on UMRA.

E. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), EPA has determined that this rulemaking does not have federalism implications. EPA believes, however, this rulemaking may be of significant interest to State and local governments. Consistent with EPA's policy to promote communications between EPA and State governments, EPA engaged with State officials early in the process of developing the proposed rule to permit them to have meaningful and timely input into its development.

EPA is finalizing updates to clarify and facilitate the process of State assumption of the section 404 program. This rule does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion. This action does not have federalism implications and will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

The Agency invited written input from State agencies from November 12, 2018, through February 11, 2019,⁴⁶ and hosted an in-person meeting with State officials on December 6, 2018. At the in-person meeting, the Agency provided an overview of the rulemaking effort and the section 404(g) program and led themed discussions for input for the proposed rule, including clarifying assumed and retained waters and adjacent wetlands, enforcement and compliance, partial assumption, and calculating economic costs and benefits of the rule. A summary of stakeholder engagement and written input from States on this action is available in the docket for this final rule. After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period and EPA held a public hearing on September 6, 2023, for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted one input session specifically for State government representatives on August 24, 2023. Summaries of the public hearing session and of the input received during the State input session can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from State and local governments in a Response to Comments document that can also be found in the docket for this rulemaking. All comment letters and recommendations received by EPA during the public comment period from State and local governments are included in the docket for this action (Docket ID No. EPA–HQ–OW–2020–0276).

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

This action may have implications for Tribal governments. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. This action would expand Tribes' ability to utilize TAS for purposes of commenting as "affected States," and would develop an avenue for EPA review of permits that may impact Tribal rights and resources.

EPA consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this regulation to permit Tribes to have

meaningful and timely input into its development. EPA has developed a document which further describes EPA's efforts to engage with Tribal representatives and is available in the docket for this rulemaking.

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of this certification is included in the docket for this action.

The Agency initiated a Tribal consultation and coordination process before proposing a rule by sending a "Notification of Consultation and Coordination" letter, dated October 19, 2018, to all Tribes federally recognized at that time. The letter invited Tribal leaders and designated representatives to participate in the Tribal consultation and coordination process for this rulemaking. The Agency engaged with Tribes over a 60-day consultation period that concluded on December 21, 2018, including two Tribes-only informational webinars on November 20 and 29, 2018. During this consultation period, EPA participated in in-person meetings with Tribal associations, including a presentation for the National Tribal Water Council on October 24, 2018, and an informational session at the National Congress of American Indians 75th Annual Convention on October 24, 2018. The Agency also attended the EPA Region 9 Regional Tribal Operations Committee (RTOC) meeting on October 31, 2018, the EPA Region 6 RTOC meeting on November 28, 2018, and the EPA Region 7 Enhancing State and Tribal Programs Wetland Symposium on November 5, 2018. At the meetings and webinars, EPA sought input on aspects of the section 404 Tribal and State program regulations and assumption process. The Agency initiated a second Tribal consultation and coordination period on July 18, 2023. The Agency engaged with Tribes over a 60-day period that concluded on September 17, 2023, including two Tribal input sessions on August 15 and 30, 2023. During this consultation period, EPA participated in various meetings with Tribal associations, continued outreach and engagement with Tribes, and sought other opportunities to provide information and hear feedback from Tribes at national and regional Tribal meetings during and after the end of the consultation period. The Agency notes that two Tribes requested government-to-government consultation. However, no responses were received to schedule

⁴⁶ The Agency invited written input from State agencies from November 12, 2018, through January 11, 2019. Due to the lapse in Federal Government funding, EPA accepted input from states until February 2019.

the consultations.⁴⁷ All Tribal and Tribal organization letters and a summary of the Tribal consultation and coordination effort may be found in the docket for this action.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period and EPA held a public hearing on September 6, 2023, for all stakeholders to provide public comment on the proposed rule. Summaries of the public hearing and of the input received during the Tribal input sessions can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from Tribal representatives in a Response to Comment document that can also be found in the docket for this rulemaking.

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA’s Policy on Children’s Health also does not apply.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on communities with environmental justice concerns. The final rule creates more transparency and clarity for Tribes and States with existing section 404 programs and for those seeking to assume. Environmental justice considerations are potentially addressed through the following topics in the final rule: (1) public notice and hearings, (2) no less stringent than, (3) long-term permitting, (4) judicial review, (5) affected States, and (6) opportunities for Tribes.

First, within the final rule and assumption process, there are multiple opportunities for public engagement through public notice and hearings, including for communities with environmental justice concerns. Second, the section 404 Tribal and State regulations require that Tribes or States with an approved section 404 program may not impose conditions less stringent than those required under Federal law, so the environmental impacts of permitted projects would not increase due to this transfer of authority. Third, the final rule provides an improved ability for communities with environmental justice concerns to participate in the section 404 permitting process for long-term projects. Fourth, the requirements for State-assumed section 404 programs allow for judicial review in State courts, which is an opportunity for affected stakeholders to address concerns through judicial review.

Lastly, EPA additionally identified and addressed potential environmental justice concerns by expanding Tribes’ ability to utilize TAS for purposes of commenting as “affected States” and developing an avenue for EPA review of permits that may impact Tribal rights and resources. The final rule will enable Tribes to have a more significant role in the permit decision-making process than under prior practice. See Section V of the Economic Analysis for the Final Rule for additional information on the final regulations.

The information supporting this Executive Order review is contained in Section V of the Economic Analysis for the Final Rule, which is available in the docket for this action.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action does not meet the criteria as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 123

Environmental protection, Flood control, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

40 CFR Part 233

Environmental protection, Administrative practice and procedure, Incorporation by reference, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

Michael S. Regan,
Administrator.

For the reasons set forth in this preamble, EPA amends 40 CFR parts 123, 124, 232, and 233 as follows:

PART 123—STATE PROGRAM REQUIREMENTS

■ 1. The authority citation for part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 123.27 is amended by:

- a. Revising paragraphs (a) introductory text and (a)(3) introductory text;
- b. Removing the note immediately following paragraph (a)(3)(ii); and
- c. Revising paragraph (b)(2).

The revisions read as follows:

§ 123.27 Requirements for enforcement authority.

(a) Any State agency administering a program shall have the authority to establish the following violations and have available the following remedies and penalties for such violations of State program requirements:

* * * * *

(3) To assess or sue to recover in court civil penalties and to seek criminal penalties as follows:

* * * * *

⁴⁷ During the consultation period prior to the development of the final rule, two requests for government-to-government consultation were received. On July 25, 2023, EPA sent both the Mille Lacs Band of Ojibwe and the Grand Portage Band of Lake Superior Chippewa an invitation to schedule consultation. No responses were received to the invitation to schedule consultation.

(b) * * *

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the Act, except that a State may establish criminal violations based on any form or type of negligence.

Note 3 to paragraph (b)(2): For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 3. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

■ 4. Amend § 124.1 by revising paragraphs (e) and (f) to read as follows:

§ 124.1 Purpose and scope.

* * * * *

(e) Certain procedural requirements set forth in this part must be adopted by States in order to gain EPA approval to operate RCRA, UIC, and NPDES permit programs. These requirements are listed in 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA) and signaled by the following words at the end of the appropriate part 124 section or paragraph heading: (applicable to State programs see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)). This part does not apply to PSD permits or 404 permits issued by an approved State.

(f) To coordinate decision-making when different permits will be issued by EPA and approved State programs, this part allows applications to be jointly processed, joint comment periods and hearings to be held, and final permits to be issued on a cooperative basis whenever EPA and a State agree to take such steps in general or in individual cases. These joint processing agreements may be provided in the Memorandum of Agreement developed under 40 CFR 123.24 (NPDES), 145.24 (UIC), and 271.8 (RCRA).

■ 5. Amend § 124.2 by:

■ a. In paragraph (a):

■ i. Revising the introductory text;

■ ii. Revising the definitions for “Facility or activity”, “General permit”, “Major facility”, “Owner or operator”, “Permit”, and “SDWA”; and

■ iii. Removing the definition for “Section 404 program or State 404 program or 404”; and

■ iv. Revising the definition for “Site”; and

■ b. Revising paragraph (b).

The revisions read as follows:

§ 124.2 Definitions.

(a) In addition to the definitions given in 40 CFR 122.2 and 123.2 (NPDES), 501.2 (sludge management), 144.3 and 145.2 (UIC), and 270.2 and 271.2 (RCRA), the definitions below apply to this part, except for PSD permits which are governed by the definitions in § 124.41. Terms not defined in this section have the meaning given by the appropriate Act.

* * * * *

Facility or activity means any “HWM facility,” UIC “injection well,” NPDES “point source” or “treatment works treating domestic sewage”, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, or NPDES programs.

* * * * *

General permit (NPDES) means an NPDES “permit” authorizing a category of discharges or activities under the CWA within a geographical area. For NPDES, a general permit means a permit issued under 40 CFR 122.28.

* * * * *

Major facility means any RCRA, UIC, or NPDES “facility or activity” classified as such by the Regional Administrator, or, in the case of “approved State programs,” the Regional Administrator in conjunction with the State Director.

Owner or operator means owner or operator of any “facility or activity” subject to regulation under the RCRA, UIC, or NPDES programs.

Permit means an authorization, license or equivalent control document issued by EPA or an “approved State” to implement the requirements of this part and parts 122, 123, 144, 145, 270, and 271 of this chapter. “Permit” includes RCRA “permit by rule” (40 CFR 270.60), RCRA emergency permit (40 CFR 270.61), RCRA standardized permit (40 CFR 270.67), UIC area permit (40 CFR 144.33), UIC emergency permit (§ 144.34), and NPDES “general permit” (40 CFR 122.28). Permit does not include RCRA interim status (40 CFR 270.70), UIC authorization by rule (40 CFR 144.21), or any permit which has not yet been the subject of final agency action, such as a “draft permit” or a “proposed permit.”

* * * * *

SDWA means the Safe Drinking Water Act (Pub. L. 95–523, as amended by Pub. L. 95–1900; 42 U.S.C. 300f *et seq.*).

Site means the land or water area where any “facility or activity” is physically located or conducted, including adjacent land used in connection with the facility or activity.

* * * * *

(b) For the purposes of 40 CFR part 124, the term Director means the State Director or Regional Administrator and is used when the accompanying provision is required of EPA-administered programs and of State programs under 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA). The term Regional Administrator is used when the accompanying provision applies exclusively to EPA-issued permits and is not applicable to State programs under these sections. While States are not required to implement these latter provisions, they are not precluded from doing so, notwithstanding use of the term “Regional Administrator.”

■ 6. Amend § 124.3 by revising paragraph (a) heading, and paragraphs (a)(1) and (3) to read as follows:

§ 124.3 Application for a permit.

(a) *Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).* (1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under 40 CFR 270.1 (RCRA), 144.1 (UIC), 40 CFR 52.21 (PSD), and 122.1 (NPDES). Applications are not required for RCRA permits by rule (40 CFR 270.60), underground injections authorized by rules (40 CFR 144.21 through 144.26), and NPDES general permits (40 CFR 122.28).

* * * * *

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of 40 CFR 122.22 (NPDES), 144.32 (UIC), and 270.11 (RCRA).

* * * * *

■ 7. Amend § 124.5 by:

■ a. Revising paragraph (a), paragraph (c) heading, and paragraphs (c)(1) and (3);

■ b. Removing paragraph (f); and

■ c. Redesignating paragraph (g) as paragraph (f).

The revision reads as follows:

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) *(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).)* Permits (other than

PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked, and reissued or terminated for the reasons specified in 40 CFR 122.62 or 122.64 (NPDES), 144.39 or 144.40 (UIC), and 270.41 or 270.43 (RCRA). All requests shall be in writing and shall contain facts or reasons supporting the request.

* * * * *

(c) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) (1) If the Director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.62 (NPDES), 144.39 (UIC), or 270.41 (other than 40 CFR 270.41(b)(3) or 40 CFR 270.42(c) (RCRA)), he or she shall prepare a draft permit under 40 CFR 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, other than under 40 CFR 270.41(b)(3), the Director shall require the submission of a new application. In the case of revoked and reissued permits under 40 CFR 270.41(b)(3), the Director and the permittee shall comply with the appropriate requirements in subpart G of this part for RCRA standardized permits.

* * * * *

(3) "Minor modifications" as defined in 40 CFR 122.63 (NPDES), and 144.41 (UIC), and "Classes 1 and 2 modifications" as defined in 40 CFR 270.42 (a) and (b) (RCRA) are not subject to the requirements of this section.

* * * * *

- 8. Amend § 124.6 by:
 - a. Revising paragraphs (a) and (c), paragraph (d) heading and introductory text, paragraphs (d)(1) through (3);
 - b. Removing paragraph (d)(4)(iv);
 - c. Redesignating paragraph (d)(4)(v) as paragraph (d)(4)(iv); and
 - d. Revising the paragraph (e) heading.

The revisions read as follows:

§ 124.6 Draft permits.

(a) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit or to deny the application.

* * * * *

(c) (*Applicable to State programs, see 40 CFR 123.25 (NPDES).*) If the Director tentatively decides to issue an NPDES general permit, he or she shall prepare

a draft general permit under paragraph (d) of this section.

(d) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under 40 CFR 122.41 and 122.43 (NPDES), 144.51 and 144.42 (UIC), or 270.30 and 270.32 (RCRA) (except for PSD permits);

(2) All compliance schedules under 40 CFR 122.47 (NPDES), 144.53 (UIC), or 270.33 (RCRA) (except for PSD permits);

(3) All monitoring requirements under 40 CFR 122.48 (NPDES), 144.54 (UIC), or 270.31 (RCRA) (except for PSD permits); and

* * * * *

(e) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) * * *

* * * * *

- 9. Amend § 124.8 by revising the introductory text and paragraph (a) to read as follows:

§ 124.8 Fact sheet.

(*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, or NPDES facility or activity, for every Class I sludge management facility, for every NPDES general permit (40 CFR 122.28 of this subchapter), for every NPDES draft permit that incorporates a variance or requires an explanation under 40 CFR 124.56(b), for every draft permit that includes a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

* * * * *

- 10. Amend § 124.10 by:

- a. Revising paragraph (a)(1);
- b. Revising the paragraph (b) heading;
- c. Revising the introductory text of paragraph (c), and paragraphs (c)(1)(i), (ii), and (iv);
- d. Removing paragraph (c)(1)(vi);
- e. Redesignating paragraphs (c)(1)(vii) through (xi) as paragraphs (c)(1)(vi) through (x);

- f. Revising paragraph (c)(2)(i);
- g. Revising the paragraph (d) heading, and paragraphs (d)(1)(ii) and (iii);
- h. Removing paragraph (d)(1)(viii);
- i. Redesignating paragraphs (d)(1)(ix) and (x) as paragraphs (d)(1)(viii) and (ix);
- j. Adding at the end of paragraph (d)(2)(ii) the word "and" after the semicolon;
- k. Removing the text "; and" at the end of paragraph (d)(2)(iii) and adding a period in its place;
- l. Removing paragraph (d)(2)(iv); and
- m. Revising paragraph (e).

The revisions read as follows:

§ 124.10 Public notice of permit actions and public comment period.

(a) * * *

(1) The Director shall give public notice that the following actions have occurred:

- (i) A permit application has been tentatively denied under § 124.6(b);
- (ii) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) A draft permit has been prepared under § 124.6(d);

(iii) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) A hearing has been scheduled under § 124.12; or

(iv) An NPDES new source determination has been made under § 122.29 of this subchapter.

* * * * *

(b) *Timing (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)).*

* * * * *

(c) Methods (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)). Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) * * *

(i) The applicant (except for NPDES general permits when there is no applicant);

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act), NPDES, sludge management permit, or ocean dumping permit under the Marine Research Protection and Sanctuaries Act for the same facility or activity (including EPA when the draft permit is prepared by the State);

* * * * *

(iv) For NPDES permits only, any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S.

Fish and Wildlife Service and the National Marine Fisheries Service;

* * * * *

(2)(i) For major permits, NPDES general permits, and permits that include sewage sludge land application plans under 40 CFR 501.15(a)(2)(ix), publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity; and for EPA-issued NPDES general permits, in the **Federal Register**;

Note 1 to paragraph (c)(2)(i): The Director is encouraged to provide as much notice as possible of the NPDES draft general permit to the facilities or activities to be covered by the general permit.

* * * * *

(d) *Contents (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA))—*

(1) * * *

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of NPDES draft general permits under 40 CFR 122.28;

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for NPDES general permits when there is no application;

* * * * *

(e) *(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).)* In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1) (i) through (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

■ 11. Revise § 124.11 to read as follows:

§ 124.11 Public comments and requests for public hearings.

(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).) During the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in § 124.17.

■ 12. Amend § 124.12 by revising the paragraph (a) heading to read as follows:

§ 124.12 Public hearings.

(a) *(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).)*

* * * * *

■ 13. Amend § 124.17 by revising the paragraph (a) heading, and paragraphs (a)(2) and (c) to read as follows:

§ 124.17 Response to comments.

(a) *(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).)*

* * * * *

(2) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

* * * * *

(c) *(Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).)* The response to comments shall be available to the public.

PART 232—404 PROGRAM DEFINITIONS—EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 14. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 15. Amend § 232.2 by revising the definition of “State regulated waters” to read as follows:

§ 232.2 Definitions.

* * * * *

State regulated waters means those waters of the United States in which the Corps suspends the issuance of section 404 permits upon program assumption by a State, which exclude those identified as retained waters pursuant to 40 CFR 233.11(i). All waters of the United States other than those identified as retained waters in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by 40 CFR part 233.

* * * * *

PART 233—404 STATE PROGRAM REGULATIONS

■ 16. The authority citation for part 233 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 17. Amend § 233.1 by:

- a. Revising the fourth sentence in paragraph (b);
- b. Removing the note that appears after paragraph (c);
- c. Revising paragraph (d); and
- d. Adding paragraphs (e) and (f).

The revisions and additions read as follows:

§ 233.1 Purpose and scope.

* * * * *

(b) * * * The discharges previously authorized by a Corps’ general permit will be regulated by State permits.

* * *

* * * * *

(d) State assumption of the section 404 program is limited to certain waters, as provided in section 404(g)(1) and as identified through the process laid out in § 233.11(i). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains section 404 jurisdiction.

(e) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose. States may not make one requirement more lenient than required under these regulations as a tradeoff for making another requirement more stringent than required. Where the 404(b)(1) Guidelines (40 CFR part 230) or other regulations affecting State 404 programs suggest that the District Engineer or Corps of Engineers is responsible for certain decisions or actions (e.g., approving mitigation bank instruments), in an approved State Program the State Director carries out such action or responsibility for purposes of that program, as appropriate.

(f) EPA may facilitate resolution of disputes between Federal agencies, Tribes, and States seeking to assume and/or administer a CWA section 404 program. Where a dispute resolution or elevation process is enumerated in this part or in an agreement approved by EPA at the time of assumption or program revision, such process and procedures shall be followed.

■ 18. Amend § 233.2 by:

- a. Adding in alphabetical order the definitions for “Indian lands”, “Retained waters description”, and “RHA section 10 list”; and
- b. Revising the definition “State 404 program or State program”.

The additions and revision read as follows:

§ 233.2 Definitions.

* * * * *

Indian lands means “Indian country” as defined under 18 U.S.C. 1151. That section defines Indian country as:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

* * * * *

Retained waters description: The subset of waters of the United States over which the Corps retains administrative authority upon program assumption by a State as identified through the process at § 233.11(i). The description shall address, in the case of State assumption, the extent to which waters on Indian lands are retained.

RHA section 10 list: The list of waters determined to be navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act and 33 CFR part 329 and that are maintained in Corps district offices pursuant to 33 CFR 329.16.

* * * * *

State 404 program or *State program* means a program which has been approved by EPA under section 404 of the Act to regulate the discharge of dredged or fill material into all waters of the United States except those identified in the *retained waters description* as defined in § 233.2.

■ 19. Revise § 233.4 to read as follows:

§ 233.4 Conflict of interest.

Any public officer, employee, or individual with responsibilities related to the section 404 permitting program who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision by the agency or any entity that reviews agency decisions.

■ 20. Amend § 233.10 by revising paragraph (a) to read as follows:

§ 233.10 Elements of a program submission.

* * * * *

(a) A letter from the Governor of the State or Tribal leader requesting program approval.

* * * * *

■ 21. Revise § 233.11 to read as follows:

§ 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State’s program. The description must include the extent of the State’s jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, permit review criteria, and a description as to how the permit review criteria will be sufficient to carry out the requirements of 40 CFR part 233 subpart C.

(b) A description of the State’s permitting, administrative, judicial review, and other applicable procedures.

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities and additional budget and funding mechanisms of each agency and how the agencies intend to coordinate administration, funding, compliance, enforcement, and evaluation of the program.

(d) A description of the funding and staffing which will be available for program administration, including staff position descriptions and qualifications as well as program budget and funding mechanisms, sufficient to meet the requirements of 40 CFR part 233, subparts C through E.

(e) A description and schedule of the actions that will be taken following EPA approval for the State to begin administering the program if the State makes a request to assume administration of the program more than 30 days after EPA’s approval.

(f) An estimate of the anticipated workload, including but not limited to number of discharges, permit reviews, authorizations and field visits, and decisions regarding jurisdiction.

(g) Copies of permit application forms, permit forms, and reporting forms.

(h) A description of the State’s compliance evaluation and enforcement programs, including staff position descriptions and qualifications as well as program budget and funding mechanisms, sufficient to meet the requirements of 40 CFR part 233,

subpart E, and an explanation of how the State will coordinate its enforcement strategy with that of the Corps and EPA.

(i) A description of the waters of the United States within a State over which the State assumes jurisdiction under the assumed program; a description of the waters of the United States within a State over which the Secretary retains administrative authority subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

(1) Before a State provides a program submission to the Regional Administrator, the Governor, Tribal leader, or Director shall submit a request to the Regional Administrator that the Corps identify the subset of waters of the United States that would remain subject to Corps administrative authority to include in its program submission. The request shall also include one of the following elements of required information: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from the head of a State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. If the Regional Administrator determines that the request includes the required information, within seven days of receiving the State’s request, the Regional Administrator shall transmit the request for the retained waters description to the Corps. Transmitting the request to the Corps is intended to allow the Corps time to review its RHA section 10 list(s) and prepare a description of retained waters based on that list(s), in accordance with paragraph (i)(4) of this section, if the Corps chooses to do so.

(2) When the Regional Administrator transmits a request for the retained waters description to the Corps, the Regional Administrator shall notify the public of this transmission by posting a notice on its website and circulating notice to those persons known to be interested in such matters of its transmission, inviting public input to the Corps and the State for the subsequent 60 days on the development of the description.

(3) If the Corps does not notify the State and EPA that it intends to provide a retained waters description within 30 days of receiving the State’s request transmitted by EPA, or if it does not provide a retained waters description within 180 days of receiving the State’s request transmitted by EPA, the State may develop a retained waters

description pursuant to the process described in paragraph (i)(4) of this section. Alternatively, the State and the Corps may mutually agree to extend the time period in which the Corps may develop the retained waters description.

(4) The program description in the State's program request to the Regional Administrator shall include a description of those waters of the United States over which the Corps retains administrative authority. The description may be a retained waters description that the Corps provides the State pursuant to paragraph (i)(1) of this section, or, if the Corps did not provide a list to the State, a description that the State prepares pursuant to paragraph (i)(3) of this section. The retained waters description prepared by either the Corps or the State shall be compiled as follows:

(i) Using the relevant RHA section 10 list(s) as a starting point;

(ii) Placing waters of the United States, or reaches of these waters, from the RHA section 10 list into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;

(iii) To the extent feasible and to the extent that information is available, adding other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; and

(iv) Adding a description of retained wetlands that are adjacent to the foregoing waters. A specific listing of each wetland that is retained is not required.

(5) As a general matter, descriptions of retained waters compiled in accordance with the process in paragraph (i)(4) of this section will satisfy the statutory criteria for retained waters. The Regional Administrator ultimately determines whether to approve a State program submission, however.

(6) The State assumes permitting authority over all waters of the United States not retained by the Corps as described in paragraph (i)(4) of this section. The State does not assume permitting authority over waters of the United States in Indian Country and Lands of Exclusive Federal Jurisdiction, as these are outside of the State's jurisdiction. All discharges of dredged or fill material into waters of the United States must be regulated either by the State or the Corps; at no time shall there

be a gap in permitting authority for any water of the United States.

(j) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

(k) A description of the State's approach to ensure that all permits issued satisfy the substantive standards and criteria for the use of compensatory mitigation consistent with the requirements of 40 CFR part 230, subpart J. The State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect State administration of the program using State processes as opposed to Corps administration. For example, a State program may choose to provide for mitigation in the form of banks and permittee-responsible compensatory mitigation but not establish an in-lieu fee program. A State program may not be less stringent than the requirements of subpart J.

■ 22. Amend § 233.13 by adding paragraph (b)(5) to read as follows:

§ 233.13 Memorandum of Agreement with Regional Administrator.

* * * * *

(b) * * *

(5) Provisions specifying the date upon which the State shall begin administering its program. This effective date shall be 30 days from the date that notice of the Regional Administrator's decision is published in the **Federal Register**, except where the Regional Administrator has agreed to a State's request for a later effective date, not to exceed 180 days from the date of publication of the decision in the **Federal Register**.

■ 23. Amend § 233.14 by revising paragraph (b) to read as follows:

§ 233.14 Memorandum of Agreement with the Secretary.

* * * * *

(b) The Memorandum of Agreement shall include:

(1) A description of all navigable waters within the State over which the Corps retains administrative authority. Retained waters shall be identified in accordance with procedures set forth in § 233.11(i).

(2) Procedures whereby the Secretary will, prior to or on the effective date set forth in the Memorandum of Agreement with the Regional Administrator, transfer to the State pending section 404 permit applications for discharges into State regulated waters and other

relevant information not already in the possession of the Director.

Note 1 to paragraph (b)(2): Where a State permit program includes coverage of those navigable waters in which only the Secretary may issue section 404 permits, the State is encouraged to establish in this Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notice and public hearings.

(3) An identification of all general permits issued by the Secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director relevant information not already in the possession of the Director. The information to be transferred includes but is not limited to support files for permit issuance, conditions and certifications placed on the Corps general permits, compliance reports, and records of enforcement actions.

(4) Procedures whereby the Secretary would notify the State of changes to its RHA section 10 list that implicate waters that are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, and the State would then incorporate these changes into its retained waters description, pursuant to the procedures in § 233.16(d).

■ 24. Amend § 233.15 by:

- a. Revising the first sentence of the introductory text of paragraph (e);
- b. Revising the second sentence of paragraph (g); and
- c. Revising paragraph (h).

The revisions read as follows:

§ 233.15 Procedures for approving State programs.

* * * * *

(e) After determining that a State program submission is complete, the Regional Administrator shall publish notice of the State's program submission in the **Federal Register** and in enough of the largest newspapers in the State to attract statewide attention. * * *

* * * * *

(g) * * * The Regional Administrator shall prepare a responsiveness summary of significant comments received and the Regional Administrator's response to these comments. * * *

(h) If the Regional Administrator approves the State's section 404 program, the Regional Administrator shall notify the State and the Secretary of the decision, publish notice in the **Federal Register**, and post notice on

EPA's website. The program for State-assumed waters shall transfer to the State on the date established in the Memorandum of Agreement between the State and Regional Administrator. The Secretary shall suspend the issuance by the Corps of section 404 permits in State regulated waters on such effective date.

* * * * *

■ 25. Amend § 233.16 by revising paragraphs (d)(2) and (3), and (e) to read as follows:

§ 233.16 Procedures for revision of State programs.

* * * * *

(d) * * *

(2) Notice of approval of program changes which the Regional Administrator determines are not substantial revisions may be given by letter from the Regional Administrator to the Governor or the Tribal leader and are effective upon the date in the approval letter. The Regional Administrator will notify the Secretary of the approval of any approved program modifications. The Regional Administrator will also notify other Federal agencies of approved program modifications as appropriate. The Regional Administrator shall post any such approval letters on the relevant pages of EPA's website.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, the Regional Administrator shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this part, and shall publish notice of the decision in the **Federal Register**. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that remove waters from the retained waters description (other than *de minimis* removals), as well as revisions that affect the scope of activities regulated, criteria for review of permits, public participation, or enforcement capability. Revisions to an Indian Tribe's assumed program that would add a new geographic area to the approved program require that the Regional Administrator determine that the Tribe meets the eligibility criteria in § 233.60 with regard to the new geographic area and constitute substantial revisions.

* * * * *

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's program, the Regional Administrator may request and the State shall provide a supplemental Attorney General's statement, program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this part.

■ 26. Amend § 233.21 by revising paragraphs (b) and (e)(2) to read as follows:

§ 233.21 General permits.

* * * * *

(b) The Director may issue a general permit for categories of similar activities if the Director determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines.

* * * * *

(e) * * *

(2) Once the Director notifies the discharger of the Director's decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

■ 27. Amend § 233.23 by revising the introductory text of paragraph (c)(8) to read as follows:

§ 233.23 Permit conditions.

* * * * *

(c) * * *

(8) Inspection and entry. The permittee shall allow the Director, or the Director's authorized representative, upon presentation of proper identification, at reasonable times to:

* * * * *

■ 28. Add § 233.24 to subpart C read as follows:

§ 233.24 Judicial review.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. Indian Tribes must provide a commensurate form of citizen recourse for permit applicants and others affected by Tribe-issued permits.

■ 29. Amend § 233.30 by revising paragraphs (a) and (b)(5) to read as follows:

§ 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign, and submit a permit application to the Director. Applicants for projects that take more than five years to complete must submit a complete application for each five-year permit, and an applicant seeking a new five-year permit must apply for the new permit at least 180 days prior to the expiration of the current permit. The Tribe or State may grant permission to submit an application less than 180 days prior to the expiration of the current permit but no later than the permit expiration date. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) * * *

(5) All activities which the applicant plans to undertake which are reasonably related to the same project must be included in the same permit application. For projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application, the application for both the first and subsequent five-year permits must include an analysis demonstrating that each element of the 404(b)(1) Guidelines is met, consistent with 40 CFR part 230, for the full term of the project. Applicants for subsequent five-year permits must update the 404(b)(1) Guidelines analysis if there has been a change in circumstance related to the project following approval of the previous five-year permit, and clearly indicate whether the 404(b)(1) Guidelines analysis has been updated.

* * * * *

■ 30. Revise and republish § 233.31 to read as follows:

§ 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, the Director shall notify the affected State and the Regional Administrator in writing prior to permit issuance of the Director's failure to accept these recommendations, together

with the Director's reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

(b) State section 404 permits shall be coordinated with the Federal and Federal-State water related planning and review processes.

(c) For the purposes of § 233.31(a), the definition of "State" in § 233.2 includes Indian Tribes that have been approved by EPA under CWA section 518 and applicable regulations for eligibility to administer any CWA provision as well as Indian Tribes that have been approved by EPA under paragraph (d) of this section for eligibility for the purpose of commenting under § 233.31(a).

(d) An Indian Tribe may apply to the Regional Administrator for a determination that it meets the statutory criteria of section 518 of the CWA, 33 U.S.C. 1377, to be treated in a manner similar to that in which EPA treats a State, for purposes of the coordination requirements of sections 404(h)(1)(C) and (E), 33 U.S.C. 1344(h)(1)(C) and (E), of the CWA and paragraphs (a) and (c) of this section.

(1) The Tribe's application shall concisely describe how:

(i) The Indian Tribe is recognized by the Secretary of the Interior;

(ii) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(iii) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(iv) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and applicable regulations.

(2) The Regional Administrator shall promptly notify the Indian Tribe of receipt of an application submitted under this section and shall process such application in a timely manner.

■ 31. Amend § 233.32 by revising the introductory text of paragraph (c)(1) and paragraph (d)(6) to read as follows:

§ 233.32 Public notice.

* * * * *

(c) * * *

(1) By mailing a copy of the notice to the following persons (any person

otherwise entitled to receive notice under this paragraph (c)(1) may waive their rights to receive notice for any classes or categories of permits):

* * * * *

(d) * * *

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based. For projects with a planned schedule that extends beyond five years at the time of the initial five-year permit application, the public notice for subsequent five-year permits must indicate whether the 404(b)(1) Guidelines analysis has been updated.

* * * * *

■ 32. Amend § 233.33 by revising paragraph (b) to read as follows:

§ 233.33 Public hearing.

* * * * *

(b) The Director shall hold a public hearing whenever the Director determines there is a significant degree of public interest in a permit application or a draft general permit. The Director may also hold a hearing, at the Director's discretion, whenever the Director determines a hearing may be useful to a decision on the permit application.

* * * * *

■ 33. Amend § 233.34 by revising paragraph (c) to read as follows:

§ 233.34 Making a decision on the permit application.

* * * * *

(c) After the Director has completed review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining the Director's decision and rationale for the decision. For projects with a planned schedule that extends beyond five years at the time of the initial five-year permit application, if the Director decides not to require an update to the 404(b)(1) Guidelines for a subsequent five-year permit, the Director must provide a detailed written explanation of the decision not to require an update in its determination for the subsequent five-year permit. The determination shall be dated, signed, and included in the official record prior to final action on the application. The official record shall be open to the public.

■ 34. Amend § 233.36 by revising the introductory text of paragraph (a) and revising paragraph (c)(1) to read as follows:

§ 233.36 Modification, suspension or revocation of permits.

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on the Director's own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if the Director determines that sufficient cause exists. Among the factors to be considered are:

* * * * *

(c) * * *

(1) The Director shall develop procedures to modify, suspend, or revoke permits if the Director determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

* * * * *

■ 35. Revise § 233.37 to read as follows:

§ 233.37 Signatures on permit applications and reports.

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that the applicant or the agent possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

■ 36. Amend § 233.41 by revising paragraph (b)(2) to read as follows:

§ 233.41 Requirements for enforcement authority.

(b) * * *

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the Act, except that a State may establish criminal violations based on any form or type of negligence.

* * * * *

■ 37. Amend § 233.50 by:

■ a. Revising the section heading;

- b. Revising paragraphs (d), (e), (f), and (h)(1); and
- c. Adding paragraph (k).

The revisions read as follows:

§ 233.50 Review of and objection to State permits and review of compensatory mitigation instruments.

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), the Regional Administrator shall notify the Director of the Regional Administrator's intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that the Regional Administrator reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, the Regional Administrator shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of the Regional Administrator's comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is:

(1) The subject of an interstate dispute under § 233.31(a); and/or

(2) Outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, the Director shall not issue the permit unless the Director has taken the steps required by the Regional

Administrator to eliminate the objection.

* * * * *

(h) * * *

(1) If the Regional Administrator withdraws the objection or requirement for a permit condition, the Director may issue the permit.

* * * * *

(k) If the State establishes third-party compensation mechanisms as part of its section 404 program (e.g., banks or in-lieu fee programs), the Director must transmit a copy of instruments associated with these compensatory mitigation approaches to the Regional Administrator, the Corps, FWS, and NMFS for review prior to issuance, as well as to any other State agencies to the extent the State committed to do so in the program description pursuant to § 233.11(k). To the extent the State deems appropriate, the Director may also send these draft instruments to other relevant State agencies for review. This transmission and review requirement does not apply to permittee-responsible compensatory mitigation. If the Regional Administrator, the Corps, FWS, or NMFS intend to comment upon such instruments they must notify the Director of their intent within 30 days of receipt. If the Director has been so notified, the instrument must not be issued until after the receipt of such comments or after 90 days of receipt of the proposed instrument by the Regional Administrator, the Corps, the FWS, or NMFS. The Director must respond to any comments received within 90 days from the Regional Administrator, the Corps, FWS, NMFS, or State agencies that received the draft instruments pursuant to the State program description and inform the commenting agency of any comments or recommendations not accepted prior to approving the final compensatory mitigation instrument. In the event that the Regional Administrator has commented that the instrument fails to apply or ensure compliance with the requirements of § 233.11(k), the Director must not approve the final compensatory mitigation instrument until the Regional Administrator notifies the Director that the final instrument ensures compliance with § 233.11(k).

■ 38. Amend § 233.51 by adding paragraph (d) to read as follows:

§ 233.51 Waiver of review.

* * * * *

(d) If within 20 days of public notice of a permit application, pursuant to § 233.32, a Tribe notifies EPA that the

application potentially affects Tribal rights or interests, including those beyond reservation boundaries, EPA will request a copy of the public notice for the permit application, even if Federal review of the relevant category of discharge has been waived, and the Regional Administrator and the Director shall then proceed in accordance with § 233.50.

■ 39. Amend § 233.52 by revising paragraphs (b) and (e) to read as follows:

§ 233.52 Program reporting.

* * * * *

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program, steps taken to resolve these problems, and recommendations for resolving any outstanding problems along with a timeline for resolution. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permitting program on the integrity of the State regulated waters; identification of areas of particular concern or interest within the State; the number and nature of individual and general permits issued, modified, and denied; the number of violations identified and number and nature of enforcement actions taken; the number of suspected unauthorized activities reported and nature of action taken; an estimate of the extent of activities regulated by general permits; the number of permit applications received but not yet processed; and an assessment of avoidance, minimization, and compensation required for permits issued, including the type and quantity of resources impacted, type and quantity of compensation required (including quantification and rationale for out-of-kind or compensation provided outside the watershed), and a description of why compensation was not required, if applicable. The Annual Report shall briefly summarize resolution of issues identified in the previous Annual Report. Additionally, to the extent appropriate, the Annual Report should analyze program resources and staffing, including staffing changes, training, and vacancy rate since approval or the previous Annual Report.

* * * * *

(e) Within 30 days of receipt of the Regional Administrator's final comments, the Director will finalize the annual report, incorporating and/or

responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator. The Director shall make a copy of the final annual report, accepted by the Regional Administrator, publicly available.

* * * * *

■ 40. Amend § 233.53 by revising paragraphs (a)(1) and (c) to read as follows:

§ 233.53 Withdrawal of program approval.

(a) * * *

(1) The State shall give the Administrator and the Secretary no less than 180 days' notice of the proposed transfer. With the notice, the State shall submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications, as well as files regarding ongoing investigations, compliance orders, and enforcement actions) which are necessary for the Secretary to administer the program. The notice shall include the proposed transfer date.

* * * * *

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Notice to State.* If the Regional Administrator has cause to believe that a State is not administering or enforcing its assumed program in compliance with the requirements of the CWA and this part, the Regional Administrator shall inform the Director in writing of the specific areas of alleged noncompliance. If the State demonstrates to the Regional Administrator within 30 days of such notification that the State program is in compliance, the Regional Administrator shall take no further action toward withdrawal, and shall so notify the State in writing.

(2) *Public hearing.* If the State has not demonstrated its compliance to the satisfaction of the Regional Administrator within 30 days of notification, the Regional Administrator shall inform the Director of that finding. The Administrator shall then schedule a public hearing to solicit comments on the administration of the State program and its compliance with the Act and this part. Notice of such public hearing shall be published in the **Federal Register**, on EPA's website, and in enough of the largest newspapers and/or news websites in the State to attract statewide attention and mailed or emailed to persons on appropriate Tribal, State, and EPA mailing lists.

This hearing shall be convened not less than 30 days or more than 60 days following the date of publication of the notice of the hearing in the **Federal Register**. Notice of the hearing shall identify the Administrator's concerns. All interested parties shall be given opportunity to make written or oral presentations on the State's program at the public hearing.

(3) *Notice to State of findings.* If the Administrator finds, after the public hearing, that the State is not in compliance, within 90 days of the public hearing the Administrator shall notify the State via letter of the specific deficiencies in the State program, including administration and enforcement, and of necessary remedial actions. Within 90 days of receipt of the above letter, the State shall either carry out the required remedial action(s) or the Administrator shall withdraw program approval. If the State performs all required remedial action(s) in the allotted time or, if the Administrator determines as a result of the hearing that the State is in compliance, the Administrator shall so notify the State in writing and conclude the withdrawal proceedings. If the Administrator makes the determination that the assumed program should be withdrawn, then such determination will be published in the **Federal Register**, and the Administrator shall remove from the CFR, as appropriate, any provision addressing that State's assumed program. The effective date of the withdrawal, and the date upon which the Corps shall be the permitting authority, shall be 30 days after publication of the Administrator's decision in the **Federal Register**.

(4) *Determination to withdraw.* The Administrator's determination to withdraw program approval shall constitute final Agency action within the meaning of 5 U.S.C. 704.

* * * * *

§ 233.60 [Amended]

■ 41. Amend § 233.60 paragraph (c) by removing the word "Untied" and adding in its place the word "United."

■ 42. Amend § 233.61 by revising paragraph (e) to read as follows:

§ 233.61 Determination of Tribal eligibility.

* * * * *

(e) The Administrator may, at the Administrator's discretion, request further documentation necessary to support a Tribal application.

* * * * *

■ 43. Revise and republish § 233.62 to read as follows:

§ 233.62 Procedures for processing an Indian Tribe's application.

(a) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to § 233.61 in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

(b) The Regional Administrator shall follow the procedures described in § 233.15 in processing a Tribe's request to assume the 404 dredge and fill permit program.

(c) The Regional Administrator shall follow the procedures for substantial program revisions described in § 233.16 in processing a Tribe's request to add additional geographic area(s) to its assumed 404 dredged or fill material permit program that would add reservation areas to the scope of its approved program. A Tribe making such a request shall provide an application meeting the requirements of § 233.61 that describes how the Tribe meets the eligibility criteria in § 233.60 for the new area.

■ 44. Revise § 233.70 to read as follows:

§ 233.70 Michigan.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the Michigan Department of Environment, Great Lakes, and Energy (previously named Department of Natural Resources, Department of Environmental Quality, and Department of Natural Resources and Environment), approved by EPA, pursuant to section 404 of the CWA. Notice of this approval was published in the **Federal Register** on October 2, 1984; the effective date of this program is October 16, 1984. This program consists of the following elements, as submitted to EPA in the State's program submission and subsequently revised.

(a) *Incorporation by reference.* The Michigan statutes and regulations cited in paragraphs (a)(1) and (2) of this section are incorporated by reference as part of the applicable section 404 Program under the CWA for the State of Michigan. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, EPA must

publish a document in the **Federal Register** and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from EPA. Contact EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (phone: 202-566-1744), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and at the Water Division, Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. For information on the availability of this IBR material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov. The material may be obtained from the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933, phone: 800-662-9278.

(1) Michigan Statutes Applicable to the State's Approved Clean Water Act Section 404 program (available at www.legislature.mi.gov), as follows:

(i) The Michigan Administrative Procedures Act of 1969, MCL § 24-201 *et seq.*, in effect as of February 13, 2024.

(ii) Natural Resources and Environmental Protection Act 451 of 1994:

(A) Part 31 Water Resources Protection, MCL § 324.31 *et seq.*, in effect as of September 29, 2023.

(B) Part 301 Inland Lakes and Streams, MCL § 324.301 *et seq.*, in effect as of October 20, 2021.

(C) Part 303 Wetland Protection, MCL § 324.303 *et seq.*, in effect as of April 27, 2019.

(D) Part 307 Inland Lake Levels, MCL § 324.307 *et seq.*, in effect as of October 16, 2020.

(E) Part 315 Dam Safety, MCL § 324.315 *et seq.*, in effect as of September 10, 2004.

(F) Part 323 Great Lakes Shorelands Protection and Management, MCL § 324.323 *et seq.*, in effect as of October 20, 2021.

(G) Part 325 Great Lakes Submerged Lands, MCL § 324.325 *et seq.*, in effect as of October 20, 2021.

(2)(i) Michigan Regulations Applicable to the State's Approved Clean Water Act Section 404 program (www.michigan.gov/lara/bureau-list/moahr/admin-rules), Michigan Administrative Code, Department of Environmental Quality, as follows:

(A) Land and Water Management:

(1) Great Lakes Shorelands, R 281.21 through R 281.26 inclusive, in effect as of 2000.

(2) Wetlands Protection, R 281.921 through R 281.925 inclusive, in effect as of 2006.

(3) Wetland Mitigation Banking, R 281.951 through R 281.961 inclusive, in effect as of 1997.

(4) Dam Safety, R 281.1301 through R 281.1313 inclusive in effect as of 1993.

(B) Water Resources Division, Inland Lakes and Streams, R 281.811 through R 281.846 inclusive, in effect as of 2015.

(ii) This material contains Michigan's rules for shoreline protection, inland lakes and streams, wetlands protection, wetland mitigation banking, and dam safety.

(b) *Other Laws.* The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

(1) Administrative Procedures Act, MCL 24.201 *et seq.*

(2) Freedom of Information Act, MCL 15.231 *et seq.*

(3) Open Meetings Act, MCL 15.261 *et seq.*

(4) Natural Resources and Environmental Protection Act 451 of 1994, Part 17 Michigan Environmental Protection Act, MCL 324.17 *et seq.*

(c) *Memoranda of Agreement.* The following memoranda, although not incorporated by reference also are part of the approved State-administered program:

(1) The Memorandum of Agreement between EPA Region V and the Michigan Department of Natural Resources, signed by EPA Region V Administrator on December 9, 1983. The 1983 Memorandum of Agreement has subsequently been replaced by a Memorandum of Agreement between EPA Region 5 and the Michigan Department of Environmental Quality (now referred to as the Michigan Department of Environment, Great Lakes, and Energy) signed on November 9, 2011.

(2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the Michigan Department of Natural Resources, signed by the Commander, North Central Division, on March 27, 1984.

(d) *Statement of Legal Authority.* The following documents, although not incorporated by reference, also are part of the approved State administered program:

(1) "Attorney General Certification section 404/State of Michigan", signed by Attorney General of Michigan, as submitted with the request for approval

of "The State of Michigan 404 Program", October 26, 1983.

(e) The Program description and any other materials submitted as part of the original submission or supplements thereto.

■ 45. Amend § 233.71 by:

■ a. Revising the introductory text and paragraph (a);

■ b. Removing paragraph (b); and

■ c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).

The revisions read as follows:

§ 233.71 **New Jersey.**

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in New Jersey that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the New Jersey Department of Environmental Protection and Energy, approved by EPA, pursuant to section 404 of the CWA. Notice of this approval was published in the **Federal Register** on March 2, 1994; the effective date of this program is March 2, 1994. This program consists of the following elements, as submitted to EPA in the State's program submission and subsequently revised.

(a) *Incorporation by reference.* The New Jersey statutes and regulations cited in paragraphs (a)(1) and (2) of this section are incorporated by reference as part of the applicable 404 Program under the CWA for the State of New Jersey. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, EPA must publish a document in the **Federal Register** and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from EPA. Contact EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (phone: 202-566-1744), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and at the Library of the Region 2 Regional Office, Ted Weiss Federal Building, 290 Broadway, New York, NY 10007. For information on the

availability of this IBR material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov. The materials may be obtained from the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625; website: www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj.

(1)(i) New Jersey Statutes Applicable to the State's Approved Clean Water Act Section 404 program as follows:

(A) Freshwater Wetlands Protection Act, New Jersey Statutes Annotated, Title 13: Conservation and Development—Parks and Reservations; Chapter 9B: Freshwater Wetlands, N.J.S.A.13:9B–1 *et seq.*, effective as of December 23, 1993.

(B) [Reserved]

(ii) The Freshwater Wetlands Protection Act provides the New Jersey Department of Environmental Protection with the authority to regulate and permit activities in freshwater wetlands.

(2)(i) New Jersey Regulations Applicable to the State's Approved Clean Water Act Section 404 program as follows:

(A) Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, amended November 7, 2022.

(B) [Reserved]

(ii) This chapter contains regulations to implement the Freshwater Wetlands Protection Act.

* * * * *

[FR Doc. 2024–29484 Filed 12–17–24; 8:45 am]

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Part VIII

Environmental Protection Agency

40 CFR Part 751

Carbon Tetrachloride (CTC); Regulation Under the Toxic Substances Control Act (TSCA); Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 751**

[EPA-HQ-OPPT-2020-0592; FRL-8206-02-OCSPP]

RIN 2070-AK82

Carbon Tetrachloride (CTC); Regulation Under the Toxic Substances Control Act (TSCA)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA or “Agency”) is finalizing a rule to address the unreasonable risk of injury to health presented by carbon tetrachloride (CTC) under its conditions of use. TSCA requires that EPA address by rule any unreasonable risk of injury to health or the environment identified in a TSCA risk evaluation and apply requirements to the extent necessary so that the chemical no longer presents unreasonable risk. EPA’s final rule will establish workplace safety requirements for most conditions of use, including the condition of use related to the making of low Global Warming Potential (GWP) hydrofluoroolefins (HFOs); prohibit the manufacture (including import), processing, distribution in commerce, and industrial/commercial use of CTC for conditions of use where information indicates use of CTC has ceased; and establish recordkeeping and downstream notification requirements. The use of CTC in low GWP HFOs is particularly important in the Agency’s efforts to support the American Innovation and Manufacturing Act of 2020 (AIM Act) and the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, which was ratified on October 26, 2022.

DATES: This final rule is effective on January 17, 2025.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2020-0592, is available online at <https://www.regulations.gov>. Additional information about dockets generally, along with instructions for visiting the docket in-person, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information: Emilia Echeveste Briseño, Existing Chemicals Risk Management Division (7404M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone

number (202) 566-0543; email address: CarbonTetrachlorideTSCA@epa.gov.

For general information: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Executive Summary***A. Does this action apply to me?***1. General Applicability**

This action applies to you if you manufacture (defined under TSCA to include import), process, distribute in commerce, use, or dispose of CTC (CASRN 56-23-5). TSCA section 3(9) defines the term “manufacture” to mean “to import into customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), produce, or manufacture”. Therefore, unless expressly stated otherwise, importers of CTC are subject to any provisions regulating manufacture of CTC. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities include:

- Chemical Manufacturing (NAICS code 325);
- Nonmetallic Mineral Product Manufacturing (NAICS code 327);
- Primary Metal Manufacturing (NAICS code 331);
- Waste Management and Remediation Services (NAICS code 562);
- Petrochemical Manufacturing (NAICS code 325110);
- Industrial Gas Manufacturing (NAICS code 325120);
- Other Basic Inorganic Chemical Manufacturing (NAICS code 325180);
- Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing (NAICS code 325194);
- All Other Basic Organic Chemical Manufacturing (NAICS code 325199);
- Plastics Material and Resin Manufacturing (NAICS code 325211);
- Pesticide and Other Agricultural Chemical Manufacturing (NAICS code 325320);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS code 325998);
- Cement Manufacturing (NAICS code 327310);
- Ground or Treated Mineral and Earth Manufacturing (NAICS code 327992);
- Nonferrous Metal (except Aluminum) Smelting and Refining (NAICS code 331410);

- NAICS code 562211—Hazardous Waste Treatment and Disposal NAICS code 562211); and

- Solid Waste Combustors and Incinerators (NAICS code 562213).

2. Applicability to Importers and Exporters

This action may also affect certain entities subject to import certification, and export notification rules under TSCA (<https://www.epa.gov/tsc-import-export-requirements>). Persons who import any chemical substance in bulk form, as part of a mixture, or as part of an article (if required by rule) are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B.

In addition, any persons who export or intend to export a chemical substance that is the subject of this final rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

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

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if the U.S. Environmental Protection Agency, hereinafter referred to as EPA or “the Agency”, determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk.

C. What action is the Agency taking?

Pursuant to TSCA section 6(b), EPA determined that CTC presents an unreasonable risk of injury to health, without consideration of costs or other nonrisk factors, including an unreasonable risk to potentially exposed or susceptible subpopulations (PESS) identified as relevant to the 2020 Risk Evaluation for Carbon Tetrachloride by EPA, under the conditions of use (Refs. 1, 2, 3). A description of the conditions of use that contribute to EPA’s determination that CTC presents an unreasonable risk is in the proposed rule (88 FR 49190) (FRL-8206-01-OCSPP) and Unit IV. Accordingly, to

address the unreasonable risk, EPA is issuing this final rule under TSCA section 6(a) to:

(1) Require a Workplace Chemical Protection Program (WCPP), including an inhalation exposure concentration limit, direct dermal contact controls, and related workplace exposure controls, for the following occupational conditions of use of CTC not prohibited, outlined in Unit IV.B.:

- Domestic manufacture;
- Import;
- Processing as a reactant in the production of hydrochlorofluorocarbons (HCFCs), hydrofluorocarbons (HFCs), HFOs, and perchloroethylene (PCE);
- Incorporation into formulation, mixture or reaction products in agricultural products manufacturing, vinyl chloride manufacturing, and other basic organic and inorganic chemical manufacturing;
- Repackaging for use as a laboratory chemical;
- Recycling;
- Industrial and commercial use as an industrial processing aid in the manufacture of agricultural products and vinyl chloride;
- Industrial and commercial use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine; and
- Disposal.

(2) Require use of laboratory ventilation devices, such as fume hoods or glove boxes, and dermal personal protective equipment (PPE) for the industrial and commercial use as a laboratory chemical, as outlined in Unit IV.C.;

(3) Prohibit these additional conditions of use, for which the Agency understands use of CTC has already ceased, as outlined in Unit IV.D.:

- Incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride (for which EPA is requiring a WCPP);
- Industrial and commercial use as an industrial processing aid in the manufacture of petrochemicals-derived products except in the manufacture of vinyl chloride (for which EPA is requiring a WCPP);
- Industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail

gas from the production of chlorine (for which EPA is requiring a WCPP);

- Industrial and commercial use in metal recovery;
- Industrial and commercial use as an additive; and
- Industrial and commercial use in specialty uses by the U.S. Department of Defense (DoD).

(4) Require recordkeeping, as outlined in Unit IV.E.1.

(5) Require manufacturers (including importers), processors, and distributors to provide downstream notification of the requirements, as outlined in Unit IV.E.2.

EPA notes that not all TSCA conditions of use of CTC are subject to this final rule. “Conditions of use” is defined in TSCA section 3(4) to mean the circumstances, as determined by EPA, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of. As described in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) and the 2022 Revised Unreasonable Risk Determination for Carbon Tetrachloride (Ref. 3), two conditions of use of CTC do not drive the unreasonable risk: distribution in commerce and processing as a reactant/intermediate in reactive ion etching. EPA is not finalizing any restrictions for the processing of CTC as a reactant/intermediate in reactive ion etching. However, under TSCA section 6(a), EPA may select from among a suite of risk management requirements in TSCA section 6(a), including requirements related to distribution in commerce, as part of its regulatory options to address the unreasonable risk; EPA’s final regulatory action includes prohibitions on the distribution in commerce of CTC for certain downstream conditions of use to address unreasonable risk from those downstream conditions of use. Additionally, as explained in Section 1.4.2.3 of the 2020 Risk Evaluation for Carbon Tetrachloride and Section 2.2.2.1 of the 2018 Problem Formulation of the Risk Evaluation for Carbon Tetrachloride, EPA concluded that the industrial/commercial/consumer uses of CTC in adhesives/sealants, paints/coatings, and cleaning/degreasing solvent products contain only trace amounts of CTC, present only de minimis exposures or otherwise insignificant risks under TSCA, and did not warrant inclusion in the risk evaluation. Therefore, EPA has excluded from the rule’s requirements CTC that is solely present unintentionally in trace quantities with another chemical substance or mixture,

whether as a manufacturing residue, unreacted feedstock, byproduct, or other contaminant. However, EPA notes that the Agency has discretion to further assess trace quantities of CTC under other regulatory authorities, such as the Clean Air Act. Finally, manufacture of CTC as a byproduct was not evaluated in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1); therefore, in this final rule, WCPP requirements applicable to the domestic manufacture of CTC do not apply where CTC is manufactured solely as a byproduct. EPA anticipates that any risks presented by the presence of CTC as a byproduct formed during the manufacturing, processing or use of a parent compound will be considered in the scope of the risk evaluation of such parent compound. For example, EPA will assess the risks of CTC manufactured as a byproduct during the manufacture of 1,2-dichloroethane in the TSCA risk evaluation for 1,2-dichloroethane (Ref. 1).

D. Why is the Agency taking this action?

Under TSCA section 6(a), “[i]f the Administrator determines in accordance with subsection (b)(4)(A) that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, the Administrator shall by rule . . . apply one or more of the [section 6(a)] requirements to such substance or mixture to the extent necessary so that the chemical substance or mixture no longer presents such risk.” CTC was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in November 2020 (Ref. 1). In addition, EPA issued a revised unreasonable risk determination in December 2022 (Ref. 3), determining that CTC, as a whole chemical substance, presents an unreasonable risk of injury to health under the conditions of use. On July 28, 2023, EPA issued a proposed rulemaking (88 FR 49180) (FRL–8206–01–OCSPP) under TSCA section 6(a) to take action to the extent necessary so that CTC no longer presents such risk. The Agency received public comment on the proposal. With this action, EPA is finalizing with modifications the July 2023 proposed rule so that CTC no longer presents an such risk. The conditions of use that contribute to the unreasonable risk from CTC are described in the proposed rule (88 FR 49190) (FRL–8206–01–OCSPP) and Unit IV.

CTC’s hazards are well established. EPA’s 2020 Risk Evaluation for Carbon Tetrachloride considered the hazards

associated with exposure to CTC and determined that CTC presents an unreasonable risk of injury to health due to the significant adverse health effects associated with the exposure of CTC. While some risks of adverse effects from CTC exposure are associated with acute single exposures, other risks are associated with long-term repeated exposures. EPA identified cancer and liver toxicity adverse effects from chronic inhalation and dermal exposures as well as liver toxicity from acute dermal exposures to CTC (Refs. 1, 2, 3). Cancer adverse effects (*e.g.*, liver, pheochromocytoma, neuroblastoma) were identified for chronic inhalation and dermal exposures. Cancer was selected based on the best available science and weight of scientific evidence, and in consideration of the severity of hazards, magnitude of exposure, population exposed, and uncertainties in the November 2020 Risk Evaluation for Carbon Tetrachloride and the December 2022 Revised Risk Determination for Carbon Tetrachloride. EPA identified in the 2020 Risk Evaluation for Carbon Tetrachloride a threshold cancer point of departure (POD) for liver tumors (assuming a margin of exposure of 300), and an inhalation unit risk (IUR) for adrenal tumors, based on effects observed in mice following inhalation exposure. The chronic non-cancer PODs for inhalation exposures are based on a study observing increased fatty changes in rodent livers (fatty changes in the liver are a precursor for liver fibrosis). EPA also identified additional risks associated with other adverse effects (*e.g.*, immediate and temporary depression of the central nervous system, kidney toxicity, reproductive and developmental toxicity, irritation and sensitization, and genetic toxicity) resulting from acute and chronic exposures. For this action, EPA has determined that protecting against liver and adrenal cancer would also address the risk for acute non-cancer, chronic non-cancer, and additional cancer risks from CTC, as identified in the 2020 Risk Evaluation for Carbon Tetrachloride and the Revised Unreasonable Risk Determination for CTC in December 2022 (Ref. 1, 2 and 3).

CTC is primarily used as a feedstock to make products such as refrigerants, aerosol propellants, and foam-blowing agents. Requirements under the Montreal Protocol and Title VI of the Clean Air Act (CAA), which were included in the CAA Amendments of 1990 and are codified at 42 U.S.C. Chapter 85, Subchapter VI, led to a phaseout of CTC production in the

United States for most non-feedstock domestic uses, such as degreasers and fire suppressants. In addition, the Consumer Product Safety Commission (CPSC) banned the use of CTC in household (*i.e.*, consumer) products (excluding unavoidable residues not exceeding 10 ppm atmospheric concentration) in 1970 (see 16 CFR 1500.17(a)(2)). The Agency has considered the benefits of CTC for various uses as required under TSCA section 6(c)(2)(A) and (B) and recognizes that continued use of CTC for some TSCA conditions of use should be maintained for several reasons. The use of CTC may provide benefits that complement the Agency's efforts to address climate-damaging HFCs under the AIM Act and the Kigali Amendment to the Montreal Protocol, supporting human health and environmental protection under these programs. In addition, the use of CTC may provide other benefits due to certain unique properties of CTC (*e.g.*, it does not react with the process gasses when used as a process agent in the manufacture of agricultural products (Ref. 4)). Finally, strict workplace controls can be implemented to address unreasonable risk across many conditions of use. For some workplaces, EPA understands that existing controls may already reduce exposures enough to meet the inhalation exposure concentration limit proposed in this rulemaking or to prevent direct dermal contact with CTC. For many of the conditions of use for which EPA is finalizing workplace controls under a WCPP, data indicating that certain uses could meet the exposure limit and ancillary requirements of an effective WCPP in addressing unreasonable risk were submitted during the risk evaluation, the comment period following publication of the proposed rule, or during stakeholder outreach engagements, and are available in the corresponding public dockets (EPA-HQ-OPPT-2016-0733; EPA-HQ-OPPT-2019-0499; EPA-HQ-OPPT-2020-0592).

Accordingly, EPA is finalizing workplace controls to address the unreasonable risk while allowing continued use for 100% of the production volume of CTC manufactured annually, including the processing of CTC as a reactant in the production of HFOs. The rationale for the final regulatory action, including the TSCA section 6 requirements considered in developing the regulatory action, is described in Units II.D. and III.

E. What are the estimated incremental impacts of this action?

EPA has prepared an Economic Analysis for the potential incremental impacts associated with this rulemaking that can be found in the rulemaking docket (Ref. 5). As described in more detail in the Economic Analysis and in Unit V.D., EPA's estimate of the incremental costs of this final rule is \$19.7 million per year annualized over 20 years at a 3% discount rate and \$19 million per year at a 7% discount rate (Ref. 5). In response to the updated Circular A-4 published in November 2023, the incremental costs of this rule at a 2% discount rate (\$19.9 million annualized over 20 years) are provided in Appendix C of the Economic Analysis (Ref. 5).

These costs include compliance with a WCPP for certain conditions of use, applicable PPE requirements, and notification and recordkeeping costs. EPA was not able to quantify the costs associated with administrative and engineering controls because they are site-specific and depend on the extent to which controls are already in place, which is likely to vary across individual facilities. Thus, for the purpose of estimating costs and benefits, this analysis assumes that PPE is used. Under the WCPP, regulated entities would be required to consider respirators and dermal PPE only after consideration of other more effective strategies in the hierarchy of controls adopted by the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) to reduce exposures (Ref. 6). Regulated entities are required first to consider other measures in the hierarchy of controls and then to select PPE based on monitoring results because the Agency recognizes that workplaces have unique processes and equipment in place, and that varying levels of respiratory Assigned Protection Factor (APFs) may be needed for different workplaces.

Industry is expected to incur costs associated with performing inspections, documenting efforts to meet the regulatory requirements associated with the WCPP, including reducing exposure and occurrences of exposure, monitoring, respirators and dermal PPE, training on the use of respirators and dermal PPE, and notification and recordkeeping burdens and costs associated with the WCPP. Industry is also expected to incur equipment costs associated with dermal PPE for laboratory use. EPA assumes that industry would not incur equipment costs associated with the ventilated

laboratory safety requirement for laboratory settings because these requirements are part of baseline industry practices. All manufacturers (including importers), processors, and distributors will bear downstream notification and recordkeeping costs.

The costs are estimated as incremental to baseline conditions, including current use of PPE. The costs represent a high-end estimate of the number of entities and workers affected by the regulation because the high estimates of workers and entities from the 2020 Risk Evaluation for Carbon Tetrachloride were used. To the extent that EPA's approach overestimates the number of entities subject to the regulation, actual realized costs of this action will be lower. More details regarding the provisions of the final rule are in Unit IV.

In addition to the quantified costs, there is an unquantified cost to workers and firms associated with prolonged use of respirators, which could interfere with work tasks. The potential for respirator use to cause discomfort and productivity losses could lead companies to offer higher wages as compensation, but the extent of this effect is unknown and thus unquantified. The Economic Analysis contains additional information about the unquantified costs in Chapter 3 and in the *Estimated Incremental Costs* section of the Executive Summary (Ref. 5).

Unit IV. details which actions apply to specific conditions of use. EPA estimates that 30 firms associated with 72 sites may be manufacturing (including importing), processing, or releasing CTC.

EPA estimates that the final rule would affect at least seven small entities. EPA compared the highest annualized per-facility cost of the final regulatory action with ultimate parent company annual revenues of the affected small businesses. EPA found impacts under 1% of annual revenues for five of the seven small entities. Two small entities were estimated to have a cost-to-revenue impact ratio of between one and three percent.

In alignment with the goals of President Biden's Cancer Moonshot, the rule will protect people from cancer and other adverse health effects of CTC (Ref. 7). The actions in this final rule are expected to achieve health benefits for the American public. The Economic Analysis monetizes benefits to occupational users and non-users of avoiding cases of adrenal and liver cancer due to reduced inhalation exposures that result from implementation of the WCPP. The

magnitude of the cancer benefits from reduced inhalation exposure is estimated assuming companies provide respirators to comply. It is also possible that employees will receive respiratory benefits from other actions on OSHA's hierarchy of controls, such as engineering controls, since regulated entities are required first to consider other measures in the hierarchy of controls and then to select PPE based on monitoring results. However, the Economic Analysis does not estimate the costs of such controls because feasible controls and their costs are site-specific and the amount of additional exposure reduction that could be achieved through any given type of control would depend on the extent to which such controls are already in place, which is likely to vary across individual facilities. This assumption is made for the purpose of estimating costs only and is not an assumption about how facilities would necessarily comply with WCPP requirements. Other human health benefits, including noncancer and additional cancer benefits, while tangible and significant, cannot be monetized due to data and methodology limitations. These include additional cancer benefits from avoided brain tumors, noncancer health benefits, health benefits from avoided dermal exposure, and benefits to the environment. The incremental improvements in health outcomes achieved by given reductions in exposure cannot currently be quantified for non-cancer health effects associated with CTC exposure, and therefore cannot be converted into monetized benefits. Although some benefits cannot be quantified, they are not necessarily less important than the quantified benefits. The primary reason these benefits were not quantified is the difficulty in estimating the relationship between an incremental change in CTC use and the corresponding change to a specific health or environmental outcome.

Adrenal and liver cancer avoidance benefits are calculated based on reductions in inhalation exposure using the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) for those uses which are continuing but with a WCPP in place. Therefore, benefits are only calculated for the WCPP in the final rule, which could include respiratory protection. The estimated monetized benefit of the final rule ranges from approximately \$0.13 to \$0.14 million per year annualized over 20 years at a 3% discount rate and from \$0.06 to \$0.07 million per year at a 7% discount rate. In response to the updated Circular

A-4 published in November 2023, the incremental benefits at a 2% discount rate (\$0.16 to \$0.17 million annualized over 20 years) are provided in Appendix C of the Economic Analysis (Ref. 5). To estimate the costs and benefits of the WCPP, the Economic Analysis generated a likely distribution of air monitoring outcomes at CTC facilities. This distribution was used to project the number of facilities that would require each respirator APF. These estimates are subject to uncertainties, and there could be facilities with higher or lower air exposures than estimated in the Economic Analysis.

Using the high-end estimates for the number of entities and workers affected by the final rule, the monetized net benefit of the final rule, which is negative, is -\$19.6 million per year annualized over 20 years at a 3% discount rate and is -\$18.9 million per year at a 7% discount rate. In response to the updated Circular A-4 published in November 2023, the incremental net benefits at a 2% discount rate (-\$19.7 million annualized over 20 years) are provided in Appendix C of the Economic Analysis (Ref. 5). The range in the monetized net benefits estimate at each discount rate presented in the Economic Analysis reflects uncertainty in cancer risk reductions given the shorter exposure durations being considered and the life stage at which the changes in exposure occur. Although the estimated monetized net benefits are negative, there are also non-monetized benefits due to other avoided adverse health effects associated with CTC exposure, including liver, reproductive, renal, developmental, and central nervous system (CNS) toxicity endpoints. These are serious health endpoints, even though the change in risk due to CTC exposure was not quantified in the 2020 Risk Evaluation for Carbon Tetrachloride.

Section 6.6 of the Economic Analysis, addressing environmental justice impacts, provides sociodemographic data on communities and workers in industries affected by the rule and people who live in proximity to potentially affected facilities. EPA analyzed the baseline conditions facing communities near CTC and HFO manufacturing facilities as well as those of workers in the same industry and county as CTC facilities and HFO manufacturing facilities. The environmental justice analysis found that, across the entire population within 1- and 3-miles of CTC facilities, there are higher percentages of people who identify as Black and living below the poverty line and a similar percentage of people who identify as Hispanic

compared to the national averages. CTC facilities are concentrated in Texas and Louisiana, especially near Houston and Baton Rouge.

II. Background

A. Overview of Carbon Tetrachloride

As described in more detail in the proposed rule, EPA identified liver and adrenal toxicity cancer adverse effects from chronic inhalation and dermal exposures, as well as liver toxicity from acute dermal exposures in the workplace as the basis for the unreasonable risk determination for CTC (Ref. 1, 2, and 3). This final rule is specifically intended to address the unreasonable risk of injury to health EPA identified in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) and the 2022 Revised Unreasonable Risk Determination for Carbon Tetrachloride (Ref. 3), as described in Unit II.C. CTC is a volatile organic compound that is primarily used as a feedstock in the production of HCFCs, HFCs, and HFOs.

According to data submitted for EPA's 2016 and 2020 Chemical Data Reporting (CDR) Rule, in Reporting Years (RY) 2015 and 2019, between 100 and 250 million pounds of CTC were manufactured or imported in the United States (Refs. 5, 8, 9). CTC's use as a feedstock in the production of HCFCs, HFCs, and HFOs and the description of finalized requirements to address the unreasonable risk are described in Unit IV.B.

B. Regulatory Actions Pertaining to Carbon Tetrachloride

Because of its adverse health effects, CTC is subject to numerous Federal laws and regulations in the United States and is also subject to regulation by some states and other countries. A summary of EPA regulations pertaining to CTC, as well as other Federal, State, and international regulations, is provided in the docket (Refs. 1, 10).

As described in more detail in Unit II.C. of EPA's proposed rule (88 FR 49184, July 28, 2023) (FRL-8206-01-OCSP) and the Response to Public Comments document (Ref. 11), EPA considered the adequacy of the current occupational safety and health standards from the OSHA (29 CFR part 1910) for protection of workers. EPA notes that the standards for chemical hazards that OSHA promulgates under the Occupational Safety and Health (OSH Act) share a broadly similar purpose with the worker protection-related regulations that EPA promulgates under TSCA section 6(a). The control measures OSHA and EPA

require to satisfy the objectives of their respective statutes may also, in many circumstances, overlap or coincide. However, there are important differences between EPA's and OSHA's regulatory approaches and jurisdiction, and EPA considers these differences when deciding whether and how to account for OSHA requirements when evaluating and addressing potential unreasonable risk to workers so that compliance requirements are clearly explained to the regulated community. TSCA risk evaluations are subject to statutory science standards, an explicit requirement to consider risks to potentially exposed or susceptible subpopulations, and a prohibition on considering costs and other non-risk factors when determining whether a chemical presents an unreasonable risk that warrants regulatory actions—all requirements that do not apply to development of OSHA regulations. As such, EPA may find unreasonable risk for purposes of TSCA notwithstanding OSHA requirements. In addition, health standards issued under section 6(b)(5) of the OSH Act must reduce significant risk only to the extent that it is technologically and economically feasible. OSHA's legal requirement to demonstrate that its section 6(b)(5) standards are technologically and economically feasible at the time they are promulgated often precludes OSHA from imposing exposure control requirements sufficient to ensure that the chemical substance no longer presents a significant risk to workers. While it is possible in some cases that the OSHA standards for some chemicals reviewed under TSCA will eliminate unreasonable risk, based on EPA's experience thus far in conducting occupational risk assessments under TSCA, EPA believes that OSHA chemical standards would in general be unlikely to address unreasonable risk to workers within the meaning of TSCA, since TSCA section 6(b) unreasonable risk determinations may account for unreasonable risk to more sensitive endpoints and working populations than OSHA's risk evaluations typically contemplate and EPA is obligated to apply TSCA section 6(a) risk management requirements to the extent necessary so that the unreasonable risk is no longer presented. Because the requirements and application of TSCA and OSHA regulatory analyses differ, it is necessary for EPA to conduct risk evaluations and, where it finds unreasonable risk to workers, develop risk management requirements for chemical substances that OSHA also regulates, and it is expected that EPA's

findings and requirements may sometimes diverge from OSHA's. Additional considerations of OSHA standards in the 2022 Revised Unreasonable Risk Determination for Carbon Tetrachloride are discussed further in the **Federal Register** of December 27, 2022 (87 FR 79303).

EPA intends for this regulation to be as consistent as possible with OSHA regulations for toxic and hazardous substances, with additional requirements as necessary to address the unreasonable risk. Consistent with TSCA section 9(d), EPA consults and coordinates TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burdens of duplicative requirements.

C. Summary of EPA's Risk Evaluation Activities on Carbon Tetrachloride

EPA published the scope of the CTC risk evaluation in July 2017 (82 FR 31592) (FRL-9963-57), and, after receiving public comments, published the problem formulation on June 11, 2018 (83 FR 26998) (FRL-9978-40). In January 2020, EPA published a draft risk evaluation (85 FR 4658, January 27, 2020) (FRL-10003-92), and, after public comment and peer review by the Science Advisory Committee on Chemicals (SACC), EPA issued the Risk Evaluation for Carbon Tetrachloride in November 2020 in accordance with TSCA section 6(b) (Ref. 1) (85 FR 70147, November 4, 2020) (FRL-10015-51). EPA subsequently issued a draft revised TSCA unreasonable risk determination for CTC (87 FR 52766, August 29, 2022) (FRL-9948-01-OCSP), and, after public notice and receipt of comments, published a Revised Unreasonable Risk Determination for Carbon Tetrachloride in December 2022 (Ref. 3) (87 FR 79303, December 27, 2022) (FRL-9948-02-OCSP). The 2020 Risk Evaluation for Carbon Tetrachloride and supplemental materials are in docket EPA-HQ-OPPT-2019-0499, and the December 2022 revised unreasonable risk determination and additional materials supporting the risk evaluation process in docket EPA-HQ-OPPT-2016-0733 available at <https://www.regulations.gov>.

1. 2020 Risk Evaluation

In the 2020 Risk Evaluation for Carbon Tetrachloride, EPA evaluated risks associated with 15 conditions of use within the following categories: manufacture (including import), processing, distribution in commerce, industrial and commercial use, and disposal (Ref. 1). The conditions of use are described in Unit III.B.1. of the

proposed rule (88 FR 49190) (FRL–8206–01–OCSPP) and in Unit IV. of this final rule. The 2020 Risk Evaluation for Carbon Tetrachloride identified significant adverse health effects associated with short-term and long-term exposure to CTC. A further discussion of the hazards of CTC is presented in Unit III.B.3 of the proposed rule (88 FR 49192) (FRL–8206–01–OCSPP) and in Unit V. of this final rule.

2. 2022 Revised Unreasonable Risk Determination

As described in more detail in the proposed rule, EPA revised the original unreasonable risk determination based on the 2020 Risk Evaluation for Carbon Tetrachloride and issued a final revised unreasonable risk determination in December 2022 (Ref. 3). EPA revised the risk determination for the 2020 Risk Evaluation for Carbon Tetrachloride pursuant to TSCA section 6(b) and consistent with Executive Order 13990 (titled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”) and other Administration priorities (Refs. 12, 13, 14). The revisions consisted of making a single risk determination for the whole-chemical substance instead of making the risk determination for each individual condition of use, which resulted in the revised risk determination superseding the prior “no unreasonable risk” determinations for specific conditions of use (Ref. 3), the withdrawal of the associated TSCA section 6(i)(1) “no unreasonable risk” order, and clarification that the risk determination does not reflect an assumption that all workers are always provided and appropriately wear personal protective equipment (PPE) (Ref. 3).

EPA determined that CTC presents an unreasonable risk of injury to health, and EPA did not identify risks of injury to the environment that contribute to the unreasonable risk determination for CTC. The CTC conditions of use that contribute to EPA’s determination that the chemical substance poses unreasonable risk to health are listed in the unreasonable risk determination (Ref. 3) and also in Unit III.B.1. of the proposed rule, with descriptions to aid chemical manufacturers, processors, and users in determining how their particular use or activity would be addressed under the final regulatory action. The descriptions of the conditions of use subject to this final rule are in Unit IV.

The conditions of use that do not drive the unreasonable risk for CTC (distribution in commerce and processing as a reactant/intermediate in

reactive ion etching) are also listed in the unreasonable risk determination (Ref. 3) and in Unit III.B.2. of the proposed rule. EPA’s final rule includes prohibitions on the distribution in commerce of CTC for certain downstream uses, but does not include any restrictions for the processing as a reactant/intermediate in reactive ion etching.

3. Description of Unreasonable Risk

EPA has determined that CTC presents an unreasonable risk of injury to health under the conditions of use, based on cancer and acute and chronic toxicity for non-cancer effects. As described in more detail in the proposed rule, the TSCA section 6(b) 2020 Risk Evaluation for Carbon Tetrachloride, and the July 2022 errata memorandum correcting risk estimates for acute dermal exposures, EPA identified cancer and liver toxicity adverse effects from chronic inhalation and dermal exposures as well as liver toxicity from acute dermal exposures to CTC (Refs. 1, 2, 3). Cancer adverse effects (*e.g.*, liver, pheochromocytoma, neuroblastoma) were identified for chronic inhalation and dermal exposures. For chronic and acute non-cancer inhalation exposure to CTC, liver toxicity due to fatty change in the liver was indicative of cellular damage and selected as the most sensitive non-cancer endpoint. EPA identified additional risks associated with other adverse effects (*e.g.*, immediate and temporary depression of the central nervous system, kidney toxicity, reproductive and developmental toxicity, irritation and sensitization, and genetic toxicity) resulting from acute and chronic exposures (Ref. 1). By establishing protections from liver and adrenal cancer, EPA’s final rule will also prevent the unreasonable risk from other less sensitive endpoints, including acute, chronic non-cancer, and additional cancer risks from CTC (Ref. 15).

EPA considered potentially exposed or susceptible subpopulations identified as relevant to the risk evaluation by the Agency, which are included in the quantitative and qualitative analyses described in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) and were considered in the determination of unreasonable risk for CTC.

4. Conditions of Use Subject to This Regulatory Action

As noted in Unit I.C., “Conditions of use” is defined in TSCA section 3(4). To assist with the implementation and compliance with the final rule, in Unit IV., EPA has provided a description of

the conditions of use subject to the WCPP and to prescriptive controls, as well as those conditions of use prohibited by this final rule. The descriptions provided were obtained from EPA sources such as CDR codes, the 2020 Risk Evaluation for Carbon Tetrachloride and related documents, as well as the Organisation for Economic Co-operation and Development (OECD) harmonized use codes, and stakeholder engagements. EPA received public comments requesting minor clarifications of the descriptions for some industrial and commercial uses, and EPA has clarified those descriptions in Unit IV. A description of the minor changes can be found in the response to comments document (Ref. 11) and in Unit III.E.

For the purposes of this final rule, “occupational conditions of use” refers to the TSCA conditions of use described in Units IV.B.1., IV.C.1., and IV.D.1. of the final rule. Although EPA identified both industrial and commercial uses in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) for purposes of distinguishing exposure scenarios, the Agency clarified then and clarifies now that EPA interprets the authority Congress gave to the Agency to “regulat[e] any manner or method of commercial use” under TSCA section 6(a)(5) to reach both industrial and commercial uses.

EPA further notes that this rule does not apply to any substance excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(ii) through (vi). Those exclusions include, but are not limited to, any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide; and any food, food additive, drug, cosmetic, or device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act, when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device.

D. EPA’s Proposed Rule Under TSCA Section 6(a) for Carbon Tetrachloride

1. Description of TSCA Section 6(a) Requirements

Under TSCA section 6(a), if the Administrator determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to potentially exposed or susceptible subpopulation identified as relevant to

the Agency's risk evaluation, under the conditions of use, EPA must by rule apply one or more of the TSCA section 6(a) requirements to the extent necessary so that the chemical substance or mixture no longer presents such risk.

The TSCA section 6(a) requirements can include one or more of the following actions alone or in combination:

- Prohibit or otherwise restrict the manufacturing (including import), processing, or distribution in commerce of the substance or mixture, or limit the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce (TSCA section 6(a)(1)).

- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of the substance or mixture for a particular use or above a specific concentration for a particular use (TSCA section 6(a)(2)).

- Limit the amount of the substance or mixture which may be manufactured, processed, or distributed in commerce for a particular use or above a specific concentration for a particular use specified (TSCA section 6(a)(2)).

- Require clear and adequate minimum warnings and instructions with respect to the substance or mixture's use, distribution in commerce, or disposal, or any combination of those activities, to be marked on or accompanying the substance or mixture (TSCA section 6(a)(3)).

- Require manufacturers and processors of the substance or mixture to make and retain certain records, or conduct certain monitoring or testing (TSCA section 6(a)(4)).

- Prohibit or otherwise regulate any manner or method of commercial use of the substance or mixture (TSCA section 6(a)(5)).

- Prohibit or otherwise regulate any manner or method of disposal of the substance or mixture, or any article containing such substance or mixture, by its manufacturer or processor or by any person who uses or disposes of it for commercial purposes (TSCA section 6(a)(6)).

- Direct manufacturers or processors of the substance or mixture to give notice of the unreasonable risk determination to distributors, certain other persons, and the public, and to replace or repurchase the substance or mixture (TSCA section 6(a)(7)).

This unit summarizes the TSCA section 6 considerations for issuing regulations under TSCA section 6(a), and it is consistent with the considerations and analyses presented in the proposed rule to manage the

unreasonable risk from CTC (88 FR 49180, July 28, 2023 (FRL–8206–01–OCSPP)).

As required, EPA developed a proposed regulatory action and an alternative regulatory action, which are described in Units IV.A. and IV.B., respectively, of the proposed rule (88 FR 49193 through 491205 (FRL–8206–01–OCSPP)). To identify and select a regulatory action, EPA considered the two routes of exposure driving the unreasonable risk, inhalation and dermal, and the exposed populations. For occupational conditions of use, EPA considered how it could directly regulate manufacturing (including import), processing, distribution in commerce, industrial and commercial use, or disposal to address the unreasonable risk.

As required by TSCA section 6(c)(2), EPA considered several factors, in addition to the identified unreasonable risk, when selecting among possible TSCA section 6(a) regulatory requirements for the proposed rule. EPA's considerations regarding TSCA section 6(c)(2) and section 6(c)(2)(A) for CTC are discussed in full in Unit VI. of the proposed rule (88 FR 49209) (FRL–8206–01–OCSPP), including the statement of effects with respect to these considerations. After review of the public comments received, EPA has revised its statement of effects considerations in Unit V. of this final rule.

Additionally, as described in more detail in EPA's proposed rule in Unit V.B. (88 FR 49209) (FRL–8206–01–OCSPP), EPA considered the availability of alternatives when finalizing a prohibition or a substantial restriction (TSCA section 6(c)(2)(C)), and in setting final compliance dates in accordance with the requirements in TSCA section 6(d)(1)(B)).

To the extent information was reasonably available, EPA considered pollution prevention strategies and the hierarchy of controls adopted by OSHA and the NIOSH when developing its proposed rule, with the goal of identifying risk management control methods that would be permanent, feasible, and effective. EPA also considered how to address the unreasonable risk while providing flexibility to the regulated community where appropriate, and EPA took into account the information presented in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1), input from stakeholders, insight received during consultations, and anticipated compliance strategies from regulated entities.

Taken together, these considerations led EPA to the proposed regulatory action and alternative action described in Unit II.D.3. The proposed rule presents additional details related to how the requirements described in Unit II.D.1. of this document were incorporated into development of the proposed rule and primary alternative action.

2. Consultations and Other Engagement

a. Consultations

EPA conducted consultations and outreach as part of development of the July 28, 2023 proposed rule (88 FR 49180) (FRL–8206–01–OCSPP). The Agency held a federalism consultation from December 17, 2020, until February 17, 2021, as part of the rulemaking process and pursuant to Executive Order 13132 (Ref. 16).

EPA also consulted with Tribal officials (Ref. 17). The Agency held a Tribal consultation from December 7, 2020, through March 12, 2021, with meetings held on January 6 and 12, 2021 (Ref. 17). EPA received no written comments as part of this consultation.

EPA's Environmental Justice (EJ) consultation occurred from February 2, 2021, through April 2, 2021 (Ref. 18). On February 2 and 18, 2021, EPA held public meetings as part of this consultation. These meetings were held pursuant to Executive Orders 12898 and 14008. EPA received one written comment following the EJ meeting, in addition to oral comments provided during the consultation (Ref. 18).

More information regarding the consultations is presented in Units VIII.E., VIII.F. and VIII.J.

b. Other Stakeholder Consultations

In addition to the formal consultations described in Unit II.D.2.a., EPA held a webinar on December 10, 2020, providing an overview of the TSCA risk management processes and the risk evaluation findings for CTC (Ref. 19). EPA also presented on the TSCA risk management process and the findings in the 2020 Risk Evaluation for Carbon Tetrachloride at a Small Business Administration (SBA) Roundtable on December 4, 2020 (Ref. 20). Attendees of these meetings were given an opportunity to voice their concerns on both the risk evaluation and risk management.

Furthermore, during development of the proposed and final rule, EPA engaged in discussions with representatives from different industries, non-governmental organizations, organized labor, technical experts, and users of CTC, including a

webinar providing an overview of the proposed rule. A list of external meetings held during the development of the 2023 proposed and final rule is available in the docket (Ref. 21); meeting materials and summaries are also in the docket.

c. Children's Environmental Health

The Agency's 2021 Policy on Children's Health (Ref. 22) requires EPA to protect children from environmental exposures by consistently and explicitly considering early life exposures (from conception, infancy, early childhood and through adolescence until 21 years of age) and lifelong health in all human health decisions through identifying and integrating children's health data and information when conducting risk assessments. TSCA section 6(b)(4)(A) also requires EPA to conduct risk evaluations "to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use." In addition, TSCA section 6(a) requires EPA to apply one or more risk management requirements under TSCA section 6(a) so that CTC no longer presents an unreasonable risk (which includes unreasonable risk to any relevant potentially exposed or susceptible subpopulation). Information on how the Policy was applied and on the health and risk assessments supporting this action is available under Units II.C. II.D. and V.A., as well as in Unit III.A.3. of the July 2023 proposed rule (88 FR 49184 through 49188, 49205 through 49208 and 49190) (FRL-8206-01-OCSPP), the 2020 Risk Evaluation for Carbon Tetrachloride, and the Economic Analysis for this rule (Refs. 1, 5).

3. Proposed Regulatory Action

EPA's proposed rule under TSCA section 6(a) to address the unreasonable risk presented by CTC under its conditions of use included the following:

- Requirements for strict workplace controls, including a CTC WCPP, which would include requirements to meet an inhalation exposure concentration limit and prevent direct dermal contact with CTC, for 9 occupational conditions of use;
- Requirements for prescriptive workplace controls for laboratory use; and
- Prohibition of certain processing, industrial, and commercial conditions

of use and the manufacture, processing, and distribution for those uses.

The proposed rule included timeframes for implementation. The prohibitions EPA proposed would take effect six months after the date of publication of the final rule, except for the prohibition of the industrial and commercial use of CTC in specialty uses by the Department of Defense, which would take effect one year after the date of publication of the final rule. Likewise, for the WCPP, EPA proposed timeframes for phases of compliance, beginning with monitoring at six months and full implementation after 12 months, as described in Unit IV.A.1. of the proposed rule. EPA also proposed a compliance timeframe of six months for prescriptive controls for laboratory use.

Under TSCA section 6(c)(2)(A)(iv)(II) through (III), EPA is mandated to consider one or more alternative regulatory actions. The primary alternative regulatory action was included in the proposed rule in Unit IV.B. (88 FR 49204) (FRL-8206-01-OCSPP). Similar to the proposed regulatory action, the primary alternative regulatory action combined requirements for a WCPP and prescriptive controls to address the unreasonable risk from CTC under its conditions of use.

The primary alternative regulatory action included prescriptive workplace controls, specifically respirators and dermal PPE, for the conditions of use for which EPA had proposed a WCPP. The primary alternative action also included a WCPP for processing, industrial, and commercial uses of CTC that EPA had proposed to prohibit. At the time of proposal, EPA did not have reasonably available information indicating that any of the uses proposed for prohibition were ongoing. EPA requested comment on whether any of the uses the Agency proposed to prohibit are ongoing and if EPA should consider a WCPP for those conditions of use of CTC. For the industrial and commercial use of CTC as a laboratory chemical, the primary alternative regulatory action considered by EPA included the implementation of only the requirements of Direct Dermal Contact Controls (DDCC) of the WCPP in combination with the use of fume hoods in workplace laboratory settings and advanced engineering controls specifically for DoD's use of CTC as a laboratory chemical in chemical weapons destruction. The compliance timeframes for the controls as part of the primary alternative regulatory action were the same as the timeframes proposed.

For a comprehensive overview of the primary alternative regulatory action

refer to Unit IV.B. of the proposed rule, with the rationale for the primary alternative regulatory action provided in Unit V.A.4. of the proposed rule (88 FR 49205 through 49208) (FRL-8206-01-OCSPP).

4. Public Comments Received

EPA requested comment on all aspects of the proposed rule. During the public comment period, EPA held a webinar on August 15, 2023, providing an overview of the proposed rule and TSCA section 6; during the webinar, members of the public had the opportunity to share their perspectives (Ref. 23). The comment period closed on September 11, 2023. EPA received 23 public comments, with a majority received from industry trade organizations. The public comments also include comments from chemical manufacturers, advocacy organizations, laboratory users, a union, an academic institution, members of the regulated community, and individual residents. A summary of the comments as well as EPA's responses is in the docket for this rulemaking (Ref. 11). Additionally, Unit III. contains summaries of public comments that informed EPA's regulatory approach in this final rule.

After the close of the public comment period for the proposed rule, stakeholders, including affected industry and interested groups, requested meetings with EPA. Topics of these meetings included exposure controls, process descriptions, monitoring data, and specific conditions of use. EPA received data as part of and following these stakeholder meetings and has made the information available to the public in the rulemaking docket (EPA-HQ-OPPT-2020-0592) (Ref. 21).

After review of the public comments received from the proposed rule, EPA revised certain preliminary considerations that impacted which conditions of use were proposed by EPA to be prohibited or that could continue under the WCPP or prescriptive controls (Ref. 11). Similarly, based on public comments received, EPA modified for this final rule several proposed compliance timeframes, with details in Unit III.

III. Changes From the Proposed Rule

Unit III. summarizes the main changes from the proposed rule to the final rule, based on the consideration of the public comments.

A. Changes to Requirements for Certain Conditions of Use

As described in Unit III.A.1., when compared to the proposed rule, EPA's final rule no longer prohibits two sub-

uses, under two separate conditions of use that were proposed for prohibition, and now allows them to continue under the WCPP. In addition, this final rule broadens the type of prescriptive controls required for one condition of use (Unit III.A.2.), as compared to the proposed rule. The rationale for these changes is described in this unit. EPA emphasizes that implementation of the WCPP or prescriptive controls can fully address the unreasonable risk from CTC for these conditions of use, and that these changes do not significantly impact the production volume of CTC expected to remain in commerce when compared to the proposed regulatory action. Taken together, EPA estimates that there are 10 facilities involved in the changes of the requirements to the conditions of use described in Units III.A.1. and 2., nine of which use CTC for the industrial and commercial use as a laboratory chemical. In addition, EPA understands that small quantities of CTC are used for the sub-uses that will continue under the WCPP instead of the proposed prohibition (Ref. 24). The two sub-uses which will continue under the WCPP account for approximately 0.4% to 1% of total production volume, based on a comparison of 2019 CDR data on CTC production volume (between 100 million and 250 million lbs.) and information reported to EPA regarding the two sub-uses (Ref. 5, Ref. 24).

1. Changes to the Prohibition of Certain Conditions of Use

EPA's primary alternative regulatory action described in the proposed rule considered regulating several conditions of use under the WCPP as an alternative to the proposed prohibition, including incorporation into formulation, mixtures, or reaction products in petrochemicals-derived manufacturing, and industrial and commercial use as an industrial processing aid in the manufacture of petrochemicals-derived products. In addition, EPA requested comment on whether the Agency should require a WCPP or prescriptive controls, including respirators and dermal PPE, for any of the conditions of use EPA proposed to prohibit.

EPA is finalizing a WCPP for incorporation into formulation, mixtures, or reaction products in vinyl chloride manufacturing and the industrial and commercial use as an industrial processing aid in the manufacture of vinyl chloride, as included in the primary alternative regulatory action of EPA's proposal under the broader categories of processing: incorporation into formulation, mixtures, or reaction products in petrochemical-derived

manufacturing and industrial and commercial use as an industrial processing aid in the manufacture of petrochemical-derived products. EPA proposed to prohibit these sub-uses of CTC due to the lack of information indicating that these uses are ongoing, but requested comment on whether CTC is still used in these and other conditions of use EPA proposed to prohibit, and stated that if EPA received information indicating the continued use of CTC for these conditions of use, the Agency would consider regulating these uses rather than prohibiting them (88 FR at 49202 through 49203, 49205, and 49218). EPA received comments from one entity indicating that the incorporation of CTC into formulation, mixtures, or reaction products in vinyl chloride manufacturing and the industrial and commercial use of CTC as an industrial processing aid in the manufacture of vinyl chloride are ongoing (Ref. 24). The entity indicated that switching to an alternative chemical or process would require replacement of existing infrastructure and result in the temporary loss of revenue. The entity using CTC for these uses provided manufacturing data used in the 2020 Risk Evaluation for Carbon Tetrachloride, indicating that CTC is used by this entity in industrialized and standardized settings that can meet the requirements of the WCPP. Therefore, EPA understands that the entity is able to meet the WCPP requirements for processing: incorporation into formulation, mixtures, or reaction products in vinyl chloride manufacturing and the industrial and commercial use as an industrial processing aid in the manufacture of vinyl chloride as well. Furthermore, EPA understands as a general matter that these uses would occur in highly industrialized settings and controlled and closed processes, suggesting a WCPP could be successfully implemented such that risk of injury to health presented by CTC is no longer unreasonable. CTC was used in other petrochemical-derived manufacturing (other than vinyl chloride manufacturing); however, based on the reasonably available information, such uses of CTC do not appear to be ongoing. Therefore, EPA has concluded that industry has already found feasible alternatives to CTC for these uses, EPA is prohibiting processing: incorporation into formulation, mixtures, or reaction products in the remainder of petrochemical-derived manufacturing and the industrial and commercial use of CTC as a processing aid in the manufacture of remaining

petrochemical-derived products, as proposed, to address the unreasonable risk contributed by these conditions of use.

2. Changes to Restrictions: Prescriptive Controls for Industrial and Commercial Use as a Laboratory Chemical

In general, EPA is finalizing the prescriptive control requirements for the industrial and commercial use of CTC as a laboratory chemical as proposed, with some modifications based on consideration of public comments. As described in the proposed rule, to address the unreasonable risk of injury to health resulting from dermal exposures to CTC for the industrial and commercial use as a laboratory chemical, EPA proposed to require dermal PPE in combination with comprehensive training for tasks related to the use of CTC in a laboratory setting for each potentially exposed person in direct dermal contact with CTC. EPA also proposed to require the use of fume hoods to codify the assumption of existing good laboratory practices that EPA relied upon as a key basis for its evaluation of risk from this condition of use (Ref. 1). EPA requested comment relative to the ability of owners and operators to implement laboratory chemical fume hood and dermal PPE related requirements within six months of publication of the final rule. Under the primary alternative regulatory action, EPA included DDCC for laboratory use and solicited comment on non-prescriptive requirements of DDCC as compared to the prescriptive workplace controls of dermal PPE.

EPA received several comments regarding the industrial and commercial use as a laboratory chemical. One commenter stated that the proposed regulation would result in confusion and duplication with the OSHA standard for occupational exposure to hazardous chemicals in laboratories under 29 CFR 1910.1450 that is already in effect (Ref. 25). A couple of commenters urged EPA to align its requirements for laboratory use of CTC more closely with the OSHA's laboratory standard to reduce compliance burden (Refs. 25, 26). Commenters also requested that EPA include flexibility for engineering controls beyond a fume hood for consistency with the OSHA lab standard, stating that, while fume hoods are considered best practice and commonly used to reduce exposure in laboratories, experiment designs utilizing CTC may not be able to be accommodated within a fume hood (Refs. 25, 27). Commenters described other alternative controls that can be

designed and implemented to reduce exposure, such as glove boxes, exhausted enclosures, ducted biosafety cabinets, and filtration devices.

Based on information provided by commenters related to exposure mitigation controls to comply with the OSHA laboratory standard and best management practices available to laboratories, EPA has determined that requiring laboratory ventilation devices such as fume hoods or glove boxes, would better align with the OSHA laboratory standard and existing good laboratory practices. As described in Unit V.A.2. the proposed rule (88 FR 49201, July 28, 2023) (FRL–8206–01–OCSPP), EPA proposed to require fume hoods in laboratory settings to codify assumptions made in the 2020 Risk Evaluation for CTC, where EPA's risk estimates and determination that inhalation exposures from the industrial and commercial use of CTC as a laboratory chemical did not contribute to the unreasonable risk were predicated on its findings that expected safety practices of using CTC in small amounts under a fume hood reduce the potential for inhalation exposures (Ref. 1). In addition to fume hoods, EPA has determined that other types of ventilation systems or containment devices, when used in compliance with the OSHA laboratory standard at 29 CFR 1910.1450(e)(3), may minimize inhalation exposures in a laboratory setting consistent with the qualitative assumption in the 2020 Risk Evaluation for CTC that the potential for inhalation exposure is low due to expected use of a fume hood. For the industrial and commercial use as a laboratory chemical, EPA concurs with the commenters that indicated EPA's requirements should align more closely with the OSHA laboratory standard wherever possible to prevent confusion. The requirement in this final rule that laboratory ventilation safety devices, such as fume hoods or glove boxes, are in use and functioning properly and that specific measures are taken to ensure proper and adequate performance of such equipment to minimize exposures to persons in the area when CTC is used in a laboratory setting aligns with existing requirements from the OSHA laboratory standard at 29 CFR 1910.1450(e)(3)(iii) while remaining consistent with the assumptions made in the 2020 Risk Evaluation.

As detailed in Unit IV.C. of this final rule, EPA is finalizing the requirements for dermal PPE in combination with comprehensive training for tasks related to the use of CTC in a laboratory setting as proposed. EPA believes these requirements align with OSHA's

laboratory standard and OSHA's General Requirements for Personal Protective Equipment at 29 CFR 1910.132 to the extent possible while still addressing the unreasonable risk of injury to health resulting from dermal exposures to CTC identified for the industrial and commercial use as a laboratory chemical.

B. Changes to WCPP Timeframes

For the conditions of use for which EPA proposed the WCPP, EPA proposed several compliance timeframes, including the following requirements: that initial exposure monitoring be conducted within six months of publication of the final rule in the **Federal Register** (or within 30 days of introduction of CTC into the workplace if CTC use commences at least six months after the date of publication); that each owner or operator ensure that the exposure to CTC does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons within nine months of publication of the final rule in the **Federal Register**; and that owners and operators implement an exposure control plan within 12 months of publication of the final rule in the **Federal Register**. EPA requested comment regarding the ability of owners or operators to comply with the various provisions of the WCPP, including initial exposure monitoring, within the compliance timelines included in the proposal, and anticipated timelines necessary for any procedural adjustments needed to comply with the establishment of a respiratory protection program and development of an exposure control plan. EPA also requested comment regarding the amount of time, if any, it would take the regulated community to develop a method to measure at or below the ECEL over an entire work shift and information on what levels of detection are possible over an entire work shift based on existing monitoring methods, justification for the timeframe of the specific steps needed to develop a more sensitive monitoring method, cost associated with a more sensitive monitoring method, and any additional detailed information related to establishing a monitoring program to reliably measure CTC at or below the ECEL.

Public comments highlighted challenges with the proposed timeframes and suggested longer timeframes for initial exposure monitoring. For example, one commenter stated that the proposed 6-month timeframe to conduct initial exposure monitoring may not be possible because CTC use may be

infrequent and only occur annually or even less frequently, such as maintenance exercises (Ref. 28). Other commenters expressed concern that requirements to comply with a new exposure limit will stress industrial hygiene consultants and laboratories that analyze the samples, and urged EPA to ensure that there is adequate time for consultant firms and laboratories to establish sufficient capacity (Refs. 29, 30, 31). Several commenters stated that the proposed 6-month timeframe for initial monitoring would be untenable and suggested that the deadline be extended to 18 months (Refs. 29, 30, 32). One commenter stated that owners or operators should be given sufficient time to implement any new requirements which could involve substantial investments (Ref. 27). Two of the commenters reasoned that, particularly for CTC, at least 18 months is necessary to revalidate methods and determine whether revision to corporate exposure assessment strategy is necessary to address the new ECEL, including to address the specific implementation and technical feasibility challenges of measuring the CTC ECEL for both full shift and task measurements (Refs. 29, 30). One commenter indicated that they need to develop methods to achieve the detection limit for the proposed ECEL and ECEL action level, to procure professional services to implement the requirements, and most likely require laboratory analytical support (Ref. 33). Additionally, one commenter expressed concern that corporate and facility industrial hygiene resources as well as third party laboratories may also be conducting a reassessment and analysis for the methylene chloride and PCE rules recently promulgated under TSCA section 6(a), thereby requiring additional time for CTC (Ref. 29).

In consideration of public comments and the challenges of initiating the WCPP, even for facilities with industrial hygiene programs in place, and the difference in the occupational exposure limits between the OSHA permissible exposure limit (PEL) and the EPA ECEL and the challenges associated with monitoring to new, lower EPA exposure thresholds that may spur an increase in the need for monitoring or other exposure control assessment infrastructure, EPA has determined that a longer compliance deadline of 540 days is as soon as practicable to conduct initial monitoring for CTC, which likely would require regulated entities to contract new services or realign current industrial hygiene professionals towards WCPP compliance. Providing 540 days

for initial monitoring is intended to (1) prevent professional safety service sectors from being overwhelmed by new EPA requirements; (2) provide time to procure the necessary services while ensuring the preservation of safety quality, standards, and practices; and (3) provide sufficient time for a comprehensive exposure evaluation, increasing the likelihood of successful implementation of the WCPP. Following initial monitoring, EPA is finalizing the requirement that each owner or operator supply a respirator to each person who enters a regulated area within three months after the receipt of any exposure monitoring that indicates exposures exceeding the ECEL. Therefore, each owner or operator must ensure that the exposures to CTC do not exceed the ECEL as an 8-hour TWA for all potentially exposed persons, including by providing respiratory protection, no later than 630 days after December 18, 2024. Given the full WCPP requirements (including the exposure control plan) are required after owners or operators are required to ensure that no person is exposed to an airborne concentration that exceeds the TWA ECEL, EPA acknowledges that compliance with the ECEL may include temporary PPE use (e.g., respiratory protection) until comprehensive engineering and administrative controls are fully implemented. As described in the proposed rule, EPA believes that three months after receipt of exposure monitoring results is as soon as practicable, while also providing a reasonable transition period for entities to evaluate exposure monitoring results, acquire the correct respiratory protection, and establish the PPE program, including training, fit-testing, and medical evaluation.

EPA also received public comment regarding the compliance timeframe for full implementation of the WCPP, including detailing the evaluation steps that would be required to assess a facility and develop, document, and implement an exposure control plan. To allow time for orderly transitions and training to comply with an ECEL (0.03 ppm (8-hr TWA)) that is significantly lower than the OSHA PEL of 10 ppm (8-hr TWA) and the American Conference of Governmental Industrial Hygienists (ACGIH) threshold limit value (TLV) of 5 ppm (8-hr TWA) for CTC, two commenters suggested that EPA adopt a graduated implementation approach for ECEL implementation by first requiring entities that already meet the OSHA PEL to comply with the ACGIH TLV within two years from the effective date of the final rule and then permitting those

facilities meeting the ACGIH standard three years to transition to the ECEL (Refs. 34, 35). Two commenters expressed concern that the proposed timeframes would be insufficient for owners or operators to document their efforts to implement the hierarchy of controls as required under the WCPP, and recommended that the time required to develop the exposure control plan be extended to two years from completion of initial monitoring, for a total of 24 to 36 months from the effective date of the final rule, to provide adequate time for entities to evaluate and implement appropriate compliance approaches that provide flexibility and are the most effective for protecting workers (Refs. 29, 30).

Based on comments, outreach, reasonably available information, and existing OSHA standards, EPA maintains that the majority of the exposure reduction and worker safety infrastructure needed for compliance is currently in place, but recognizes the fundamental challenge of building a new exposure control strategy around the new, lower EPA exposure limit. Additionally, based on consideration of public comment and given that OSHA has not promulgated a detailed standard specific to CTC, EPA has determined that a longer compliance timeframe of 1080 days for development and implementation of an exposure control plan is as soon as practicable to ensure that the regulated community has adequate time to evaluate monitoring data, assess and develop an exposure strategy, procure appropriate control technology and PPE, and implement the required chemical safety program for CTC.

Therefore, EPA is finalizing the compliance timeframes for the WCPP provisions as follows: (1) The requirements for each owner or operator to conduct initial baseline monitoring must be met within 540 days after December 18, 2024, or within 30 days of introduction of CTC into the workplace, whichever is later; (2) the requirements for each owner or operator to ensure that exposure to CTC does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons, including by providing respiratory protection to all potentially exposed persons in the regulated area must be met within 630 days after December 18, 2024, or within three months after receipt of the results of any exposure monitoring that indicates exposures exceeding the ECEL; and (3) the requirements for development and implementation of an exposure control plan must be met within 1,080 days after December 18, 2024. For greater clarity in this final

rule, EPA is also finalizing with slight modification the requirement that owners and operators institute a training and information program for potentially exposed persons and assure their participation in the training and information program, and that this requirement be met within 630 days after December 18, 2024 (see Unit IV.B.7.a.).

EPA understands that certain departments and agencies of the Federal government, as well as Federal contractors acting for or on behalf of the Federal government, need additional time to comply with these timeframes. For example, complying with these timeframes could impact the ability of the Department of Energy (DOE) to perform sampling and groundwater treatment at contaminated plumes and wastewater treatment facilities. While, for example, 29 CFR part 1960 sets forth procedures and guidelines for ensuring that Federal workers are protected in comparable ways to their non-Federal counterparts, EPA believes that compliance with this final rule will require increased and different preparations on the part of Federal agencies. For example, Federal agencies must follow procurement requirements, which will likely result in increased compliance timelines. In addition, these requirements will require support in the Federal budget, which, for some agencies, is a multi-year process. Therefore, EPA is providing additional time for agencies of the Federal government and their contractors, when acting for or on behalf of the Federal government, to comply with the WCPP provisions as follows: (1) The requirements for each owner or operator to conduct initial baseline monitoring must be met within 915 days after December 18, 2024, or within 30 days of introduction of CTC into the workplace, whichever is later; (2) the requirements for each owner or operator to ensure that exposure to CTC does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons, including by providing respiratory protection to all potentially exposed persons in the regulated area, must be met within 1,005 days after December 18, 2024, or within three months after receipt of the results of any exposure monitoring that indicates exposures exceeding the ECEL; (3) the requirements for each owner or operator to ensure all persons are separated, distanced, physically removed, or isolated from direct dermal contact with CTC, including by providing dermal PPE, must be met within 1,005 days after December 18, 2024; (4) the requirements for

development and implementation of an exposure control plan must be met within 1,080 days after December 18, 2024; and (5) the requirement that owners or operators of workplaces subject to the WCPP institute a training and information program for potentially exposed persons and assure their participation in the training and information program within 1,005 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 20, 2027).

C. Changes to WCPP Requirements

1. Exposure Monitoring Requirements

As part of the WCPP, EPA proposed to require owners or operators meet certain documentation requirements for each monitoring event of CTC, including compliance with the Good Laboratory Practice (GLP) Standards in accordance with 40 CFR part 792.

Numerous commenters expressed concern regarding the requirement that the WCPP include compliance with the GLP Standards (Refs. 28, 29, 30, 31, 35, 36). Commenters stated that it is atypical, for industrial hygiene purposes, to use this standard for air sampling of CTC (Refs. 29, 30, 31). According to the commenters, it is common practice within the industrial hygiene community to have analyses performed by American Industrial Hygiene Association (AIHA) accredited labs (Ref. 29). One commenter added that collection of occupational monitoring samples need not be conducted under the GLP Standards where planning and collection is overseen by a Certified Industrial Hygienist or Environmental Professional as defined at 40 CFR 312.10 (Refs. 30, 31). Commenters also suggested applying the policy described in typical TSCA section 5(e) orders that establish a New Chemical Exposure Limit (NCEL) under the TSCA New Chemicals Program, which states that compliance with GLP Standards is not required where exposure monitoring samples are analyzed by a laboratory accredited by either: (A) the AIHA Industrial Hygiene Laboratory Accreditation Program; or (B) another comparable program approved in advance in writing by EPA (Refs. 29, 30, 31). Another commenter reasoned that GLP Standards were not intended for air monitoring in a workplace when compliance with such standards would mean that real-time assessments could not be made, as air samples would need to be processed and analyzed in a laboratory (Ref. 28).

EPA agrees with the commenter that the WCPP is incompletely served by solely relying on the GLP Standards

initially put forth in the July 29, 2023 proposed rule (88 FR 49180) (FRL–8206–01–OCSPP). Given the concern from commenters regarding potential increases in demand for professional safety services and sampling laboratories having a negative impact due to anticipated industry strain and sampling limitations (Refs. 29, 30, 31), EPA has broadened the scope of laboratory accreditation accordingly. EPA has considered this laboratory capacity issue, in addition to other revisions for finalization in this rule, so that the additional infrastructure is in place for the regulated community to successfully implement the WCPP. For the final rule, EPA is requiring that exposure samples be analyzed using an appropriate analytical method, and related records retained, by a laboratory that complies with the GLP Standards in 40 CFR part 792 or that otherwise maintains a relevant third-party laboratory accreditation (*e.g.*, under the AIHA Laboratory Accreditation Programs, LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized programs.

Another commenter stated that EPA's proposal did not make clear that "personal breathing zone" air samples to monitor exposures are to be taken without regard to respirator use. The commenter noted that OSHA requires exposure monitoring to be conducted without regard to respirator use (citing as an example OSHA's definition of "employee exposure" at 29 CFR 1910.1052(b)) and asserted that this important element of OSHA's monitoring program was omitted from EPA's proposal (Ref. 37). EPA agrees with the commenter that exposure monitoring should be conducted without regard to respiratory protection to inform engineering control options and respiratory protection considerations. Therefore, EPA is finalizing this rule to explicitly state that air sampling is required to measure ambient concentrations for CTC without taking respiratory protections into account when being performed. This will ensure the appropriate degree of protection to potentially exposed persons by logging accurate ambient air concentrations of CTC, thus empowering owners or operators to appropriately consider the hierarchy of controls.

Additionally, as part of the WCPP, EPA proposed to require owners and operators to re-monitor within 15 working days after receipt of any exposure monitoring when results indicated non-detect, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified

Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary. EPA received several comments disagreeing with the proposed requirement to review non-detect air monitoring samples. The commenters stated that facilities use accredited labs to perform industrial hygiene sampling analysis, the results are reviewed by industrial hygiene professionals, and it is an unnecessary step that adds no value to reduce risk to workers (Refs. 29, 30, 31).

EPA disagrees with commenters that expressed the opinion that re-evaluating a non-detect result adds no value and is inappropriate. While in some cases a non-detect result may accurately indicate that the chemical is not present and that air concentrations are below the ECEL action level, in other cases it may not necessarily imply negligible occupational exposure to the chemical. For example, interference from another chemical during sampling may result in an incorrect result of non-detect. This interference may not be recognized at the time of sampling or analysis. Owners and/or operators also may not be using sampling techniques or analytical procedures that are effective or appropriate for the particular chemical of interest. In each of these cases, non-detect results, along with supporting documentation about the sampling and analytical methods used to get those results, is a meaningful part of the potentially exposed person's exposure record required under the WCPP. The WCPP in the proposed rule and in this final rule does not require re-monitoring in all cases. Re-monitoring may be necessary based on a professional evaluation by an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist. This flexibility allows owners or operators options in terms of revisiting occupational sampling in the event of a non-detect result, or evaluation by a qualified professional.

EPA determined that a non-detect sampling result when effective sampling and analysis procedures are used is valuable to an owner/operator in that it suggests effective implementation of exposure controls. Potentially exposed persons may also use these records in discussions with owner/operators, in collective bargaining situations, or in compliance assistance inquiries to EPA or other federal agencies. Exposure monitoring results may also improve overall workplace health and reducing owner/operator liability in the effective detection, treatment, and prevention of occupational disease or illness. All of the above scenarios are valuable for

owner/operators, potentially exposed persons, and for effective mitigation of occupational exposures. In consideration of these factors, EPA has removed the air monitoring equipment malfunction from the monitoring activities that do not require resampling based on professional evaluation by an Environmental Professional or Certified Industrial Hygienist. While professional discretion may be warranted in determining whether re-monitoring is needed following results that indicate non-detect, EPA has determined this is not appropriate in the event of air monitoring equipment malfunction. This is due to the importance of air monitoring in ensuring that the requirements of the WCPP are met, and the importance of the WCPP in reducing risks from exposures to CTC in the workplace. Monitoring results from malfunctioning air monitoring equipment are not valid monitoring and therefore not sufficient to meet the monitoring requirements under the WCPP.

EPA may consider developing additional guidance regarding occupational monitoring in the future. Therefore, EPA is finalizing the requirement to re-monitor within 15 working days after receipt of any exposure monitoring if results indicated non-detect unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary. EPA has updated the recordkeeping requirements associated with the WCPP exposures records required under 40 CFR 751.713(b)(1) to require documentation of the determination by the Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist to be maintained as a record. Occupational monitoring (and associated recordkeeping) is an area that EPA may develop guidance as part of final rule implementation efforts.

2. Designated Representative

EPA proposed to require owners and operators to provide potentially exposed persons regular access to the exposure control plan, exposure monitoring records, and PPE program implementation plan (documenting proper application, wear, and removal of PPE). EPA requested comment on how owners and operators could engage with potentially exposed persons on the development and implementation of an exposure control plan and PPE program. One commenter stated that employees should be engaged in the development and implementation of the exposure

control plan and that the engagement is best performed during the PPE and respirator training (Ref. 27). Another commenter urged EPA to require that owners and operators consult with workers and their designated representatives in developing and implementing their plans (Ref. 37).

EPA received public comment on the role of designated representatives in the WCPP. One commenter, a group of labor unions, urged EPA to incorporate requirements similar to OSHA's access standard at 29 CFR 1910.1020 (entitled, "Access to employee exposure and medical records") in EPA's proposed recordkeeping requirements for the WCPP to ensure that exposure information is promptly and fully shared with both potentially exposed persons and their designated representatives (Ref. 37). The commenter also suggested that EPA include a requirement that employers provide employees or their designated representatives an opportunity to observe monitoring events. The commenter observed that workers and their designated representatives have a critical role to play in ensuring effective control of toxic substances and further noted that, often, unions are the organizations with expertise in understanding occupational exposure information.

Following review of the comments received, EPA recognizes the importance of having the ability for potentially exposed persons and their designated representative(s), such as labor union representatives, to observe exposure monitoring and have prompt access to exposure records. EPA additionally recognizes that, in some instances, individual workers may be hesitant to ask owners or operators for information relating to their chemical exposure or may be less familiar with discipline-specific industrial hygiene practices. EPA determined that it is appropriate in this final rule to establish requirements regarding designated representatives, consistent with existing OSHA precedent in certain 29 CFR part 1910, subpart Z regulations, to allow designated representatives the ability to observe occupational exposure monitoring and have access to exposure monitoring records. In EPA's final rule, the WCPP includes a requirement that owners and operators provide potentially exposed persons or their designated representatives an opportunity to observe any exposure monitoring that is designed to characterize their exposures and is conducted under the WCPP. EPA is also finalizing a requirement that designated representatives have access to relevant

exposure records, similar to provisions in certain OSHA regulations under 29 CFR part 1910, subpart Z, such as 29 CFR 1910.1200 and 29 CFR 1910.1020. EPA is requiring owners and operators to notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records of exposure monitoring and PPE program implementation within 30 days of the date that the exposure control plan is completed and at least annually thereafter. EPA is also requiring, consistent with the proposed requirement for notification of exposure monitoring results, that the notice of the availability of the exposure control plan and associated records be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English. While EPA encourages owners or operators to consult with persons that have potential for exposure and their designated representatives on the development and implementation of the exposure control plan, EPA has determined that it is not necessary to include this as a requirement in the final rule, consistent with OSHA, because the involvement of designated representatives in the observation of occupational monitoring and the potential to access exposure records being finalized in this rule provide a productive forum for communicating with owner/operators about the exposure control plan. EPA believes that the notification of the exposure control plan and associated records may help facilitate participation from potentially exposed persons and their designated representatives in the implementation and further development of that plan.

EPA's final rule to address the unreasonable risk of PCE under TSCA section 6(a) (RIN 2070-AK84) established the definition of "designated representative" intended to apply to all TSCA section 6(a) requirements under 40 CFR part 751 at § 751.5. A recognized or certified collective bargaining agent must be treated automatically as a designated representative without regard to written authorization. Additionally, with respect to Federal Government employees, EPA, like OSHA at 29 CFR 1960.2(e), will interpret these designated representative requirements consistent with the Federal Service Labor Management

Relations Statute (5 U.S.C. 7101 *et seq.*), or collective bargaining or other labor-management arrangements that cover the affected employees.

Should a request be initiated for such records by the potentially exposed person or their designated representative(s), the owner or operator will be required to provide the specified records at a reasonable time, place, and manner, analogous to provisions outlined in OSHA's 29 CFR 1910.1020(e)(1)(i). If the owner or operator is unable to provide the requested records within 15 working days, the owner or operator must, within those 15 days, inform the potentially exposed person or designated representative(s) requesting the record of the reason for the delay and the earliest date when the record will be made available. Additionally, in the event that a designated representative is observing exposure monitoring, the owner or operator must ensure that designated representatives are provided with PPE appropriate for the observation of monitoring. Finally, this rule requires owners or operators to provide notice to potentially exposed persons and their designated representatives of exposure monitoring results and of the availability of the exposure control plan and associated records. For purposes of this requirement, the owner or operator is only required to provide notice to those designated representatives that the owner or operator is aware of, such as representatives designated in writing or a recognized collective bargaining agent for the owner or operator's own employees.

3. Other Changes to the WCPP

EPA proposed various requirements under the WCPP for owners or operators to provide PPE, including respiratory protection and dermal protection, to potentially exposed persons and to establish a PPE program. For greater clarity in this final rule, EPA has revised the PPE requirements with respect to the cross-references to the relevant OSHA regulations. While the language appears different than the requirements included in the proposed rule, it remains EPA's intention that owners and operators implement PPE programs that are consistent with OSHA requirements. The PPE requirements as part of the WCPP in this final rule are described in Unit IV.B.6.

D. CTC Unintentionally Present in Trace Quantities in Other Chemical Substances

Several public comments on the proposed rule urged EPA to establish an

explicit "de minimis" weight fraction threshold or add an exemption for impurities or other contaminants from the rule's requirements for small levels of CTC present in other chemical substances or mixtures (Refs. 26, 28, 29, 30, 31, 35, 38, 39). Two commenters raised concerns that absent such exemption, the proposed prohibition on industrial and commercial use of CTC as an industrial processing aid in the manufacture of petrochemicals-derived products would inadvertently prohibit the industrial and commercial use of PCE as a processing aid in catalyst regeneration in petrochemical manufacturing, which EPA is regulating under a WCPP in a separate TSCA section 6(a) rulemaking for PCE, because PCE contains trace amounts of CTC as an impurity or other contaminant (Refs. 26, 38). Two other commenters who supported a de minimis exclusion for impurities noted that prohibiting impurities in downstream products or CTC impurities in feedstocks could severely hamper numerous value chains and stated that establishing a de minimis weight fraction threshold of 0.1% by weight for the CTC restrictions would align with existing requirements under OSHA's Hazard Communication Standard (Refs. 30, 31). One of these commenters stated that a member company imports a product containing a very small amount of CTC as an impurity, then sells the sealed container for rubber processing; this commenter urged EPA to expressly exempt from the WCPP requirement these zero exposure and de minimis scenarios (Ref. 31). Another commenter stated that a member uses some raw materials that contain CTC, primarily chlorinated rubbers and methylene chloride, in the manufacturing of adhesives and coatings, and was concerned that this use would fall under the proposed prohibitions (Ref. 39). Another commenter asserted that any formulated products that contain de minimis concentrations of CTC (*i.e.*, concentrations less than 0.1% by weight) would not pose a risk and should not be covered by the rule (Ref. 29). Two other commenters recommended that EPA include both a de minimis exemption for materials in which CTC may appear at de minimis levels of less than 0.1% by weight, and an exemption for CTC present in a formulation, in an intermediate, or in an end product as an impurity or byproduct, including when present as an unintentional byproduct or impurity in an imported product (Refs. 26, 35). One commenter suggested that EPA

implement a de minimis weight fraction threshold of 0.5% (Ref. 39).

In the final rule, EPA has excluded from the rule's requirements CTC that is solely present unintentionally in trace quantities with another chemical substance or mixture. This exclusion is intended to cover circumstances in which another chemical substance or mixture unintentionally contains trace quantities of CTC that may be present as a manufacturing residue, unreacted feedstock, byproduct, or other contaminant. The Agency determined that this exclusion was appropriate because the conditions of use of CTC that were evaluated in the 2020 Risk Evaluation for Carbon Tetrachloride and determined to contribute to the unreasonable risk presented by CTC did not include scenarios in which trace amounts of CTC is unintentionally present in other chemical substances or mixtures. To the contrary, Section 1.4.2.3 of the Risk Evaluation stated that there were conditions of use that EPA concluded in the 2018 Problem Formulation of the Risk Evaluation for Carbon Tetrachloride would present only de minimis exposures or otherwise insignificant risks from trace amounts of CTC and did not warrant inclusion in the risk evaluation. This conclusion was related specifically to industrial/commercial/consumer uses of CTC in adhesives/sealants, paints/coatings, and cleaning/degreasing solvent products. EPA reserves the right to assess and address potential environmental and health risks of trace quantities of CTC under different authorities such as CAA Title I and VI. The 2020 Risk Evaluation for Carbon Tetrachloride explained that while CTC's use as a process agent in the manufacturing of other chlorinated compounds may result in trace levels of CTC as a manufacturing residue in the chlorinated substances used to manufacture downstream products, those trace amounts are expected to volatilize during the product manufacturing process, such that EPA expected insignificant or unmeasurable concentrations of CTC in the chlorinated substances in commercially available adhesive/sealant, paint/coating, and cleaning/degreasing products. The final rule's exclusion for CTC unintentionally present in trace quantities with another chemical substance or mixture is consistent with this earlier exclusion from the scope of the Risk Evaluation for Carbon Tetrachloride. Any product with CTC concentrations above trace quantities that falls within a condition of use regulated under this rule will be subject to the relevant rule provisions (*e.g.*,

WCPP, prescriptive controls, or prohibition), as appropriate based on the condition of use of CTC.

In addition, any potential occupational risk from the presence of trace quantities of CTC in PCE is expected to be eliminated by the recently promulgated final risk management rule for PCE under TSCA section 6(a) (to be codified at 40 CFR part 751, subpart G). The occupational and consumer protections from exposures to PCE under that final rule, which address the unreasonable risk of injury to health presented by PCE under its conditions of use, would also have the effect of reducing the risk from exposures to trace amounts of CTC that may be present in PCE. For example, the final rule requires a workplace chemical protection program with both an Existing Chemical Exposure Limit of 0.14 ppm of PCE as an 8-hr TWA and direct dermal contact control requirements for the industrial/commercial use of PCE as a processing aid in catalyst regeneration in petrochemical manufacturing. Any engineering controls or PPE used to reduce occupational exposures to PCE for the use as a processing aid in catalyst regeneration in petrochemical manufacturing are expected to reduce workplace exposures to CTC. The limitations on inhalation and dermal exposures to PCE to prevent unreasonable risk of injury to health from that chemical substance are also expected to limit any potential exposure to trace quantities of CTC that may be unintentionally present in the PCE, reducing the risk of injury to health from the CTC, so that that condition of use does not contribute to the unreasonable risk of CTC.

At this time, EPA is not establishing a specific weight fraction or other numerical threshold value for the trace quantities exclusion in the CTC final rule, consistent with existing exclusions of trace quantities of remaining substances from the definitions of “controlled substance” and “transform” under 40 CFR 82.3. Instead, the exclusion is based on the plain meaning of the term, “trace quantities.” If the CTC is intentionally retained in the chemical substance or mixture of which it is a part and provides a desired purpose, then it is not “present unintentionally in trace quantities” and would not be excluded from the rule’s requirements.

E. Other Changes

EPA has revised its proposed description of industrial and commercial use of CTC as a laboratory chemical to provide additional clarity as

suggested by a commenter (Ref. 33). The revised description for industrial and commercial use as a laboratory chemical appears in Unit IV.C.1. In addition, EPA has slightly modified the industrial and commercial use descriptions in 40 CFR 751.705(b)(1)(ii)(B), 751.707(a)(8), and 751.711(c) to clarify that the industrial and commercial use of CTC in the recovery of chlorine in tail gas from the production of chlorine falls under the WCPP rather than the prohibition on industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings). In the proposed rule, EPA had intended this use of CTC to be captured with the description of “industrial and commercial use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda,” but EPA agrees with two public commenters that it would be clearer to specifically list use of CTC in the recovery of chlorine in tail gas from the production of chlorine in the regulatory text (Refs. 29, 30).

EPA has revised its proposed description of disposal. Based on coordination across Federal programs, for the disposal COU, EPA has determined it is appropriate that owners and operators of cleanup sites where potentially exposed persons are involved in the disposal of CTC-containing wastewater for the purposes of cleanup projects of CTC-contaminated water and groundwater, including industrial pre-treatment and industrial treatment activities, must ensure that potentially exposed persons involved with the activity of removing the groundwater from the location where it was found and treating the removed groundwater on site comply with the WCPP. At cleanup sites, the WCPP, including the ECEL, would apply to any potentially exposed person involved in the disposal of CTC-containing groundwater, which most likely includes a worker who is involved with the activity of removing CTC-containing groundwater from the location where it was found and the on-site treatment of the groundwater, typically referred to as *ex situ* remediation, which is most consistent with the scope of the 2020 CTC Risk Evaluation. *Ex situ* remediation includes both active and passive remediation methods that span traditional (e.g., pump and treat) and less traditional (e.g., phytoremediation) approaches, but only if the remediation method would be considered industrial wastewater pretreatment, industrial

wastewater treatment or discharge to a publicly owned treatment work (POTW). EPA generally considers workers in and around those locations to be potentially exposed persons as that term is defined in 40 CFR 751.5. For example, EPA’s requirements would apply to protect workers conducting remediation through pump and treat systems or workers sampling groundwater in conjunction with groundwater extraction or treatment (e.g., remediation or cleanup) activities. EPA considers only those treatment activities that are performed at the cleanup site on CTC-contaminated wastewater that has been removed from the subsurface, surface water impoundments, or aquifers and that are recognized as industrial treatment, industrial pretreatment, or discharge to a POTW to be covered under the provisions described in Unit IV.B. The provisions of the WCPP for the disposal COU, including the ECEL, are not intended to cover potentially exposed persons who are sampling groundwater to monitor the presence of a plume, but specifically only those sampling at the site of extraction and treatment activities. EPA emphasizes that this standard is only for cleanup sites involved in the active or passive *ex situ* treatment (or disposal) of CTC contaminated groundwater and wastewater from cleanup sites and that no other remedial actions at cleanup sites will be covered or affected. Additionally, while EPA considers solid wastes as part of the waste streams included in the disposal COU, at groundwater remediation sites managed by the Federal government and under existing waste disposal requirements, the WCPP requirements under this rulemaking only apply to water contaminated with CTC, and any other type of CTC-impacted waste will be managed according to relevant existing requirements under RCRA, other statutes, and regulatory agreements.

Additionally, it is not necessary to establish previously proposed Subpart A definitions for “authorized person,” “owner or operator,” “potentially exposed person,” and “regulated area” in this final rule because EPA already established definitions for these terms at 40 CFR 751.5 in the TSCA section 6 final rule for methylene chloride (RIN 2070-AK70) (89 FR 39254, May 8, 2024 (FRL-8155-01-OCSPP)) so that these definitions may be commonly applied to this and other rules under TSCA section 6 that would be codified under 40 CFR part 751. Similarly, it is not necessary to establish previously proposed Subpart A definitions for “direct dermal

contact,” “exposure group,” and “ECEL” in this final rule because EPA already established definitions for these terms at 40 CFR 751.5 in the TSCA section 6 final rule for PCE (RIN 2070-AK84).

EPA proposed to require that the notification to companies to whom CTC is shipped under 40 CFR 751.111(c) identify the uses for which CTC is allowed to be distributed in commerce. To provide greater clarity to downstream users of CTC regarding the provisions of this rule, EPA is modifying the notification to identify the uses prohibited under this regulation.

EPA also made other minor edits to the preamble and regulatory text to provide more clarity to the requirements of the final rule.

IV. Provisions of the Final Rule

EPA intends that each provision of this rulemaking be severable. In the event of litigation staying, remanding, or invalidating EPA’s risk management approach for one or more conditions of use in this rule, EPA intends to preserve the risk management approaches in the rule for all other conditions of use to the fullest extent possible. The Agency evaluated the risk management options in TSCA section 6(a)(1) through (7) for each condition of use and generally EPA’s regulation of one condition of use to address its contribution to the unreasonable risk from CTC functions independently from EPA’s regulation of other conditions of use, which may have different characteristics leading to EPA’s risk management decisions. Further, the Agency crafted this rule so that different risk management approaches are reflected in different provisions or elements of the rule that are capable of operating independently. Accordingly, the Agency has organized the rule so that if any provision or element of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid.

There are many permutations of the above. For example, as discussed in Unit IV.D., this final rule prohibits both the industrial and commercial use of CTC in metal recovery, and the industrial and commercial use of CTC as a processing aid in the manufacture of petrochemical-derived products except in the manufacture of vinyl chloride (for which EPA is requiring a WCPP as described in Unit III.A.). To the extent that a court were to find that EPA lacked substantial evidence to support the prohibition of CTC as a processing aid in the manufacture of petrochemical-derived products or otherwise found

legal issues with EPA’s approach to that condition of use, it would have no bearing on other similarly situated conditions of use, such as the industrial and commercial use in metal recovery, unless the specific issue also applies to the particular facts associated with metal recovery. This is reflected in the structure of the rule, which describes the prohibited conditions of use separately under 40 CFR 751.705.

As another example, for the processing of CTC as a reactant in the production of HCFCs, HFCs, HFOs, and PCE and the industrial and commercial use of CTC as a laboratory chemical, EPA took different risk management approaches—application of the WCPP for the processing of CTC as a reactant in the production of HCFCs, HFCs, HFOs, and PCE and specific prescriptive controls for use as a laboratory chemical. To the extent that a court were to find a legal issue with EPA’s approach to the WCPP, impacting the processing of CTC as a reactant in the production of HCFCs, HFCs, HFOs, and PCE, it would have no bearing on EPA’s decision to require specific prescriptive controls for industrial and commercial use as a laboratory chemical, and vice versa. This is reflected in the structure of the rule, which organizes the WCPP and prescriptive controls into different sections of the regulation.

EPA also intends all TSCA section 6(a) risk management requirements in this rule to be severable from each regulatory exclusion from those requirements. For example, to the extent a court were to find a legal issue with excluding trace quantities of CTC from the rule’s requirements pursuant to 40 CFR 751.701(b), or with excluding manufacture of CTC as a byproduct from WCPP requirements pursuant to 40 CFR 751.707(a)(1), the underlying risk management requirements would not be impacted. Rather, the excluded activities would become subject to the underlying TSCA section 6(a) risk management requirements applicable to the condition of use. EPA further notes that the specific examples of severability described in this unit are not intended to be exhaustive, but rather illustrative of a wide variety of scenarios that reflect EPA’s overarching intent that each provision of this rulemaking be severable.

EPA acknowledges that after the issuance of this rule, a person or entity may become aware of important information which indicates a particular use, that would otherwise be prohibited, is ongoing, and could meet the criteria of a WCPP. EPA also notes that there are multiple avenues to ask EPA to revisit issues in this TSCA section 6(a)

rulemaking, both before and after the mandatory compliance dates are set consistent with TSCA section 6(d). EPA has the authority under TSCA section 6(g) to consider whether an exemption is appropriate and, consistent with TSCA section 6(g)(1), may propose such exemptions independently from this rulemaking. Additionally, any person could petition EPA to request that EPA issue or amend a rule under TSCA section 6.

A. Applicability

This final rule sets prohibitions and restrictions on the manufacture (including import), processing, distribution in commerce, commercial use, and disposal of CTC to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a), 15 U.S.C. 2605(a).

Additionally, pursuant to TSCA section 12(a)(2), this rule applies to CTC even if being manufactured, processed, or distributed in commerce solely for export from the United States because EPA has determined that CTC presents an unreasonable risk to health within the United States. Several commenters expressed concern that an unclear statement in the proposed rule preamble appeared to indicate that all manufacture, processing, and distribution for export would be prohibited under the proposed rule (Refs. 29, 30, 32). This was not EPA’s intent. Rather, EPA intended to indicate that because EPA determined that CTC presents an unreasonable risk of injury to health within the United States, manufacturing and processing of CTC for export would not be exempt from any otherwise-applicable TSCA section 6(a) regulatory requirements. Because distribution in commerce did not contribute to EPA’s unreasonable risk determination for CTC, and because this final rule permits manufacturing and processing, including recycling, for various uses to continue under the WCPP, EPA intends this final rule to permit manufacturing and processing in compliance with the WCPP for export, as well as distribution in commerce for export, without regard for the intended use in the destination country. In other words, manufacturing, processing, and distribution for the conditions of use listed in 40 CFR 751.705(a)(1)(i) and (ii) are prohibited where such conditions of use would occur inside the United States, but in instances where such conditions of use would occur solely outside of the United States after export, the upstream manufacturing, processing, and distribution for export would not be prohibited. EPA has clarified the regulatory text at 40 CFR

751.707(a) to make clear that any manufacture and processing for export must be in accordance with the WCPP. In addition, any persons who export or intend to export a chemical substance that is the subject of this final rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

EPA is revising the description of the Disposal COU to clarify the requirements of the WCPP at cleanup sites which would apply to any potentially exposed person involved in the disposal of CTC-containing groundwater to industrial treatment, industrial pre-treatment, or POTWs. A potentially exposed person most likely includes a worker who is involved with the activity of removing CTC-containing groundwater from the location where it was found and the on-site treatment of the groundwater, typically referred to as *ex situ* remediation, which is most consistent with the scope of the 2020 CTC Risk Evaluation. *Ex situ* remediation includes both active and passive remediation methods that span traditional (e.g., pump and treat) and less traditional (e.g., phytoremediation) approaches, but only if the remediation method would be considered industrial wastewater pretreatment, industrial wastewater treatment or discharge to a publicly owned treatment work (POTW).

As discussed in Unit III.D, the prohibitions and restrictions described in this unit do not apply to CTC that is solely present unintentionally in trace quantities with another chemical substance or mixture, whether as a manufacturing residue, unreacted feedstock, byproduct, or other contaminant. Additionally, the provisions of this final rule only apply to chemical substances as defined under TSCA section 3. Notably, TSCA section 3(2) excludes from the definition of chemical substance “any food, food additive, drug, cosmetic, or device (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device” and “any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 *et seq.*]) when manufactured, processed, or distributed in commerce for use as a pesticide.” Additional details regarding TSCA statutory authorities can be found in section 2 of the response to comments document (Ref. 11).

EPA uses the term “potentially exposed person” in Unit IV. And in the regulatory text to include workers, occupational non-users, employees, independent contractors, employers, and all other persons in the work area where CTC is present and who may be exposed to CTC under the conditions of use for which a WCPP or specific prescriptive controls would apply. (EPA notes that this definition is intended to apply to occupational workspaces as part of implementation of the WCPP and other restrictions, and recognizes that other individuals or communities may be exposed to CTC as members of fenceline communities or members of the general population.) For certain conditions of use, EPA requires a comprehensive WCPP or specific prescriptive controls to address the unreasonable risk from CTC to workers directly handling the chemical or in the area where the chemical is being used. Similarly, the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1) did not distinguish between employers, contractors, or other legal entities or businesses that manufacture, process, distribute in commerce, use, or dispose of CTC. For this reason, EPA uses the term “owner or operator” to describe the entity responsible for implementing the WCPP or specified prescriptive controls in any workplace where an applicable condition of use is identified in Unit IV. And subject to the WCPP or prescriptive controls is occurring. The term includes any person who owns, leases, operates, controls, or supervises such a workplace. While owners or operators remain responsible for ensuring compliance with the WCPP or prescriptive controls requirements in the workplace, they may contract with others to provide training or implement a respiratory protection program, for example. EPA is also clarifying its intent that for the provisions in this rule, any requirement for an owner or operator, or an owner and operator, is a requirement for any individual that is either an owner or an operator.

EPA emphasizes that this approach is essential for addressing the unreasonable risk presented by CTC, including to individuals who may not be covered by OSHA requirements, such as, volunteers, self-employed persons, and State, and local government workers who are not covered by a state plan. EPA uses the term “owner or operator” in TSCA programs because the term is used in other EPA programs to describe persons with responsibilities for implementing statutory and regulatory requirements at particular locations. See, for example, CAA section

113, 42 U.S.C. 7412, which defines “owner or operator” as a person who owns, leases, operates, controls, or supervises a stationary source. There is a similar definition in section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316. EPA understands that the use of this term may result in multiple persons’ bearing responsibility for complying with provisions of this final rule, including the WCPP. However, this is also the case for workplaces regulated by OSHA, including those regulated under OSHA’s general industry standards at 29 CFR part 1910. OSHA’s 1999 Multi-Employer Citation Policy explains which employers should be cited for a hazard that violates an OSHA standard (Ref. 40). The Policy describes four different roles that employers may fill at a workplace and describes who should be cited for a violation based on factors such as whether the employer created the hazard, had the ability to prevent or correct the hazard, and knew or should have known about the hazard. More than one employer may be cited for the same hazard. This final rule will have similar results, in that more than one owner or operator may be responsible for compliance.

The OSHA multi-employer citation policy is an example of a guidance governing situations where more than one regulated entity is present. EPA has received several requests for clarification of the applicability of the term “owner or operator” to sites where more than one entity owns, leases, or controls a workplace where a CTC condition of use is ongoing and where implementation of the WCPP or prescriptive controls is required. EPA understands that there are a wide variety of situations where these questions could arise, and plans to issue guidance consistent with TSCA authorities that explains how EPA will approach the issue of responsibility for implementation of, and compliance with, the WCPP requirements in practice.

B. Workplace Chemical Protection Program (WCPP)

1. Applicability

EPA is finalizing the WCPP for all of the conditions of use for which it was proposed, as well as for two additional uses related to vinyl chloride manufacturing within two conditions of use for which prohibition was proposed. EPA is also revising the description of industrial and commercial use of CTC related to chlorine production to clarify that both elimination of nitrogen trichloride in the production of chlorine and caustic soda and recovery of

chlorine in tail gas from the production of chlorine are subject to the WCPP. Additionally, EPA is revising the description of the Disposal COU to clarify the requirements of the WCPP at cleanup sites. Specifically, EPA has determined that at groundwater cleanup sites, the WCPP would apply to any potentially exposed person involved in the disposal of CTC-containing groundwater to industrial treatment, industrial pre-treatment, or POTWs. A potentially exposed person most likely includes a worker who is involved with the activity of removing CTC-containing groundwater from the location where it was found and the on-site treatment of the groundwater, typically referred to as *ex situ* remediation, which is most consistent with the scope of the 2020 CTC Risk Evaluation. *Ex situ* remediation includes both active and passive remediation methods that span traditional (e.g., pump and treat) and less traditional (e.g., phytoremediation) approaches, but only if the remediation method would be considered industrial wastewater pretreatment, industrial wastewater treatment or discharge to a publicly owned treatment work (POTW). EPA's descriptions of changes from the proposed rule in Unit III. The Agency explained why the WCPP addresses the unreasonable risk for certain conditions of use in Unit V. of the proposed rule (88 FR 49180, July 28, 2023) (FRL 8206–01–OCSPP).

EPA is finalizing the WCPP for the following conditions of use where manufacture and processing are not otherwise prohibited: domestic manufacturing (except where CTC is manufactured solely as a byproduct); import; processing as a reactant in the production of HCFCs, HFCs, HFOs, and PCE; processing; incorporation into formulation, mixture or reaction product in agricultural products manufacturing, vinyl chloride manufacturing, and other basic organic and inorganic chemical manufacturing; processing by repackaging for use as a laboratory chemical; recycling; industrial and commercial use as a processing aid in the manufacture of agricultural products and vinyl chloride; industrial and commercial use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine; and disposal. This unit provides a description of the conditions of use subject to the WCPP to assist with compliance.

a. Manufacturing

i. Domestic Manufacture

This condition of use refers to making or producing a chemical substance within the United States (including manufacturing for export), including the extraction of a component chemical substance from a previously existing chemical substance or a complex combination of substances. For purposes of this rule, WCPP requirements applicable to the manufacture of CTC do not apply where CTC is manufactured solely as a byproduct, because manufacture of CTC as a byproduct was not evaluated in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1). Under TSCA, EPA uses the term "byproduct" to refer to a chemical substance produced without a separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance(s) or mixture(s) (see, e.g., 40 CFR 710.3(d), 720.3). A byproduct is distinguishable from a coproduct, which is a chemical substance produced for a commercial purpose during the manufacture, processing, use, or disposal of another chemical substance or mixture. CTC could be manufactured as a byproduct during the manufacturing of other chlorinated compounds. EPA anticipates that any risk presented by the presence of CTC as a byproduct will be considered in the scope of the risk evaluation of the parent chemical in future risk evaluations, such as the consideration of CTC as a byproduct in the 1,2-dichloroethane risk evaluation, as explained in Section 1.4.2.3 of the 2020 Risk Evaluation for Carbon Tetrachloride (Refs. 1, 41).

ii. Import

This condition of use refers to the act of causing a chemical substance or mixture to arrive within the customs territory of the United States. This condition of use includes loading/unloading and repackaging associated with import.

b. Processing

i. Processing as a Reactant in the Production of Hydrochlorofluorocarbons, Hydrofluorocarbons, Hydrofluoroolefins, and Perchloroethylene

This condition of use refers to processing CTC in chemical reactions for the manufacturing of another chemical substance or product. Through processing as a reactant or intermediate, CTC serves as a feedstock in the production of another chemical product

via a chemical reaction in which CTC is consumed. Currently, CTC is used as a reactant to manufacture HCFCs, HFCs, HFOs, and PCE, which are used in the making of a variety of products including refrigerants, aerosol propellants, and foam-blowing agents. The specifics of the reaction process (e.g., use and types of catalysts, reaction temperature) vary depending on the product being produced; however, a typical reaction process involves unloading CTC from containers and feeding into the reaction vessel(s), where CTC either completely or partially reacts with other raw materials to form the final product. Following the reaction, the product may be purified to remove unreacted CTC or other materials if needed. This condition of use includes reuse of CTC, including CTC that is not transformed as feedstock in other manufacturing processes, as a reactant.

ii. Processing: Incorporation Into Formulation, Mixtures, or Reaction Products for Agricultural Products Manufacturing; Vinyl Chloride Manufacturing; Other Basic Organic and Inorganic Chemical Manufacturing

This condition of use refers to the process of mixing or blending several raw materials to obtain a single product or preparation or formulation. CTC has historically been incorporated into formulation or mixtures to manufacture hydrochloric acid (HCl), vinyl chloride, ethylene dichloride (EDC), chloroform, hafnium tetrachloride, thiophosgene, and methylene chloride. CTC may be incorporated into various products and formulations at varying concentrations for further distribution. For example, CTC may be unloaded from transport containers either directly into mixing equipment or into an intermediate storage vessel either manually or through automation via a pumping system. Mixing of components can occur in either a batch or continuous system. The mixture that contains CTC may be used as a reactant to manufacture a chlorinated compound that is subsequently formulated into a product or a processing aid used to aid in the manufacture of formulated products. For the purposes of this rulemaking, EPA is allowing under the WCPP the continued incorporation of CTC into formulation, mixtures, or reaction products for agricultural products manufacturing, vinyl chloride manufacturing, the elimination of nitrogen trichloride in the production of chlorine and caustic soda, and the recovery of chlorine in tail gas from the production of chlorine.

iii. Processing: Repackaging for Use as a Laboratory Chemical

This condition of use refers to the physical transfer of a chemical substance or mixture, as is, from one container to another container or containers in preparation for distribution of the chemical substance or mixture in commerce. Depending on the product, formulation products may be filtered prior to packaging. Final packaging occurs either through manual dispensing from transfer lines or through utilization of an automatic system. Typically, repackaging sites receive the chemical in bulk containers and transfer the chemical from the bulk container into another smaller container in preparation for distribution in commerce.

iv. Processing: Recycling

This condition of use refers to the process of treating generated spent chemical (which would otherwise be disposed of as waste) that is collected on-site or transported to third-party sites for reclamation/recycling. Spent chemicals can be restored to a condition that permits reuse via reclamation/recycling. The recovery process may involve an initial vapor recovery or mechanical separation step followed by distillation, purification, and final packaging.

c. Industrial and Commercial Use

i. Industrial and Commercial Use as an Industrial Processing Aid in the Manufacture of Agricultural Products and Vinyl Chloride

A processing aid is a “chemical that is added to a reaction mixture to aid in the manufacture or synthesis of another chemical substance but is not intended to remain in or become part of the product or product mixture.” Additionally, processing agents are intended to improve the processing characteristics or the operation of process equipment, but not intended to affect the function of a substance or article created. CTC is used as a processing aid/agent to aid in the manufacture of formulated products, including agricultural chemicals and vinyl chloride. CTC has historically been used as a processing agent in the manufacture of chlorosulphonated polyolefin; styrene butadiene rubber; endosulfan (insecticide); 1–1 Bis (4-chlorophenyl) 2,2,2-trichloroethanol (dicofol insecticide); and tralomethrin (insecticide) (Ref. 1). For the purposes of this rulemaking, EPA is allowing under the WCPP the continued use of CTC as an industrial processing aid in the

manufacturing of agricultural products and vinyl chloride.

ii. Industrial and Commercial Use in the Elimination of Nitrogen Trichloride in the Production of Chlorine and Caustic Soda and the Recovery of Chlorine in Tail Gas From the Production of Chlorine

This condition of use refers to a specific use of CTC as a processing aid/agent in basic inorganic chemical manufacturing. For purposes of this rulemaking, EPA is allowing under the WCPP the continued use of CTC in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine.

d. Disposal

This condition of use refers to the process of disposing waste streams of CTC that are collected either onsite (*e.g.* pumped out of the ground for treatment), or transported to a third-party site for treatment or their final disposition, such as waste incineration or landfilling. For this rule, the WCPP for the disposal of CTC-containing water and groundwater for purposes of cleanup projects of CTC-contaminated water and groundwater, including industrial pre-treatment and industrial treatment activities, applies to removing the groundwater from the location where it was located and treating the removed groundwater on site. The requirements of the WCPP apply to any potentially exposed person involved in the disposal of CTC-containing groundwater to industrial treatment, industrial pre-treatment, or POTWs. A potentially exposed person most likely includes a worker who is involved with the activity of removing CTC-containing groundwater from the location where it was found and the on-site treatment of the groundwater, typically referred to as *ex situ* remediation, which is most consistent with the scope of the 2020 CTC Risk Evaluation. *Ex situ* remediation includes both active and passive remediation methods that span traditional (*e.g.*, pump and treat) and less traditional (*e.g.*, phytoremediation) approaches, but only if the remediation method would be considered industrial wastewater pretreatment, industrial wastewater treatment or discharge to a publicly owned treatment work (POTW). A remediation method would need to be considered one of these three types of disposal to fall within the condition of use under TSCA for remediation sites managed by the Federal government and if not, would not be subject to the requirements of the rule. Further, while EPA considers solid

wastes as part of the waste streams included in the disposal COU, at groundwater remediation sites managed by the Federal government and under existing waste disposal requirements, the WCPP requirements under this rulemaking only apply to water contaminated with CTC, and any other type of CTC-impacted waste will be handled according to relevant existing requirements under RCRA and other statutes. The provisions of the WCPP for the disposal COU, including the ECEL, are not intended to cover potentially exposed persons who are sampling groundwater to monitor the presence of a plume, but specifically only those sampling at the site of extraction and treatment activities.

2. Overview

The WCPP for CTC encompasses an inhalation exposure limit and action level, DDCC, and the associated implementation requirements described in this unit, to ensure that the chemical substance no longer presents unreasonable risk. Under a WCPP, owners or operators have the ability to select controls, within the parameters outlined in this unit, regarding how they prevent exceedances of the identified EPA exposure limit thresholds or prevent direct dermal contact. In the case of CTC, meeting the EPA exposure limit threshold and implementing the DDCC requirements for certain occupational conditions of use would address the unreasonable risk to potentially exposed persons from inhalation and dermal exposure.

EPA is finalizing these requirements to apply beginning on June 11, 2026 for non-Federal owners or operators, or by June 21, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or within 30 days of introduction of CTC into the workplace, whichever is later, at which point entities would be required to complete initial monitoring (as described in Unit IV.B.3.b.). Additionally, EPA requires that each owner or operator ensure that no person is exposed to an airborne concentration of CTC that exceeds the ECEL as an 8-hour TWA, including by providing respirators to potentially exposed persons in the regulated area, no later than September 9, 2026 for non-Federal owners or operators, or no later than September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or beginning four months after introduction of CTC into the workplace, whichever is later. EPA also requires each owner or operator to ensure all persons are separated, distanced,

physically removed, or isolated from direct dermal contact with CTC, including by providing dermal PPE, by June 16, 2025 for non-Federal owners or operators, or no later than September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government. EPA also requires implementation of any needed exposure controls based on initial monitoring and development of an exposure control plan, which requires consideration and documented application of the hierarchy of controls, no later than December 3, 2027 (as described in Unit IV.B.5.).

EPA's implementation of the requirement to meet an ECEL as part of a WCPP aligns with, to the extent possible, certain elements of the existing OSHA standards for regulating toxic and hazardous substances under 29 CFR part 1910, subpart Z. However, EPA is finalizing as proposed a new, lower occupational exposure limit, derived from the TSCA 2020 Risk Evaluation for Carbon Tetrachloride (Refs. 1, 15). For CTC, this final rule will eliminate the unreasonable risk from CTC contributed to by the conditions of use subject to the WCPP, enable continued industry use where appropriate, and provide the familiarity of a pre-existing framework for the regulated community.

EPA's requirements include specific exposure limits and ancillary requirements necessary for successful implementation of an ECEL as part of a WCPP. Taken together, these WCPP requirements apply to the extent necessary so that the unreasonable risk from CTC under the conditions of use listed earlier in this unit would no longer be presented.

Unit IV. includes a summary of the WCPP, including a description of the finalized exposure limits including an ECEL and ECEL action level; implementation requirements including monitoring requirements; a description of potential exposure controls in accordance with the hierarchy of controls, including engineering controls, administrative controls, and PPE as it relates to respirator selection; and additional finalized requirements for recordkeeping and workplace participation. Additionally, Unit IV.B.4. describes DDCC requirements for CTC, including potential exposure controls, which consider the hierarchy of controls; PPE as it relates to dermal protection; and additional requirements finalized for recordkeeping. Unit IV. also describes changes to the proposed compliance timeframes, changes by EPA to certain provisions of the WCPP based on public comments, and addition of new provisions in the WCPP based on

public comments used to inform this final rule.

3. Existing Chemical Exposure Limit (ECEL)

To reduce exposures in the workplace and address the unreasonable risk of injury to health resulting from inhalation exposures to CTC identified under the occupational conditions of use in the TSCA 2020 Risk Evaluation for Carbon Tetrachloride, EPA is requiring an ECEL and ancillary requirements for all of the conditions of use identified in Unit IV.B.1.

a. ECEL and ECEL Action Level (AL)

EPA is finalizing as proposed an ECEL under TSCA section 6(a) of 0.03 ppm (0.2 mg/m³) for inhalation exposures to CTC as an 8-hour TWA based on the threshold POD for liver cancer (assuming a margin of exposure of 300) and the IUR for adrenal cancer. The ECEL memo includes linear risk calculations for adrenal gland tumors in the equation for "Cancer risk for other tumor types (e.g., adrenal glands) at the ECEL," showing that the ECEL is protective of all tumor types, including adrenal gland and brain tumors (Ref. 15). EPA has determined that ensuring exposures remain at or below the 8-hour TWA ECEL of 0.03 ppm will eliminate the unreasonable risk of injury to health for CTC resulting from acute and chronic inhalation exposures in an occupational setting (Ref. 15). If ambient exposures are kept at or below the 8-hour TWA ECEL of 0.03 ppm, a potentially exposed person will be protected against the effects described in this unit, including cancer, chronic non-cancer effects, and effects resulting from acute inhalation exposures (Ref. 15). In addition to the ECEL memo, to respond to public comments, EPA also explained that the ECEL is protective of short-term acute inhalation exposures (Refs. 11 and 15). EPA is finalizing requirements that each owner or operator ensure that the airborne concentration of CTC does not exceed the ECEL for all potentially exposed persons within 1,005 days after the date of publication of the final rule (*i.e.*, no later than September 20, 2027) for Federal agencies and Federal contractors acting for or on behalf of the Federal government, 630 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 9, 2026) for non-Federal owners and operators, or beginning four months after introduction of CTC into the workplace if CTC use commences at least 540 days after the date of publication (*i.e.*, the use commences on or after June 11, 2026).

EPA is finalizing an ECEL action level at 0.02 ppm as an 8-hour TWA for CTC. Below the ECEL action level, certain compliance activities, such as periodic monitoring, would be required less frequently, as described further in this unit. In this way, EPA's WCPP for CTC is consistent with the familiar framework that is in place in OSHA standards for regulating toxic and hazardous substances under 29 CFR 1910 Subpart Z that establish an action level, although the values differ due to differing statutory authority. As explained by OSHA, the action level provides employers and employees with greater assurance that their employees will not be exposed to concentrations above the PELs (Ref. 42).

In summary, EPA is finalizing as proposed with slight modification that owners or operators must ensure the airborne concentration of CTC within the personal breathing zone of potentially exposed persons remains at or below 0.03 ppm as an 8-hour TWA ECEL, with an action level finalized as 0.02 ppm as an 8-hour TWA. For purposes of this rulemaking, the personal breathing zone is consistent with how OSHA defines it as a hemispheric area forward of the shoulders within a six-to-nine-inch radius of a worker's nose and mouth and requires that exposure monitoring air samples be collected from within this space (Ref. 43). EPA is finalizing the ECEL for most occupational conditions of use to ensure that no person is exposed to inhalation of CTC in excess of these concentrations resulting from those conditions of use. EPA recognizes that the regulated community has the ability to detect the values for the ECEL because of viable detection limits and analytical methods of CTC for monitoring devices that are available in commerce, currently in use, which are as low as 4 micrograms per sample (Refs. 15, 44). For the purposes of this TSCA section 6(a) rulemaking, EPA will consider the use of methods for exposure monitoring (*i.e.*, NIOSH Method 1003) that produce results that are accurate, to a confidence level of 95 percent and within 25 percent (plus or minus) of airborne concentrations of CTC above 0.03 ppm ECEL, to be in compliance with this rule. EPA recognizes that current analytical methods may not measure CTC to below the action level of 0.02 ppm, particularly for short-term tasks; therefore, owners and operators will be required to monitor more frequently, as described further in this unit, until monitoring methods that measure to or below the action level become available.

b. Monitoring Requirements

i. Exposure Sampling

Initial monitoring for CTC is critical for establishing a baseline of exposure for potentially exposed persons; similarly, periodic exposure monitoring assures continued compliance over time so that potentially exposed persons are not exposed to levels that would result in an unreasonable risk of injury to health. Exposure monitoring could be suspended if certain conditions described in Unit IV. are met. Also, in some cases, a change in workplace conditions with the potential to impact exposure levels would warrant additional monitoring, which is also described.

EPA is finalizing with modifications from proposal its requirement that owners or operators determine each potentially exposed person's exposure by taking a personal breathing zone air sample of each potentially exposed person's exposure or by taking personal breathing zone air samples that are representative of each potentially exposed person with a similar exposure profile to chemical substance or mixture based on substantial similarity of tasks performed, the manner in which the tasks are performed, and the materials and processes with which they work (hereinafter identified as an "exposure group"). Personal breathing zone air samples are representative of the 8-hour TWA of all potentially exposed persons in an exposure group if the samples are of the full shift-exposure of at least one person who represents the highest potential CTC exposures in that exposure group. In addition, the initial monitoring will be required when and where the operating conditions are best representative of each potentially exposed person's full-shift exposures. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts. Additionally, air sampling is required to measure ambient concentrations for CTC without taking respiratory protections into account as sampling is being performed. For purposes of exposure monitoring requirements, owners and operators are only required to monitor potentially exposed persons that are expected to be present in the workplace.

EPA is also finalizing requirements that the owner or operator ensure that their exposure monitoring methods are accurate to a confidence level of 95% and are within (plus or minus) 25% of

airborne concentrations of CTC above the 8-hour TWA ECEL. To ensure compliance for monitoring activities, EPA is finalizing recordkeeping requirements and will require that owners or operators document their choice of monitoring method outlined in this unit. As described in Unit III.C.1., EPA is finalizing the requirement that owners or operators meet certain documentation requirements for each monitoring event of CTC, including compliance with GLP Standards in accordance with 40 CFR part 792 or use of a laboratory accredited by the AIHA (*e.g.*, AIHA LAP, LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized program. Additionally, as described in Unit III.C.1., EPA is finalizing the requirement that owners or operators must re-monitor within 15 working days after receipt of any exposure monitoring when results indicate non-detect, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary.

EPA is also finalizing the requirement that each owner or operator maintain exposure monitoring records that include the following information for each monitoring event:

- Dates, duration, and results of each sample taken.
- The quantity, location(s) and manner of use of CTC at the time of each monitoring event.
- All measurements that may be necessary to determine the conditions (*e.g.*, work site temperatures, humidity, ventilation rates, monitoring equipment type and calibration dates) that may affect the monitoring results.
- Name, workplace address, work shift, job classification, work area, and type of respiratory protection (if any) of each monitored person.
- Identification of all potentially exposed persons that a monitored person is intended to represent if using a representative sample.
- Use of appropriate sampling and analytical methods.
- Compliance with GLP Standards in accordance with 40 CFR part 792 or use of a laboratory accredited by AIHA (*e.g.*, AIHA LAP, LLC Policy Module 2A/B/E of Revision 17.3), or another analogous industry-recognized program.
- Information regarding air monitoring equipment, including: type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.
- Notification of exposure monitoring results to each person whose exposures

are monitored or who is part of a monitored exposure group.

ii. Initial Exposure Monitoring

Under the final regulation, each non-Federal owner or operator of a facility that is engaged in one or more of the conditions of use listed in Unit IV.B.1. will be required to perform initial exposure monitoring within 540 days after publication of the final rule in the **Federal Register** (*i.e.*, no later than June 11, 2026) or within 30 days of introduction of CTC into the workplace, whichever is later, to determine the extent of exposure of potentially exposed persons to CTC. As discussed in Unit III.B., EPA is providing additional time for Federal agencies and Federal contractors acting for or on behalf of the Federal government to comply with the provisions of the WCPP, so they will be required to conduct initial monitoring within 915 days after publication (*i.e.*, no later than June 21, 2027). Initial monitoring will notify owners and operators of the magnitude of possible exposures to potentially exposed persons with respect to their work conditions and environments. Based on the magnitude of possible exposures in the initial exposure monitoring, the owner or operator may need to increase or decrease the frequency of future periodic monitoring or adopt new exposure controls (such as engineering controls, administrative controls, and/or a respiratory protection program), as indicated in table 1. In addition, the initial monitoring will be required when and where the operating conditions are best representative of each potentially exposed person's work-shift exposures. If the owner or operator chooses to use a sample that is representative of potentially exposed persons' full shift exposures (rather than monitor every individual), such sampling should be representative (*i.e.*, taken from the breathing zone of potentially exposed persons and reflect duration-appropriate exposure) of the most highly exposed persons in the workplace. Additionally, EPA expects that owners and operators will conduct initial exposure monitoring representative of all tasks that a potentially exposed person will be expected to do. EPA understands that certain tasks may occur less frequently or may reflect accidental exposure (for example, due to malfunction).

EPA also recognizes that some entities may already have objective exposure monitoring data. If the owner or operator has monitoring data conducted within five years prior to 60 days following publication of the final rule in the **Federal Register** and the monitoring

satisfies all other requirements in Unit IV., including the requirement that the data represents the highest CTC exposures likely to occur under reasonably foreseeable conditions of use, the owner or operator may rely on such earlier monitoring results for the initial baseline monitoring sample. Prior monitoring data cannot be used where there has been a change in work conditions or practices that is expected to result in new or additional exposures.

As described in more detail later in Unit IV., the owner or operator must conduct periodic monitoring at least once every five years since its last monitoring. This periodic monitoring must be representative of all the potentially exposed persons in the workplace and the tasks that they are expected to do.

iii. Periodic Exposure Monitoring

EPA is finalizing the following periodic monitoring for owners or operators. These finalized requirements are also outlined in Table 1.

- If samples taken during the initial exposure monitoring reveal a concentration below the ECEL action level (<0.02 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring at least once every five years.

- If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.03 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring within three months of the most recent exposure monitoring.

- If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level (≥ 0.02 ppm 8-hour TWA) but at or below the ECEL (≤ 0.03 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring within six months of the most recent exposure monitoring.

- If the most recent (non-initial) exposure monitoring indicates that airborne exposure is below the ECEL action level, the owners or operators

must repeat such monitoring within six months of the most recent monitoring until two consecutive monitoring measurements, taken at least seven days apart, are below the ECEL action level (<0.02 ppm 8-hour TWA), at which time the owner or operator must repeat the periodic exposure monitoring at least once every five years.

- In instances where an owner or operator does not manufacture, process, use, or dispose of CTC for a condition of use for which the WCPP is required over the entirety of time since the last required periodic monitoring event, EPA is requiring that the owner or operator would be permitted to forgo the next periodic monitoring event. However, documentation of cessation of use of CTC would be required and periodic monitoring would be required to resume when the owner or operator restart any of the conditions of use listed in Unit IV.B.1.

TABLE 1—PERIODIC MONITORING REQUIREMENTS

Air concentration condition	Periodic monitoring requirement
If initial exposure monitoring is below the ECEL action level (<0.02 ppm 8-hour TWA).	Periodic exposure monitoring is required at least once every five years.
If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.03 ppm 8-hour TWA).	Periodic exposure monitoring is required within three months of the most recent exposure monitoring.
If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥ 0.02 ppm 8-hour TWA, ≤ 0.03 ppm 8-hour TWA).	Periodic exposure monitoring is required within six months of the most recent exposure monitoring.
If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart within a 6-month period, indicate exposure is below the ECEL action level (<0.02 ppm 8-hour TWA).	Periodic exposure monitoring is required within five years of the most recent exposure monitoring.
If the owner or operator engages in a condition of use for which WCPP ECEL would be required but does not manufacture, process, use, or dispose of CTC in that condition of use over the entirety of time since the last required monitoring event.	The owner or operator may forgo the next periodic monitoring event. However, documentation of cessation of use of CTC is required and periodic monitoring would be required when the owner or operator resumes the condition of use.

Note: Additional scenarios in which monitoring may be required are discussed in Unit IV.B.3.b.iv.

iv. Additional Exposure Monitoring

EPA is finalizing that each owner or operator conduct additional exposure monitoring within a reasonable timeframe after there has been a change in the production, process, control equipment, personnel or work practices may reasonably be expected to result in new or additional exposures at or above the ECEL, or when the owner or operator has any reason to believe that new or additional exposures at or above the ECEL action level have occurred, for example if an owner or operator receives information from potentially exposed person(s) suggesting that such new or additional exposures may have occurred. In the event of start-up or shutdown, or ruptures, malfunctions or other breakdowns or unexpected releases that may lead to exposure to

potentially exposed persons, EPA is finalizing that each owner or operator must conduct exposure monitoring of potentially exposed persons (using personal breathing zone sampling) within a reasonable timeframe after the conclusion of the start-up or shutdown and/or the cleanup, repair or remedial action of the malfunction or other breakdown or unexpected release. EPA is also requiring that the owner or operator document that additional monitoring was completed within a reasonable timeframe. At this time, EPA is not finalizing a specific compliance timeframe for completion of additional monitoring when there has been a change in the production, process, control equipment, personnel or work practices, or in the event of start-up or shutdown, or ruptures, malfunctions or

other breakdowns or unexpected releases that may lead to exposure to potentially exposed persons; however, other TSCA section 6(a) rules are finalizing a compliance timeframe of 30 days for additional monitoring in these cases, and such timeframe would be an indication of what EPA considers likely to be reasonable in most cases when these changes are made at facilities that use CTC or in the event of these potential releases of CTC. An additional exposure monitoring event may result in an increased frequency of periodic monitoring. For example, if the initial monitoring results from a workplace are above the ECEL action level, but below the ECEL, periodic monitoring is required every six months. If additional monitoring is performed because increased exposures are suspected, and

the results are above the ECEL, subsequent periodic monitoring would have to be performed every three months. The required additional exposure monitoring should not delay implementation of any necessary cleanup or other remedial action to reduce the exposures to persons in the workplace.

c. Regulated Area

EPA is finalizing its requirement that the owner or operator demarcate any area where airborne concentrations of CTC exceed, or are reasonably expected to exceed the ECEL. To provide more clarity regarding how regulated areas must be demarcated, EPA has incorporated the language analogous to OSHA's regulated area requirements under the standards for toxic and hazardous substances (29 CFR part 1910, subpart Z) into this final rule. Owners and operators must demarcate regulated areas from the rest of the workplace in any manner that adequately establishes and alerts potentially exposed persons to the boundaries of the area and minimizes the number of authorized persons exposed to CTC within the regulated area. This can be accomplished using administrative controls (e.g., highly visible signifiers) in multiple languages as appropriate (e.g., when potentially exposed persons who primarily speak a language other than English are present, owners and operators should post additional highly visible signifiers in the language of the largest group of workers who cannot readily comprehend or read English), placed in conspicuous areas. The owner or operator is required to restrict access to the regulated area from any potentially exposed person that lacks proper training or is otherwise unauthorized to enter.

d. Notification of Monitoring Results

EPA is finalizing the requirement that the owner or operator must, within 15 working days after the receipt of the results of any exposure monitoring, notify each potentially exposed person whose exposure is represented by that monitoring and their designated representatives in writing, either individually to each potentially exposed person or by posting the information in an appropriate and accessible location, such as public spaces or common areas, for potentially exposed persons outside of the regulated area. The notice would be required to identify the exposure monitoring results, the ECEL and ECEL action level and what they mean in plain language, statement of whether the monitored airborne concentration of

CTC exceeds the ECEL and ECEL action level, and any corresponding respiratory protection required. If the ECEL is exceeded, the notice must also include a description of the actions taken by the owner or operator to reduce inhalation exposures to or below the ECEL. The notice must also include the quantity, location, manner of CTC use, and identified releases of CTC that could result in exposure to CTC at the time of monitoring. The notice must be posted in multiple languages if necessary (e.g., notice must be in a language that the potentially exposed person understands, including a non-English language version representing the language of the largest group of workers who cannot readily comprehend or read English).

4. Direct Dermal Contact Control (DDCC) Requirements

To reduce exposures in the workplace and address the unreasonable risk of injury to health resulting from dermal exposures to CTC identified under the occupational conditions of use in the TSCA 2020 Risk Evaluation for CTC, EPA is finalizing DDCC requirements for all of the conditions of use identified in Unit IV.B.1. EPA is finalizing its requirements that owners or operators must separate, distance, physically remove, or isolate all person(s) from direct handling of CTC or from skin contact with surfaces that may be contaminated with CTC (i.e., equipment or materials on which CTC may be present) under routine conditions in the workplace (hereafter referred to as direct dermal contact) within 180 days after the date of publication of the final rule in the **Federal Register** (i.e., June 16, 2025) for non-Federal owners or operators, or within 1,005 days after the date of publication of the final rule in the **Federal Register** (i.e., September 20, 2027) for Federal agencies and Federal contractors acting for or on behalf of the Federal government. The 2020 Risk Evaluation for Carbon Tetrachloride identified that unreasonable risk to workers is also driven by the dermal exposure, specifically from direct skin contact with CTC; risk exceeding the benchmark was identified even when considering use of chemically resistant gloves in most commercial and industrial conditions of use. EPA has determined that preventing direct dermal contact will eliminate the unreasonable risk of injury to health resulting from dermal exposures for certain occupational conditions of use of CTC. See the proposed rule for EPA's description of how the requirements related to DDCC would address the unreasonable risk resulting from dermal exposures and the rationale for this

regulatory approach in Units III.B.4. and V.A. of the proposed rule. and V.A. of the proposed rule.

5. Exposure Control Plan

EPA is finalizing its requirement that entities implementing the WCPP adopt feasible exposure controls, including one or a combination of elimination, substitution, engineering controls, and administrative controls, prior to requiring the use of PPE (i.e., respirators or gloves) as a means of controlling exposures below EPA's ECEL and/or prevent directing dermal contact with CTC for all potentially exposed persons, in accordance with the hierarchy of controls (Ref. 6). If an owner or operator chooses to replace CTC with a substitute, EPA recommends careful review of the available hazard and exposure information on the potential substitutes to avoid a substitute chemical that might later be found to present an unreasonable risk of injury to health or the environment under its conditions of use or be subject to regulation (sometimes referred to as a "regrettable substitution"). EPA expects that, for conditions of use for which EPA is finalizing a WCPP, compliance at most workplaces would be part of an established industrial hygiene program that aligns with the hierarchy of controls.

Examples of engineering controls that may prevent or reduce the potential for direct dermal contact include automation, physical barriers between contaminated and clean work areas, enclosed transfer liquid lines (with purging mechanisms in place (e.g., nitrogen, aqueous) for operations such as product changes or cleaning), and design of tools (e.g., a closed-loop container system providing contact-free connection for unloading fresh and collecting spent solvents, pneumatic tools, tongs, funnels, glove bags, etc.). Examples of administrative controls that may prevent or reduce the potential for direct dermal contact include adjusting work practices (i.e., implementing policies and procedures) such as providing safe working distances from areas where direct handling of CTC may occur.

EPA is finalizing the requirement that regulated entities use the hierarchy of controls, instituting one or a combination of controls to the extent feasible, and supplement such protections using PPE, where necessary, including respirators for potentially exposed persons at risk of inhalation exposure above the ECEL and dermal PPE for persons potentially exposed through direct dermal contact to CTC. If efforts of elimination, substitution,

engineering controls, and administrative controls are not sufficient to reduce exposures to or below the ECEL or prevent direct dermal contact for all potentially exposed persons in the workplace, EPA requires that the owner or operator use feasible controls to reduce CTC concentrations in the workplace to the lowest levels achievable and supplement these controls with respiratory protection and dermal PPE as needed to achieve the ECEL or prevent direct dermal contact. In such cases, EPA requires that the owner or operator provide potentially exposed persons reasonably likely to be exposed to CTC by inhalation to concentrations above the ECEL with respirators affording sufficient protection against inhalation risk and appropriate training on the proper use of such respirators, to ensure that their exposures do not exceed the ECEL as described in Unit IV. EPA also requires that the owner or operator provides potentially exposed persons reasonably likely to be exposed to CTC by direct dermal contact with dermal protection affording sufficient protection against dermal risk and appropriate training on the proper use of dermal protection, as described in this unit. As part of the training requirement, the owner or operator is required to provide information and comprehensive training in an understandable manner (*i.e.*, plain language), considering factors such as the skills required to perform the work activity and the existing skill level of the staff performing the work, and in multiple languages as appropriate (*e.g.*, based on languages spoken by potentially exposed persons) to potentially exposed persons. This training must be provided prior to or at the time of initial assignment to a job involving potential exposure to CTC. Furthermore, EPA also requires that the owner or operator document their efforts in using elimination, substitution, engineering controls, and administrative controls to reduce exposure to or below the ECEL in an exposure control plan.

The Agency understands that certain engineering controls can reduce exposures to people inside the workplace but may lead to increased ventilation of CTC outside of the workplace. Increasing CTC releases to the ambient air could lead to increasing risks to people in fenceline communities of adverse health effects from exposures to CTC in ambient air. Therefore, as proposed, and considering the effects of CTC on health and the magnitude of the exposure of human beings, as required by TSCA section

6(c)(2)(A)(i), EPA is prohibiting increased releases of CTC to outdoor air associated with the implementation of the WCPP/ECEL. This requirement is intended to avoid unintended increases in exposures to people from CTC emissions to ambient air. Owners and operators are required to attest in their WCPP/ECEL exposure control plan that engineering controls selected do not increase emissions of CTC to ambient air outside of the workplace and document in their exposure control plan whether additional equipment was installed to capture emissions of CTC to ambient air. Owners and operators may institute air emissions monitoring or modeling to assist with meeting this requirement.

EPA is finalizing its requirement that the owner or operator include and document in the exposure control plan or through any existing documentation of the facility's safety and health program developed as part of meeting OSHA requirements or other safety and health standards, the following:

- Identification in the exposure control plan of available exposure controls that were considered and rationale for using or not using available exposure controls in the following sequence (*i.e.*, elimination and substitution, then engineering controls and administrative controls) to reduce exposures in the workplace to either at or below the ECEL or to the lowest level achievable and to prevent or reduce direct dermal contact with CTC in the workplace;
 - For each exposure control considered, exposure controls selected based on feasibility, effectiveness, and other relevant considerations;
 - A description of actions the owner or operator must take to implement exposure controls selected, including proper installation, regular inspections, maintenance, training, or other steps taken;
 - A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;
 - Attestation that exposure controls selected do not increase emissions of CTC to ambient air outside of the workplace and whether additional equipment was installed to capture or otherwise prevent increased emissions of CTC to ambient air;
 - A description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls; and

- An explanation of the procedures for responding to any change that may reasonably be expected to introduce additional sources of exposure to CTC, or otherwise result in increased exposure to CTC, including procedures for implementing corrective actions to mitigate exposure to CTC.

Under this final rule, owners or operators are prohibited from using rotating work schedules to comply with the ECEL 8-hour TWA, in alignment with certain elements of existing OSHA's standards for toxic substances under 29 CFR part 1910, subpart Z. Owners or operators must maintain the effectiveness of any engineering and administrative controls instituted as part of the exposure control plan. They must also review and update the exposure control plan as necessary, but at least every five years, to reflect any significant changes in the status of the owner or operator's approach to compliance with the exposure control requirements. EPA intends that the exposure control plan identify the *available* exposure controls and, for the exposure controls not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented. For entities for which significant amounts of time are needed to verify suitability of alternatives or procure funds or authorization for additional engineering controls, for example, EPA expects that as those controls become available the exposure control plan would be updated accordingly. EPA requires that the exposure control plan be revisited under certain conditions (and at least every five years) and encourages updates as more sophisticated controls are available.

This final rule requires owners or operators to make the exposure control plan and associated records, including ECEL exposure monitoring records, ECEL compliance records, DDCC compliance records, and workplace participation records, available to potentially exposed persons and their designated representatives. Owners or operators must notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records within 30 days of the date that the exposure control plan is completed and at least annually thereafter. The notice of the availability of the plan and associated records must be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-

English version representing the language of the largest group of workers who do not read English. This final rule also requires the owner or operator to provide the exposure control plan and associated records at a reasonable time, place, and manner to a potentially exposed person or their designated representative upon request. As explained in Unit III.C.2., if the owner or operator is unable to provide the specified records within 15 days, the owner or operator must inform the potentially exposed person or designated representative requesting the record within 15 days that reason for the delay and the earliest date when the record will be made available.

6. Personal Protective Equipment (PPE)

Where elimination, substitution, engineering controls, and administrative controls are not feasible to reduce the air concentration to or below the ECEL and/or prevent direct dermal contact with CTC for all potentially exposed persons, EPA is finalizing as proposed with slight modifications to improve clarity or for greater consistency with OSHA's regulations to require owners and operators to provide PPE, including respiratory protection and dermal protection selected in accordance with the guidelines described in this unit, and to implement a PPE program. This unit includes a description of the PPE program, including required PPE as it relates to respiratory protection, required PPE as it relates to dermal protection, and other requirements such as additional training for respirators and recordkeeping to support implementation of a PPE program.

a. Respiratory Protection

Where elimination, substitution, engineering, and administrative controls are not feasible or sufficiently protective to reduce the air concentration to or below the ECEL, or if inhalation exposure above the ECEL is still reasonably likely, EPA is finalizing, with slight modification from the proposal, minimum respiratory PPE requirements based on an owner or operator's most recent measured air concentration for one or more potentially exposed persons and the level of PPE needed to reduce exposure to or below the ECEL. In those circumstances, EPA is finalizing the requirements for a respiratory protection PPE program with worksite-specific procedures and elements for required respirator use. Owners or operators must develop and administer a written respiratory protection program in accordance with OSHA's respiratory protection standard under 29 CFR

1910.134(c)(1), (c)(3), and (c)(4). EPA is finalizing requirements that owners and operators provide training to all persons required to use respiratory protection consistent with 29 CFR 1910.134(k) prior to or at the time of initial assignment to a job involving potential exposure to CTC. Owners and operators must retrain all persons required to use PPE at least annually, or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in PPE to be used render the previous training obsolete.

EPA is finalizing requirements that each owner or operator supply a respirator, selected in accordance with requirements described in this unit, to each person who enters a regulated area within 1,005 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 20, 2027) for Federal agencies and Federal contractors acting for or on behalf of the Federal government, 630 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 9, 2026) for non-Federal owners and operators, or within three months after the receipt of any exposure monitoring that indicates exposures exceeding the ECEL, and thereafter must ensure that all persons within the regulated area are using the provided respirators whenever CTC exposures exceed or can reasonably be expected to exceed the ECEL.

EPA is also finalizing requirements that owners or operators who are required to administer a respiratory protection PPE program must supply a respirator based on a medical evaluation consistent with the requirements of 29 CFR 1910.134(e). If a potentially exposed person cannot use a negative-pressure respirator, then the owner or operator must provide that person with an alternative respirator. The alternative respirator must have less breathing resistance than the negative-pressure respirator and provide equivalent or greater protection. If the person is unable to use an alternative respirator, then the person must not be permitted to enter the regulated area. Additionally, EPA is requiring owners and operators to select respiratory protection that properly fits each affected person and communicate respirator selections to each affected person in accordance with the requirements of 29 CFR 1910.134(f). Consistent with requirements of 29 CFR 1910.134(g) through (j), EPA is requiring owners and operators to provide, ensure use of, and maintain (in a sanitary,

reliable, and undamaged condition) respiratory protection that is of safe design and construction. EPA is also requiring owners and operators to provide training to all persons required to use respiratory protection consistent with the requirements of 29 CFR 1910.134(k).

EPA is finalizing the requirements to establish minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the following requirements may be used. In instances where respiratory protection is appropriate, NIOSH Approved® equipment must be used. NIOSH Approved is a certification mark of the U.S. Department of Health and Human Services (HHS) registered in the United States and several international jurisdictions. EPA is finalizing the following requirements for respiratory protection, based on the most recent exposure monitoring concentration results measured as an 8-hour TWA that exceed the ECEL (0.03 ppm):

- If the measured exposure concentration is at or below 0.03 ppm: no respiratory protection is required.
- If the measured exposure concentration is above 0.03 ppm and less than or equal to 0.3 ppm (10 times ECEL): Any NIOSH Approved air-purifying half mask respirator equipped with organic vapor cartridges or canisters; or any NIOSH Approved Supplied-Air Respirator (SAR) or Airline Respirator operated in demand mode equipped with a half mask; or any NIOSH Approved Self-Contained Breathing Apparatus (SCBA) in a demand mode equipped with a half mask [APF 10].
- If the measured exposure concentration is above 0.3 ppm and less than or equal to 0.75 ppm (25 times ECEL): Any NIOSH Approved Powered Air-Purifying Respirator (PAPR) equipped with a loose-fitting facepiece or hood/helmet equipped with organic vapor cartridges or canisters; or any NIOSH Approved SAR or Airline Respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood [APF 25].
- If the measured exposure concentration is above 0.75 ppm and less than or equal to 1.5 ppm (50 times ECEL): Any NIOSH Approved air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved PAPR with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved SAR or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved SAR or Airline Respirator

operated in a pressure-demand or other positive-pressure mode with a half mask; or any NIOSH Approved SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50].

- If the measured exposure concentration is above 1.5 ppm and less than or equal to 30 ppm (1,000 times ECEL): Any NIOSH Approved PAPR equipped with a full facepiece equipped with organic vapor cartridges or canisters; any NIOSH Approved SAR or Airline Respirator in a continuous-flow mode equipped with full facepiece; any NIOSH Approved SAR or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply; or any NIOSH Approved SAR or Airline Respirator in a continuous-flow mode equipped with a helmet or hood and has been tested to demonstrate performance at a level of a protection of APF 1,000 or greater. [APF 1,000].

- If the measured exposure concentration is greater than 30 ppm (1,000+ times ECEL): Any NIOSH Approved SCBA equipped with a full facepiece, hood, or helmet and operated in a pressure demand or other positive pressure mode [APF 10,000].

- If the exposure concentration is unknown: Any NIOSH Approved combination supplied air respirator equipped with a full facepiece and operated in pressure demand or other positive pressure mode with an auxiliary self-contained air supply; or any NIOSH Approved SCBA operated in pressure demand or other positive pressure mode and equipped with a full facepiece or hood/helmet [APF 1000+].

Additionally, EPA is finalizing requirements that owners or operators select and provide respirators in accordance with the requirements of 29 CFR 1910.134(d)(1)(iv) and with consideration of workplace and user factors that affect respirator performance and reliability.

EPA is requiring that the owner or operator must ensure that all filters, cartridges, and canisters used in the workplace are labeled and color coded per NIOSH requirements and that the label is not removed and remains legible. Consistent with 29 CFR 1910.134(d)(3)(iii), EPA is requiring either the use of NIOSH Approved respirators with an end-of-life service indicator for the contaminant, in this case CTC, or implementation of a change schedule for canisters and cartridges that ensures that they are changed before the end of their service life. EPA is also requiring owners and operators to ensure that respirators are

used in compliance with the terms of the respirator's NIOSH approval.

EPA is finalizing requirements that owners and operators must conduct regular evaluations of the workplace, including consultations with potentially exposed persons using respiratory protection, consistent with the requirements of 29 CFR 1910.134(l), to ensure that the provisions of the written respiratory protection program described in this unit are being effectively implemented.

EPA is finalizing the requirement that owners and operators document respiratory protection used and PPE program implementation. EPA is finalizing requirements that owners and operators document in the exposure control plan or other documentation of the facility's safety and health program information relevant to the respiratory program, including records on the name, workplace address, work shift, job classification, work area, and type of respirator worn (if any) by each potentially exposed person, maintenance, fit-testing, and training as described in this unit.

b. Dermal Protection

As described in this unit EPA is finalizing requirements that each owner or operator supply dermal PPE that separates and provides a barrier to prevent direct dermal contact with CTC, selected in accordance with requirements described in this unit, to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact within 1,005 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 20, 2027) for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or 180 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than June 16, 2025) for non-Federal owners and operators. Where elimination, substitution, engineering controls, and administrative controls are not feasible or sufficient to fully prevent direct dermal contact with CTC, EPA is finalizing requirements that appropriate dermal PPE be provided by owners and operators to, and be worn by, persons potentially exposed to direct dermal contact with CTC. EPA is requiring owners and operators to provide dermal PPE that is of safe design and construction for the work to be performed. EPA is also requiring owners and operators ensure each potentially exposed person who is required to wear PPE to use and maintain PPE in a sanitary, reliable, and undamaged condition. Additionally, EPA is

requiring owners and operators to select and provide PPE that properly fits each potentially exposed person who is required to use PPE and communicate PPE selections to each affected person.

In choosing appropriate dermal PPE, EPA is requiring owners and operators to select gloves, clothing, and protective gear (which covers any exposed dermal area of arms, legs, torso, and face) based on specifications from the manufacturer or supplier or individually prepared third party testing that demonstrate an impervious barrier to CTC during expected durations of use and normal conditions of exposure within the workplace, accounting for potential chemical permeation or breakthrough times. EPA is also requiring that owners and operators demonstrate that the selected PPE will be impervious for the expected duration and conditions of exposure, such as using the format specified in ASTM F1194–99(2010) “Standard Guide for Documenting the Results of Chemical Permeation Testing of Materials Used in Protective Clothing Materials,” reporting cumulative permeation rate as a function of time, or equivalent manufacturer- or supplier-provided testing. In alignment with the OSHA Hand Protection PPE Standard (29 CFR 1910.138), EPA is requiring owners and operators to select dermal PPE based on an evaluation of the performance characteristics of the PPE relative to the task(s) to be performed, conditions present, and the duration of use. EPA is also requiring owners and operators to consider likely combinations of chemical substances to which the clothing may be exposed in the work area when selecting the appropriate PPE such that the PPE will prevent direct dermal contact to CTC.

For example, owners and operators can select gloves that have been tested in accordance with the American Society for Testing and Materials (ASTM) F739 “Standard Test Method for Permeation of Liquids and Gases through Protective Clothing Materials under Conditions of Continuous Contact.” EPA is finalizing that PPE be provided for use for a time period only to the extent and no longer than the time period for which testing has demonstrated that the PPE will be impervious during expected durations of use and conditions of exposure. EPA is finalizing requirements that owners and operators also consider other factors when selecting appropriate PPE, including effectiveness of glove type when preventing exposures from CTC alone and in likely combination with other chemical substances used in the work area or when used with glove liners, permeation, degree of dexterity

required to perform task, and temperature, as identified in the Hand Protection section of OSHA's Personal Protective Equipment Guidance (Ref. 45).

EPA is finalizing that owners and operators establish, either through manufacturer or supplier-provided documentation or individually prepared third party testing that the selected PPE will be impervious for the expected duration and conditions of exposure, such as using the format specified in ASTM F1194–99(2010) "Standard Guide for Documenting the Results of Chemical Permeation Testing of Materials Used in Protective Clothing Materials," reporting cumulative permeation rate as a function of time, or equivalent manufacturer- or supplier-provided testing. EPA is also requiring owners and operators to consider likely combinations of chemical substances to which the clothing may be exposed in the work area when selecting the appropriate PPE such that the PPE will prevent direct dermal contact to CTC. Degradation may also be appropriate to consider in the context of combination chemical exposures, as some glove types and materials may demonstrate efficient permeation barrier results but may not be fully resistant to degradation from the chemical exposure. Degradation can be evaluated using standard test methods such as select test methods within ASTM Method D 471 Standard Test Method for Rubber Property—Effect of Liquids (e.g., ASTM D412 Standard Test Methods for Vulcanized Rubber and Thermoplastic Elastomers-Tension). EPA is finalizing requirements that PPE must be immediately provided and replaced if any person is dermally exposed to CTC longer than the breakthrough time period for which testing has demonstrated that the PPE will be impermeable or if there is a chemical permeation or breakage of the PPE.

Additionally, EPA is finalizing requirements that owners and operators subject to this rule comply with provisions of 29 CFR 1910.133(b) for requirements on selection and use of eye and face protection.

Additionally, as part of the PPE program, EPA is also finalizing that owners and operators must comply with OSHA's general PPE training requirements at 29 CFR 1910.132(f) for application of a PPE training program, including providing training on proper use of dermal PPE (e.g., when and where PPE is necessary, proper application, wear, and removal of PPE, maintenance, useful life and disposal of PPE). EPA is finalizing that owners and operators provide PPE training to all

persons required to use dermal PPE prior to or at the time of initial assignment to a job involving potential exposure to CTC. Owners and operators have to re-train each affected person at least once annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in the PPE to be used render the previous training obsolete.

EPA is also finalizing requirements that owners and operators retain records of dermal PPE used and program implementation. EPA is requiring that owners and operators document in the exposure control plan or other documentation of the facility's safety and health program, information relevant to any dermal PPE program, as applicable, including:

- The name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle CTC or handle equipment or materials on which CTC may present and the type of PPE selected to be worn by each of these persons;
- The basis for specific PPE selection (e.g., demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area);
- Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE;
- Occurrence and duration of any direct dermal contact with CTC that occurs during any activity or malfunction at the workplace that causes direct dermal exposures to occur and/or glove breakthrough, and corrective actions to be taken during and immediately following that activity or malfunction to prevent direct dermal contact to CTC; and
- Training described in this unit.

7. Additional Finalized Requirements

a. Workplace Information and Training

EPA is also finalizing its requirements to implement a training program in alignment with the OSHA Hazard Communication Standard (29 CFR 1910.1200) and the OSHA General Industry Standard for Methylene Chloride (29 CFR 1910.1052). To ensure that potentially exposed persons in the workplace are informed of the hazards associated with CTC exposure, EPA is

finalizing as proposed with slight modification to require that owners or operators of workplaces subject to the WCPP institute a training and information program for potentially exposed persons and assure their participation in the training and information program within 1,005 days after the date of publication of the final rule in the **Federal Register** (i.e., no later than September 20, 2027) for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or 630 days after the date of publication of the final rule in the **Federal Register** (i.e., no later than September 9, 2026) for non-Federal owners and operators. For purposes of workplace information and training, owners and operators are only required to train potentially exposed persons that are expected to be present in the workplace or to directly handle CTC or handle equipment or materials on which CTC may present.

As part of the training and information program, the owner or operator is required to provide information and comprehensive training in an understandable manner (i.e., plain language) and in multiple languages as appropriate (e.g., based on languages spoken by potentially exposed persons) to potentially exposed persons prior to or at the time of initial assignment to a job involving potential exposure to CTC. Owners and operators are required to provide information and training, as referenced in the OSHA Hazard Communication Standard, to all potentially exposed persons that includes:

- The requirements of the CTC WCPP and how to access or obtain a copy of the requirements of the WCPP, including but not limited to the exposure control plan, monitoring requirements, and PPE program;
- The quantity, location, manner of use, release, and storage of CTC and the specific operations in the workplace that could result in CTC exposure, particularly noting where each regulated area is located;
- Principles of safe use and handling of CTC in the workplace, including specific measures the owner or operator has implemented to reduce inhalation exposure at or below the ECEL or prevent dermal contact with CTC, such as work practices and PPE used;
- The methods and observations that may be used to detect the presence or release of CTC in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance or odor of CTC when being released, etc.); and

- The acute and chronic health hazards of CTC as detailed on relevant Safety Data Sheets (SDSs).

In addition to providing training at the time of initial assignment to a job involving potential exposure to CTC, owners and operators subject to the CTC WCPP are required to re-train each potentially exposed person as necessary, but at a minimum annually, to ensure they understand the principles of safe use and handling of CTC in the workplace. The owner or operator would consider factors such as the skills required to perform the work activity and the existing skill level of the staff performing the work. EPA is finalizing its requirements that owners and update the training as necessary whenever there are changes in the workplace, such as new tasks or modifications of tasks, in particular, whenever there are changes in the workplace that increase exposure to CTC or where potentially exposed persons' exposure to CTC can reasonably be expected to exceed the action level or increase the potential for direct dermal contact with CTC. To support compliance, EPA is finalizing that each owner or operator of a workplace subject to the WCPP would be required to provide to the EPA, upon request, all available materials related to workplace information and training.

b. Workplace Participation

EPA encourages owners and operators to consult with potentially exposed persons and their designated representative on the development and implementation of exposure control plans and PPE/respirator programs. EPA is finalizing a requirement that owners and operators provide potentially exposed persons and their designated representatives regular access to the exposure control plans, exposure monitoring records, and PPE program implementation records. To ensure compliance with workplace participation, EPA is finalizing a requirement that the owner or operator document the notice to and ability of any potentially exposed person that may reasonably be affected by CTC exposure to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation records, or any other information relevant to CTC exposure in the workplace.

c. Recordkeeping

For owners and operators to demonstrate compliance with the WCPP provisions, EPA is requiring that owners and operators retain compliance records for five years (although this requirement does not supplant any longer

recordkeeping retention time periods such as those required under 29 CFR 1910.1020, or other applicable regulations). EPA is requiring the owner or operator to retain records of:

- Exposure control plan;
 - PPE program implementation and documentation, including as necessary, respiratory protection and dermal protection used and related PPE training; and
 - Information and training provided to each person prior to or at the time of initial assignment and any retraining.
- In addition, EPA is finalizing requirements that owners and operators subject to the WCPP ECEL requirements maintain records to include:
- Regulated areas and authorized personnel;
 - The exposure monitoring records;
 - Notification of exposure monitoring results; and
 - To the extent that the owner or operator relies on prior exposure monitoring data, records that demonstrates that it meets all of the requirements of this section.

The owners and operators, upon request by EPA, are required to make all records that are maintained as described in Unit IV. available to EPA for examination and copying in accordance with EPA requirements. EPA emphasizes that all records required to be maintained can be kept in the most administratively convenient form; electronic record form or paper form.

8. Compliance Timeframes

EPA is finalizing the requirement that owners or operators of workplaces subject to the WCPP implement the DDCC requirements as outlined in this unit within 1,005 days after December 18, 2024 for Federal agencies or Federal contractors acting for or on behalf of the Federal government, 180 days after December 18, 2024 for non-Federal owners and operators, or within 30 days of introduction of CTC into the workplace, whichever is later. With regard to the compliance timeframe for the WCPP provisions related to the ECEL, EPA is not finalizing the timeframes proposed. Rather, as discussed in Unit III.B., based on consideration of public comments and reasonably available information, EPA is finalizing longer timeframes for compliance with provisions related to the ECEL for non-Federal owners or operators, and is providing Federal agencies and Federal contractors acting for or on behalf of the Federal government additional time to comply with each of the provisions of the WCPP. Specifically, EPA is finalizing its requirement that non-Federal owners

and operators perform initial exposure monitoring according to the process outlined in this unit within 540 days after date of publication of the final rule in the **Federal Register** (*i.e.*, no later than June 11, 2026) or within 30 days of introduction of CTC into the workplace, whichever is later. Federal agencies and Federal contractors acting for or on behalf of the Federal government must conduct initial exposure monitoring within 915 days after the date of publication (*i.e.*, no later than June 21, 2027), or within 30 days of introduction of CTC into the workplace, whichever is later. EPA is also finalizing its requirement that each non-Federal owner or operator ensure that exposure to CTC does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons within 630 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 9, 2026), while Federal agencies and Federal contractors acting for or on behalf of the Federal government must comply with the ECEL within 1,005 days after the date of publication (*i.e.*, no later than September 20, 2027). If applicable, each owner or operator must provide respiratory protection sufficient to reduce inhalation exposures to below the ECEL to all potentially exposed persons in the regulated area within three months after receipt of the results of any exposure monitoring that indicates an exceedance of the ECEL. For non-Federal owners or operators, this will be within 630 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 9, 2026). For Federal agencies and Federal contractors acting for or on behalf of the Federal government, this will be within 1,005 days after the date of publication of the final rule in the **Federal Register** (*i.e.*, no later than September 20, 2027). EPA is also finalizing the requirement that owners and operators demarcate a regulated area within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL. Owners and operators shall proceed accordingly to implement an exposure control plan, including institution of feasible exposure controls other than PPE, within 1,080 days after date of publication of the final rule in the **Federal Register** (*i.e.*, no later than December 3, 2027).

C. Prescriptive Controls Required for Laboratory Use

In contrast to the non-prescriptive requirements of the WCPP, including the DDCC, where regulated entities would have the ability to select controls

in accordance with the hierarchy of controls to comply with the parameters outlined in Unit IV.B., EPA has found it appropriate in certain circumstances to require specific prescriptive controls for certain occupational conditions of use. In general, EPA is finalizing prescriptive controls, for the industrial and commercial use of CTC as a laboratory chemical, as described in Unit III.A.2. This unit provides a description of the industrial and commercial use of CTC as a laboratory chemical subject to specific prescriptive controls, the specific prescriptive control requirements, and the compliance timeframe for the requirements.

1. Applicability

The industrial and commercial use of CTC as a laboratory chemical refers to the industrial or commercial use of CTC, often in small quantities, in a laboratory process or in specialized laboratory equipment for instrument calibration/maintenance, chemical analysis, chemical synthesis, extracting and purifying other chemicals, dissolving other substances, executing research, development, test and evaluation methods, and similar activities, such as use as a solvent, reagent, analytical standard, or other experimental use.

After the risk evaluation was published, DoD did further analysis and provided additional information clarifying their current use of CTC as a laboratory chemical and risk management measures implemented. DoD provided information on their use of CTC as a laboratory chemical in chemical weapons destruction, indicating that CTC is used in small amounts in a confined, laboratory-like setting with advanced engineering controls. There is no waste CTC generated during this process.

EPA recognizes that potentially exposed persons in a laboratory setting may include students, researchers, visiting scholars, or others whose job classifications may vary, such as depending on the academic period in university laboratories. The requirements described in this unit apply to all potentially exposed persons in all laboratory settings, including academic and research laboratories, regardless of job classification.

2. Workplace Requirements

To address the unreasonable risk of injury to health resulting from dermal exposures to CTC identified for the industrial and commercial use as a laboratory chemical, including DoD's use of CTC as a laboratory chemical in chemical weapons destruction, EPA is

requiring dermal PPE, including impermeable gloves and protective clothing, in combination with comprehensive training for tasks particularly related to the use of CTC in a laboratory setting as specified in this unit for each potentially exposed person with direct dermal contact to CTC in the work area through direct handling of the substance or from contact with surfaces that may be contaminated with CTC. For dermal PPE, EPA is requiring that each owner or operator comply with the requirements outlined in Units IV.B.6.b. for selection of dermal PPE and training for all potentially exposed persons. EPA's description for how the requirements for the industrial and commercial use as a laboratory chemical address the unreasonable risk resulting from dermal exposures under the conditions of use and the rationale for this regulatory approach is outlined in Unit V. of the proposed rule (88 FR 49205, July 28, 2023) (FRL-8206-01-OCSP).

In addition, EPA is requiring the use of laboratory ventilation devices, such as fume hoods, glove boxes, air handling units, exhaust fans, biological safety devices, airflow controls, and other local exhaust devices, in workplace laboratory settings for the industrial and commercial use of CTC as a laboratory chemical, except for DoD's use of CTC as a laboratory chemical in chemical weapons destruction, to codify existing good laboratory practices. EPA is requiring each owner or operator of a workplace laboratory setting, except for DoD's use of CTC as a laboratory chemical in chemical weapons destruction, to ensure laboratory ventilation devices are in use and functioning properly to minimize exposures to persons in the area where CTC is used as a laboratory chemical. EPA suggests owners or operators refer to OSHA's 29 CFR 1910.1450, Appendix A, for National Research Council recommendations concerning laboratory chemical hood ventilation system characteristics and practices and to ANSI's and ASSP's Z9.5-2022 for recommendations on additional laboratory ventilation controls to minimize exposures to potentially exposed persons in the work area.

EPA understands that DoD uses CTC in small amounts in a confined, laboratory-like setting with advanced engineering controls (Ref. 46). Therefore, for DoD's industrial and commercial use of CTC as a laboratory chemical in chemical weapons destruction, EPA is requiring advanced engineering controls that essentially codify existing practices at DoD facilities. EPA is not requiring a WCPP,

specifically with monitoring requirements, for DoD's industrial and commercial use of CTC as a laboratory chemical in chemical weapons destruction.

3. Recordkeeping

To support and demonstrate compliance, EPA is requiring that each owner or operator of a laboratory workplace subject to the requirements of this unit retain compliance records for five years. In alignment with 29 CFR 1910.1450(e)(3)(ii) and (iii) and 29 CFR 1910.132(d)(2), EPA is requiring that owners and operators must retain records of:

- Dermal protection used by each potentially exposed person and PPE program implementation as outlined in this unit;
- Criteria that the owner or operator will use to determine and implement control measures to reduce potentially exposed persons' exposure to CTC including laboratory ventilation devices as outlined in this unit;
- Implementation of properly functioning laboratory ventilation devices using manufacturer's instructions for installation, use, and maintenance of the systems, including inspections, tests, development of maintenance procedures, the establishment of criteria for acceptable test results, and documentation of test and inspection results, except for DoD's use of CTC as a laboratory chemical in chemical weapons destruction; and
- For DoD's industrial and commercial use of CTC as a laboratory chemical in chemical weapons destruction, implementation of advanced engineering controls that are in use and functioning properly and specific measures taken to ensure proper and adequate performance. Owners or operators must maintain records for five years. EPA expects owners or operators ensure that records reflect actions taken within the last five years to comply with the requirements of this unit.

4. Compliance Timeframes

With regards to the compliance timeframe, EPA is requiring that each owner or operator of a workplace engaged in the industrial and commercial use of CTC as a laboratory chemical ensure laboratory ventilation devices are in use and functioning properly and that dermal PPE is provided to all potentially exposed persons with direct dermal contact with CTC within 180 days after publication of the final rule.

Similarly, EPA is requiring that DoD facilities engaged in the industrial and

commercial use of CTC as a laboratory chemical in chemical weapons destruction ensure that advanced engineering controls are in use and functioning properly and dermal PPE is provided to all potentially exposed persons with direct dermal contact with CTC within 365 days after publication of the final rule.

EPA understands that certain departments and agencies of the Federal government, as well as Federal contractors acting for or on behalf of the Federal government, need additional time to comply with these timeframes. For example, ensuring compliance with the prescriptive controls could be challenging due to changing contracting, procurement decisions and other processes in Federal facilities. Similarly, EPA is requiring for that agencies of the Federal government and their contractors, when acting for or on behalf of the Federal government, that are engaged in the industrial and commercial use of CTC as a laboratory chemical ensure laboratory ventilation devices are in use and functioning properly, and that dermal PPE and training on proper use of PPE is provided to all potentially exposed persons with direct dermal contact with CTC within 365 days after publication of the final rule.

D. Prohibition of Manufacture, Processing, Distribution, and Use of CTC

1. Applicability

EPA is finalizing the prohibitions for most of the conditions of use for which prohibition was proposed. Prohibitions will address the contribution to the unreasonable risk determined to be presented by CTC in the 2020 Risk Evaluation for Carbon Tetrachloride and 2022 Revised Unreasonable Risk Determination for Carbon Tetrachloride from industrial and commercial uses of CTC, and reasonably available information indicates that industry has already transitioned away from CTC and found technically and economically feasible alternatives to CTC for these uses. Unit V. of the proposed rule and the Response to Comments document present further discussion of EPA's rationale for why these conditions of use are being prohibited (88 FR 49205) (FRL-8206-01-OCSP). EPA's *description* of the uses proposed to be prohibited for which the Agency is finalizing a WCPP (processing: incorporation into formulation, mixtures, or reaction products in vinyl chloride manufacturing and the industrial and commercial use as an industrial processing aid in the

manufacture of vinyl chloride) are in Units III.A.1. and IV.B.1. The rule prohibits manufacture, processing, distribution in commerce, and use of CTC for the following industrial and commercial uses of CTC: industrial and commercial use as a processing aid in the manufacture of petrochemical-derived products except in the manufacture of vinyl chloride (for which EPA is finalizing a WCPP); industrial and commercial use in the manufacture of other basic chemicals (including chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine (for which EPA is finalizing a WCPP); industrial and commercial use in metal recovery; industrial and commercial use as an additive; and industrial and commercial use in specialty uses by the U.S. Department of Defense. EPA is also finalizing the explicit prohibition for processing: incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride (the upstream processing condition of use for the industrial and commercial use of CTC as a processing aid in the manufacture of petrochemicals-derived products except in the manufacture of vinyl chloride). This unit provides a description of the uses subject to the prohibitions to assist with compliance.

a. Processing: Incorporation Into Formulation, Mixture or Reaction Products in Petrochemical-Derived Manufacturing Except in the Manufacture of Vinyl Chloride

Incorporation into formulation, mixture, or reaction products refers to the process of mixing or blending several raw materials to obtain a single product or preparation or formulation. CTC has historically been incorporated into formulation or mixtures to manufacture hydrochloric acid (HCl), vinyl chloride, ethylene dichloride (EDC), chloroform, hafnium tetrachloride, thiophosgene, and methylene chloride. CTC may be incorporated into various products and formulations at varying concentrations for further distribution. For example, CTC may be unloaded from transport containers either directly into mixing equipment or into an intermediate storage vessel either manually or through automation via a pumping system. Mixing of components can occur in either a batch or continuous system. The mixture that contains CTC

may be used as a reactant to manufacture a chlorinated compound that is subsequently formulated into a product or a processing aid used to aid in the manufacture of petrochemicals-derived products. For the purposes of this rulemaking, EPA is specifically prohibiting the incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride. Incorporation into formulation, mixture or reaction products in agricultural products manufacturing, vinyl chloride manufacturing, the elimination of nitrogen trichloride in the production of chlorine and caustic soda, and the recovery of chlorine in tail gas from the production of chlorine is being regulated under the WCPP, as described in Unit IV.B.

b. Industrial and Commercial Use

i. Industrial and Commercial Use as an Industrial Processing aid in the Manufacture of Petrochemicals-Derived Products Except in the Manufacture of Vinyl Chloride.

A processing aid is a "chemical that is added to a reaction mixture to aid in the manufacture or synthesis of another chemical substance but is not intended to remain in or become part of the product or product mixture." Additionally, processing agents are intended to improve the processing characteristics or the operation of process equipment, but not intended to affect the function of a substance or article created. CTC has traditionally been used as a processing aid/agent to aid in the manufacture of petrochemical-derived products (Ref. 1). The condition of use includes the use of CTC that has historically been used as a processing agent in the manufacture of chlorosulphonated polyolefin; styrene butadiene rubber; endosulfan (insecticide); 1-1 Bis (4-chlorophenyl) 2,2,2-trichloroethanol (dicofol insecticide); and tralomethrin (insecticide). For the purposes of this rulemaking, EPA is specifically prohibiting the industrial and commercial use of CTC as an industrial processing aid in the manufacture of petrochemicals-derived products, except in the manufacture of vinyl chloride. The industrial and commercial use as an industrial processing aid in the manufacture of agricultural products and vinyl chloride is being regulated under the WCPP, as described in Unit IV.B.

ii. Industrial and Commercial Use in the Manufacture of Other Basic Chemicals (Including Manufacturing of Chlorinated Compounds Used in Solvents, Adhesives, Asphalt, and Paints and Coatings), Except for Use in the Elimination of Nitrogen Trichloride in the Production of Chlorine and Caustic Soda and the Recovery of Chlorine in Tail Gas From the Production of Chlorine

CTC has historically been used as a processing aid/agent in basic organic and inorganic chemical manufacturing. CTC could be used as a processing agent in the manufacturing of chlorinated compounds that are subsequently used in the formulation of solvents, adhesives, asphalt, and paints and coatings; in the manufacturing of chlorinated paraffins (*e.g.*, plasticizer in rubber, paints, adhesives, sealants, plastics), and chlorinated rubber (*e.g.*, additive in paints, adhesives); and in the manufacturing of inorganic chlorinated compounds, such as in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine. For the purposes of this rulemaking, EPA is specifically prohibiting the industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine. The industrial and commercial use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine is being regulated under the WCPP, as described in Unit IV.B.

iii. Industrial and Commercial Use in Metal Recovery

CTC has historically been used as a processing aid or agent to aid in metal recovery.

iv. Industrial and Commercial Use as an Additive

Additives are chemicals combined with a chemical product to enhance the properties of the product. Additives typically stay mixed within the finished product and remain unreacted. The risk evaluation examined the use of CTC as an additive for the manufacture of petrochemical-derived products and agricultural products. CTC has historically been used as an additive in

fuel and in plastic components used in the automotive industry.

v. Industrial and Commercial Use in Specialty Uses by the U.S. Department of Defense (DoD)

During the risk evaluation, DoD provided monitoring data for CTC uses in various processes that include worker activities such as cleaning and sampling residual metal and ash; destruction of munitions and storage of resulting liquid waste; and sampling of energetics with solvent. The unreasonable risk determination for CTC further determined that this condition of use contributed to the unreasonable risk. The Agency understands that DoD has successfully phased out the use of CTC for this condition of use.

As discussed in Unit II.C.4., the prohibitions do not apply to any substance that is excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(ii) through (vi).

2. Compliance Timeframes

EPA is finalizing that the prohibitions apply as of 180 days after the date of publication of the final rule for the manufacturing, processing, distribution in commerce, and use of CTC for the following: incorporation of CTC into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride; the industrial and commercial use of CTC as a processing aid in the manufacture of petrochemical-derived products except in the manufacture of vinyl chloride; the industrial and commercial use of CTC in the manufacture of other basic chemicals (including chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine; the industrial and commercial use of CTC in metal recovery; and the industrial and commercial use of CTC as an additive.

EPA is also finalizing the prohibitions for the manufacturing, processing, distribution in commerce, and use of CTC for the industrial and commercial use in specialty uses by the DoD to apply as of 365 days after the date of publication of the final rule.

E. Other Requirements

1. Recordkeeping

For conditions of use that are not otherwise prohibited under this final rule, EPA is finalizing the requirement

that manufacturers, processors, distributors, and commercial users maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions, restrictions, and other provisions of this final regulation; and to maintain such records for a period of 5 years from the date the record is generated. This requirement begins on February 18, 2025. For enforcement purposes, EPA will have access to such businesses records plus additional records required under 40 CFR 751.713. Recordkeeping requirements would ensure that owners or operators can demonstrate compliance with the regulations if necessary.

2. Downstream Notification

For conditions of use that are not otherwise prohibited under this final regulation, EPA is finalizing requirements that manufacturers (including importers), processors, and distributors of CTC provide downstream notification of the prohibitions through the SDSs by adding to sections 1(c) and 15 of the SDS the following language:

After June 16, 2025, this chemical substance (as defined in TSCA section 3(2)) may not be distributed in commerce or processed in greater than trace quantities for the following purposes: Incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride; Industrial and commercial use as an industrial processing aid in the manufacture of petrochemicals-derived products except in the manufacture of vinyl chloride; Industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine; Industrial and commercial use in metal recovery; Industrial and commercial use as an additive; and beginning December 18, 2025, industrial and commercial specialty uses by the U.S. Department of Defense.

To provide adequate time to update the SDS and ensure that all products in the supply chain include the revised SDS, EPA’s final rule requires manufacturers to revise their SDS within two months of rule publication and processors and distributors to revise their SDS within six months of rule publication. EPA did not receive public comments asserting that these compliance dates for updating the SDS were impracticable, and is therefore finalizing the compliance dates as proposed. The intention of downstream notification is to spread awareness throughout the supply chain of the

restrictions on CTC under TSCA and to provide information to commercial end-users about prohibited uses of CTC.

V. TSCA Section 6(c)(2) Considerations

A. Health Effects of Carbon Tetrachloride and the Magnitude of Human Exposure to Carbon Tetrachloride

EPA's analysis of the health effects of CTC and the magnitude of human exposure to CTC are in the 2020 Risk Evaluation for CTC and the 2022 Revised Unreasonable Risk Determination for CTC (Refs. 1, 3). A summary is presented here.

The 2020 Risk Evaluation for CTC identified potential health effects of CTC including carcinogenicity, liver toxicity, neurotoxicity, kidney toxicity, reproductive and developmental toxicity, irritation and sensitization, and genetic toxicity. Acute inhalation exposures to CTC at relatively high concentrations induce immediate and temporary depression of the central nervous-system, with effects consisting of escape-impairing symptoms such as dizziness. For chronic non-cancer inhalation exposure scenarios to CTC, liver toxicity is identified as the most sensitive adverse effect contributing to the unreasonable risk of CTC exposure due to fatty changes to the liver indicative of cellular damage. Under EPA's Guidelines for Carcinogen Risk Assessment (Ref. 47), CTC is classified as "Likely to be Carcinogenic in Humans." CTC has been shown to cause pheochromocytomas (tumors of the adrenal glands) in male and female mice by oral and inhalation exposures, and a strong association between neuroblastoma and CTC in a single well-conducted epidemiological study in the same organ raises concern for potential carcinogenic effects in human. In addition, a general correlation has been observed in animal studies with CTC between hepatocellular cytotoxicity and regenerative hyperplasia and the induction of liver tumors (Ref. 1).

Populations exposed to CTC include workers ages 17 and older of either gender, including pregnant women and individuals who do not use CTC but may be indirectly exposed due to their proximity to the user who is directly handling CTC (occupational non-users, or ONUs). EPA estimates that, annually, there are approximately between 852 and 9,554 workers and between 500 and 4,144 ONUs at between 30 and 71 facilities either manufacturing, processing, or using CTC for industrial and commercial conditions of use (Ref. 5).

In addition to these estimates of numbers of workers and occupational non-users directly exposed to CTC, EPA recognizes there is exposure to the general population from air and water pathways for CTC (fenceline communities are a subset of the general population who may be living in proximity to a facility where CTC is being used in an occupational setting). EPA separately conducted a screening approach to assess whether there may be potential risks to the general population from these exposure pathways. This analysis is summarized in the proposed rule, which includes information on the SACC peer review. This unit addresses those areas where some risk was indicated at the fenceline, and the conditions of use will be continuing under this final rule.

EPA's methodological approach to assessing potential exposures to fenceline communities of chemicals undergoing risk evaluation under TSCA section 6 was presented to the SACC peer review panel in March 2022, and EPA is including SACC recommendations, as appropriate, in assessing general population exposures in upcoming risk evaluations.

EPA's fenceline analysis for the water pathway for CTC, based on methods presented to the SACC, did not find risks from drinking water, incidental oral ingestion of ambient water, or incidental dermal exposure of surface water (Ref. 48).

Standard cancer benchmarks used by EPA and other regulatory agencies are an increased cancer risk above benchmarks ranging from 1 in 1,000,000 to 1 in 10,000 (*i.e.*, 1×10^{-6} to 1×10^{-4}). For example, when setting standards under section 112(f)(2) of the CAA, EPA uses a two-step process, with "an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual risk (MIR) of approximately 1-in-10 thousand" (Ref. 49, referencing the interpretation set forth in the 1989 final National Emission Standards for Benzene rule (54 FR 38044 Sept. 14, 1989)). In the screening level fenceline analysis for the ambient air pathway for CTC, EPA calculated its risk estimates to certain populations within the general population living or working near particular facilities and compared those risk estimates to a 1 in 1,000,000 (*i.e.*, 1×10^{-6}) benchmark value for cancer risk. There are still uncertainties where the calculated risk exceeds this cancer risk benchmark value. The benchmark values are not a bright line, and the Agency considers a number of factors

when determining unreasonable risk, such as the endpoint under consideration, the reversibility of effect, and exposure-related considerations (*e.g.*, duration, magnitude, aggregate or cumulative impacts, or frequency of exposure, or size of population exposed, including PESS).

The screening level fenceline analysis for CTC calculated risk estimates to select populations within the general population living or working near particular facilities exceeding the 1×10^{-6} benchmark value (Ref. 50). However, EPA has not determined based on this screening level analysis whether these risks to the general population contribute to the unreasonable risk presented by CTC. After considering the results, limitations, and uncertainties of the screening-level analysis, EPA determined as a matter of policy that reopening the TSCA section 6(b) risk evaluation for CTC for further evaluation of risk to the general population, and consequently delaying the promulgation of this TSCA section 6(a) rule, was not warranted. The Agency believes it is important to expeditiously promulgate this final rule to protect the public from the unreasonable risk determined in accordance with TSCA section 6(b)(4)(A), which was driven by occupational exposures.

The ambient air analysis for the multi-year fenceline analysis identified 19 facilities (in addition to 6 facilities solely manufacturing CTC as a byproduct, which were excluded because, as described earlier, the 2020 Risk Evaluation for Carbon Tetrachloride did not include the manufacture of CTC as a byproduct as a condition of use) with risk estimates above one in a million, with one facility with risk estimates above one in ten thousand, at 100 meters representing five conditions of use. Under the final regulatory action described in Unit IV., all of the ongoing conditions of use with an indication of potential risk to fenceline communities (with the exception of manufacture of CTC as a byproduct) would be required to establish a WCPP. Furthermore, EPA is prohibiting increased emissions associated with WCPP requirements, and in the WCPP exposure control plan facilities need to evaluate controls to determine how to reduce releases and exposures to potentially exposed persons in the workplace and attest that engineering controls selected do not increase emissions of CTC to ambient air outside of the workplace and whether additional equipment was installed to capture emissions of CTC to

ambient air. EPA anticipates that this analysis would help facilities to determine the most effective ways to reduce releases, including possible engineering controls or elimination/substitution of CTC, and therefore may also reduce the overall risk to fence-line communities.

EPA recognizes, as was described in the 2020 Risk Evaluation for Carbon Tetrachloride, that CTC is highly persistent in the atmosphere with an estimated tropospheric half-life exceeding 330 years. Thus, CTC has notable global background concentrations due to its long half-life, despite having limited air releases in the US, as noted in both the EPA's Air Toxic Screening Assessment modeling technical support document and in a recent EPA publication comparing the national air toxics modeling to regional monitoring data (Refs. 51, 52). The risk estimates from the fence-line analysis do not account for the background concentrations from historical emissions, which are persistent in the atmosphere.

In the instances where manufacturing, processing, or use of CTC may increase, EPA expects that potential additional exposure from emissions to ambient air to be limited as a result of the prohibition on the increased ventilation of CTC to ambient air and existing National Emission Standards for Hazardous Air Pollutants (NESHAPs) that cover CTC for these conditions of use under the CAA. Applicable NESHAPs include: 40 CFR part 63, subparts F, G, H, and I, Organic HAP from the Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipment Leaks.

The CAA establishes a two-phase process for the EPA's development, review, and potential revision of NESHAP that impose emission standards and work practice requirements on subject categories of sources of hazardous air pollutants. First, the EPA sets technology-based or performance-based standards reflecting the maximum achievable control technology (MACT) for major sources (CAA section 112(d)(2) and (3)) and generally available control technology (GACT) for area or non-major sources (CAA section 112(d)(5)). In the second phase, eight years after adoption of the first phase standards, the EPA performs a residual risk review of major source MACT standards to ensure that they provide an ample margin of safety to protect public health (CAA section 112(f)(2)), and a technology review of all NESHAP to account for developments in practices, processes and control

technologies (CAA section 112(d)(6)). The CAA only requires the EPA to conduct the residual risk review one time for each MACT standard, although the EPA has discretion to conduct additional risk reviews where warranted. The technology review, instead, is a recurring duty, and the EPA must perform it no less often than every eight years.

B. Environmental Effects of Carbon Tetrachloride and the Magnitude of Environmental Exposure to Carbon Tetrachloride

EPA's analysis of the environmental effects of CTC and the magnitude of exposure of the environment to CTC are in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1). The unreasonable risk determination for CTC is based solely on risks to human health; based on the TSCA 2020 Risk Evaluation for Carbon Tetrachloride, EPA determined that exposures to the environment did not drive the unreasonable risk. A summary is presented here in Unit V.

Exposures to terrestrial organisms from the suspended soils and biosolids pathway was qualitatively evaluated. Due to its physical-chemical properties, EPA expects that CTC does not bioaccumulate in fish or sediments; and CTC could be mobile in soil and migrate to water or volatilize to air (Ref. 1).

EPA concluded in the 2020 Risk Evaluation for Carbon Tetrachloride that CTC poses a hazard to environmental aquatic receptors. Amphibians were the most sensitive taxa for acute and chronic exposures. Acute exposures of CTC to fish, freshwater aquatic invertebrates, and sediment invertebrates resulted in hazard values as low as 10.4 mg/L, 11.1 mg/L, and 2 mg/L, respectively. For chronic exposures, CTC has a hazard value for amphibians of 0.03 mg/L based on teratogenesis and lethality in frog embryos and larvae. Furthermore, chronic exposures of CTC to fish, freshwater aquatic invertebrates, and sediment invertebrates resulted in hazard values as low as 1.97 mg/L, 1.1 mg/L, and 0.2 mg/L, respectively. In algal studies, CTC has hazard values ranging from 0.07 to 23.59 mg/L (Ref. 1).

In addition to the environmental effects assessed in the 2020 Risk Evaluation for Carbon Tetrachloride, EPA recognizes that CTC is an ozone-depleting substance with a 100-year GWP of 1730 (energy the emissions of one ton of gas will absorb over 100 years, relative to the emissions of one ton of carbon dioxide (CO₂)) (Ref. 53). As a result of its ozone-depleting effects, the Montreal Protocol and Title VI of the CAA led to a phase-out of CTC

production in the United States for most non-feedstock domestic uses. EPA did not evaluate the effect of CTC or this rule on ozone depletion. In addition, while the Agency understands that the use of CTC is expected to increase to produce low GWP HFOs, replacing many of the higher GWP HFCs, there is uncertainty in the change in volume of CTC that will be manufactured and used to produce HFOs. In the final rule, EPA is requiring owners/operators to ensure that any engineering controls instituted under the WCPP do not increase emissions of CTC to ambient air. EPA expects that potential additional exposure from emissions to ambient air would be limited as a result of the existing NESHAPs that cover CTC. However, EPA did not evaluate whether a possible increase of CTC emissions with a GWP of 1730 would offset emissions of the HFCs replaced by the lower GWP HFOs manufactured with CTC, or the overall global warming impact of CTC use.

C. Benefits of Carbon Tetrachloride for Various Uses

As described in the proposed rule, CTC is primarily used as a feedstock in the production of HCFCs, HFCs, and HFOs. Other conditions of use include regulated use as a processing agent in the manufacture of petrochemicals-derived and agricultural products and other chlorinated compounds such as chlorinated paraffins, chlorinated rubber and others that may be used downstream in the formulation of solvents for adhesives, asphalt, paints and coatings. Requirements under the Montreal Protocol and Title VI of the CAA led to a phaseout of CTC production in the United States for most non-feedstock domestic uses in 1996 and the CPSC banned the use of CTC in household products (excluding unavoidable residues not exceeding 10 ppm atmospheric concentration) in 1970.

CTC is a major feedstock for generation of lower-GWP alternative fluorocarbon products in the United States (Ref. 54). EPA anticipates that many entities currently using HFCs with higher global warming potential will transition to alternatives with lower global warming potential as requirements under the AIM Act begin to apply. The manufacturing of CTC is predicted to increase as a result of the transition from HFCs to lower-GWP HFOs that use CTC as a feedstock, such as HFO-1234yf used in motor vehicle AC and HFO-1234ze used in some types of aerosols and foam-blowing agents.

D. Reasonably Ascertainable Economic Consequences of the Final Rule

1. Likely Effect of the Rule on the National Economy, Small Business, Technological Innovation, the Environment, and Public Health

With respect to the anticipated effects of this rule on the national economy, the economic impact of a regulation on the national economy generally only becomes measurable if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP) (Ref. 55). Given the current GDP of \$23.17 trillion, this is equivalent to a cost of \$58 billion to \$116 billion which is considerably higher than the estimated cost of this rule. EPA considered the number of businesses, facilities, and workers that would be affected and the costs and benefits to those businesses and workers and society at large and did not find that there would be a measurable effect on the national economy. In addition, EPA considered the employment impacts of this final rule. For businesses subject to the WCCP, including the ECEL and DDCC requirements, and prescriptive workplace control requirements, EPA estimates the marginal cost of labor will increase. This may lead to small negative employment effects. Costs of prohibition in the final rule are not quantified, since EPA expects the prohibited uses are not ongoing. However, there may be employment effects proportionate to the extent to which CTC is still being used in the prohibited conditions of use.

EPA has determined that the rule will not have a significant impact on a substantial number of small entities. EPA estimates that the rule would affect at least seven small entities, and that the cost would only exceed 1 percent of annual revenues for two of these small entities. EPA expects that the final rule will not hinder technological innovation. Innovative applications of CTC in recent years have occurred in the production of HFOs. The regulatory options with requirements for certain conditions of use, including processing as a reactant in the production of refrigerants (such as HFOs), are not expected to inhibit innovation since they permit the continued use of CTC with appropriate controls. With respect to those conditions of use where prohibition is the requirement in the final action, EPA did not find evidence of ongoing use of CTC and thus there are no expected effects on innovation.

The effects of this rule on public health are estimated to be positive, due to the avoided incidence of adverse health effects attributable to CTC

exposure, including adrenal and liver cancer.

2. Costs and Benefits of the Regulatory Action and of the 1 or More Primary Alternative Regulatory Actions Considered by the Administrator

The costs and benefits that can be monetized for this rule are described at length in the Economic Analysis (Ref. 5). The total cost of the final rule is \$19.7 million dollars annualized over 20 years at a 3% discount rate and \$19 million dollars at a 7% discount rate. EPA's Economic Analysis for the rule quantified the benefits from avoided cases of adrenal and liver cancers. Cancer benefits are calculated based on inhalation exposure estimates from the Final Risk Evaluation. The estimated monetized benefit of the final rule ranges from approximately \$0.13 to \$0.14 million per year annualized over 20 years at a 3% discount rate and from \$0.06 to \$0.07 million per year at a 7% discount rate.

There are also unquantified benefits due to other avoided significant adverse health effects associated with CTC exposure, including liver, reproductive, renal, developmental, and CNS toxicity end points. EPA believes that the balance of costs and benefits of this final rule cannot be fairly described without considering the additional, non-monetized benefits of mitigating the non-cancer adverse effects. The non-cancer adverse effects from CTC exposure can significantly impact an individual's quality of life. The incremental improvements in health outcomes achieved by given reductions in exposure cannot currently be quantified for non-cancer health effects associated with CTC exposure, and therefore cannot be converted into monetized benefits. The qualitative discussion throughout this rulemaking and in the Economic Analysis highlights the importance of these non-cancer effects, which are not able to be monetized in the way that EPA is able to for cancer. These effects include not only cost of illness but also personal costs such as emotional and mental stress that are hard to measure appropriately. Considering only monetized benefits significantly underestimates the impacts of CTC adverse outcomes and underestimates the benefits of this final rule.

Net benefits were calculated by subtracting the costs from the quantified benefits. The net benefit of the final rule action is –\$19.6 million dollars annualized over 20 years at a 3% discount rate and –\$18.9 million dollars at a 7% discount rate.

Industry would bear monitoring, PPE, and notification and recordkeeping burdens and costs associated with the ECEL. While companies may comply with the rule using engineering controls, when estimating costs and benefits the Economic Analysis assumes firms will provide PPE to employees when monitoring thresholds are exceeded. EPA estimated monitoring results based on a log normal distribution estimated from the median and 95th percentile 8-hour time-weighted average exposure outcomes presented in the 2020 Risk Evaluation for Carbon Tetrachloride. PPE, recordkeeping, and monitoring costs after initial monitoring vary by industry and by projected initial monitoring result. Industry is expected to incur planning, recordkeeping and PPE costs associated with DDCC requirements. Industry would incur costs associated with developing an exposure control plan, performing inspections, documenting efforts to reduce exposure and occurrences of exposure, respiratory protection and dermal PPE, and training on the use of respiratory protection and dermal PPE.

EPA also considered the estimated costs of alternative regulatory actions to regulated entities. Estimated costs for regulatory alternatives can be found in the Economic Analysis for this final rule (Ref. 5).

A sensitivity analysis was conducted based on the low estimates of the number of affected entities in the 2020 Risk Evaluation for Carbon Tetrachloride. Based on these estimates, the total cost of the final rule is \$2.1 million dollars annualized over 20 years at both a 3 and 7% discount rate. The total benefit of the final rule is estimated to range from \$0.016 million dollars to \$0.018 million dollars annualized over 20 years at a 3% period discount rate, and ranges from \$0.008 million dollars to \$0.009 million dollars annualized over 20 years at a 7 percent discount rate. The net benefit of the rule under this sensitivity analysis is –\$2.1 million dollars annualized over 20 years at a 3% discount rate and a 7% discount rate. At a 2% discount rate, the cost of the rule assuming the low number of affected entities is \$2.1 million, the benefit is \$0.02 million, and the net benefit is –\$2.1 million.

3. Cost Effectiveness of the Regulatory Action and of 1 or More Primary Alternative Regulatory Actions Considered by the Administrator

For the COUs that EPA determined drive the unreasonable risk of injury to health from CTC, both the final rule and the primary alternative action, which is analyzed in the Economic Analysis,

reduce unreasonable risk to the extent necessary such that unreasonable risk is no longer presented. In achieving this result, however, the estimated costs of the final rule and the primary alternative regulatory action differ as described in Units I.E. and V.D.2. The costs of achieving the desired outcome via the final rule or the primary alternative regulatory action can be compared to evaluate cost-effectiveness. The measure of cost-effectiveness considered is the annualized cost of each regulatory option per microrisk reduction in cancer cases estimated to occur as a result of each regulatory option, where a microrisk refers to a one in one million reduction in the risk of a cancer case. The cost-effectiveness of the final rule ranges from \$681 to \$1,000 dollars per microrisk reduction at a 3% discount rate, and from \$656 to \$963 dollars per microrisk reduction at a 7% discount rate. The cost-effectiveness of the primary alternative regulatory action ranges from \$611 to \$897 dollars per microrisk reduction at a 3% discount rate, and from \$778 to \$1,142 dollars at a 7% discount rate.

The primary difference between the final and primary alternative option is that the alternative requires prescriptive controls for conditions of use which fall under the WCPP in the final rule. For two such conditions of use (Processing by incorporation into formulation, mixture, or reaction products in agricultural products manufacturing, vinyl chloride manufacturing, and other basic organic and inorganic chemical manufacturing; and Industrial and commercial use as a processing aid in the manufacture of agricultural products and vinyl chloride), the Economic Analysis analyzed a primary alternative action of prohibition for the vinyl chloride sub-uses only. In the proposed rule, EPA proposed prohibition for these sub-uses of vinyl chloride that at the time EPA did not have reasonably available information to indicate the uses were ongoing but later received public comments from one entity indicating that the incorporation of CTC into formulation, mixtures, or reaction products in vinyl chloride manufacturing and the industrial and commercial use of CTC as an industrial processing aid in the manufacture of vinyl chloride were ongoing. While the final rule requires a WCPP for these sub-uses, the primary alternative analyzes the costs and benefits of prohibiting these sub-uses of vinyl chloride.

Since the regulated universe in both the final and primary alternative regulatory actions is identical, the cost-effectiveness of the regulatory actions varies based on the differences in the

requirements of each action. Section 3.9 of the Economic Analysis provides a summary of the unquantified costs and uncertainties in the cost estimates that may impact the respective cost-effectiveness of the final rule and the primary alternative regulatory action considered.

VI. TSCA Section 9 Analysis and Section 26 Considerations

A. TSCA Section 9(a) Analysis

TSCA section 9(a) provides that, if the Administrator determines, in the Administrator's discretion, that an unreasonable risk may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA, the Administrator must submit a report to the agency administering that other law that describes the risk and the activities that present such risk. TSCA section 9(a) describes additional procedures and requirements to be followed by EPA and the other Federal agency following submission of any such report. As discussed in this unit, the Administrator does not determine that unreasonable risk from CTC under the conditions of use may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA. EPA's TSCA section 9(a) analysis is presented in Unit VII.A. of the proposed rule (88 FR 49215, July 28, 2023) (FRL-8206-01-OCSPP), and responses to comments about that analysis can be found in the Response Agree. Comments, Section 10.1 (Ref. 11).

TSCA section 9(d) instructs the Administrator to consult and coordinate TSCA activities with other Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burden of duplicative requirements. For this rulemaking, EPA has coordinated with appropriate Federal executive departments and agencies, including OSHA, to, among other things, identify their respective authorities, jurisdictions, and existing laws with regard to risk evaluation and risk management of CTC.

As discussed in more detail in the proposed rule, OSHA requires that employers provide safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education, and assistance. OSHA, in 1971, established a PEL for CTC of 10 ppm of air as an 8-hour TWA with an acceptable ceiling concentration of 25 ppm and an acceptable maximum peak above the acceptable ceiling concentration for an

eight-hour shift of 200 ppm, maximum duration of 5 minutes in any 4 hours. However, the exposure limits established by OSHA are higher than the exposure limit that EPA determined would be sufficient to address the unreasonable risk identified under TSCA from occupational inhalation exposures associated with certain conditions of use. Gaps exist between OSHA's authority to set workplace standards under the OSH Act and EPA's obligations under TSCA section 6 to eliminate unreasonable risk presented by chemical substances under the conditions of use, as further discussed in Units II.C. and VII.A. of the proposed rule.

EPA concludes that TSCA is the only regulatory authority able to prevent or reduce unreasonable risk of CTC to a sufficient extent across the range of conditions of use, exposures, and populations of concern. An action under TSCA is able to address occupational unreasonable risk and would reach entities that are not subject to OSHA. Moreover, the timeframe and any exposure reduction as a result of updating OSHA regulations for CTC cannot be estimated, while TSCA imposes a much more accelerated two-year statutory timeframe for proposing and finalizing requirements to address unreasonable risk. Finally, as discussed in greater detail in the proposed rule, the 2016 amendments to TSCA altered both the manner of identifying unreasonable risk and EPA's authority to address unreasonable risk, such that risk management is increasingly distinct from provisions of the OSH Act (88 FR 49180) (FRL-8206-01-OCSPP). For these reasons, in the Administrator's discretion, the Administrator has analyzed this issue and does not determine that unreasonable risk presented by CTC may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA.

B. TSCA Section 9(b) Analysis

If EPA determines that actions under other Federal laws administered in whole or in part by EPA could eliminate or sufficiently reduce a risk to health or the environment, TSCA section 9(b) instructs EPA to use these other authorities to protect against that risk "unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk" under TSCA. In making such a public interest finding, TSCA section 9(b)(2) states: "the Administrator shall consider, based on information reasonably available to the Administrator, all relevant aspects of

the risk . . . and a comparison of the estimated costs and efficiencies of the action to be taken under this title and an action to be taken under such other law to protect against such risk.”

Although several EPA statutes have been used to limit CTC exposure (Ref. 10), regulations under those EPA statutes largely regulate releases to the environment, rather than the occupational exposures. While these limits on releases to the environment may be protective in the context of their respective statutory authorities, regulation under TSCA is also appropriate for occupational exposures and in some cases can provide upstream protections that would prevent the need for release restrictions required by other EPA statutes (e.g., Resource Conservation and Recovery Act (RCRA), CAA, CWA). Updating regulations under other EPA statutes would not be sufficient to address the unreasonable risk of injury to the health of workers and occupational non-users who are exposed to CTC under its conditions of use. EPA’s TSCA section 9(b) analysis is presented in the proposed rule (88 FR 49216) (FRL–8206–01–OCSPP), and responses to comments on that analysis can be found in the Response to Comments, section 10.2 (Ref. 11).

For these reasons, the Administrator does not determine that unreasonable risk from CTC under its conditions of use, as evaluated in the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1), could be eliminated or reduced to a sufficient extent by actions taken under other Federal laws administered in whole or in part by EPA.

C. TSCA Section 14 Requirements

EPA is also providing notice to manufacturers, processors, and other interested parties about potential impacts to CBI. Under TSCA sections 14(a) and 14(b)(4), if EPA promulgates a rule pursuant to TSCA section 6(a) that establishes a ban or phase-out of a chemical substance, the protection from disclosure of any CBI regarding that chemical substance and submitted pursuant to TSCA will be “presumed to no longer apply,” subject to the limitations identified in TSCA section 14(b)(4)(B)(i) through (iii). Pursuant to TSCA section 14(b)(4)(B)(iii), the presumption against protection from disclosure will apply only to information about the specific conditions of use that this rule prohibits. Manufacturers or processors seeking to protect such information may submit a request for nondisclosure as provided by TSCA sections 14(b)(4)(C) and 14(g)(1)(E). Any request for nondisclosure must be submitted within

30 days after receipt of notice from EPA under TSCA section 14(g)(2)(A) stating EPA will not protect the information from disclosure. EPA anticipates providing such notice via the Central Data Exchange (CDX).

D. TSCA Section 26 Considerations

As explained in the 2023 proposed rule (88 FR 49216, July 29, 2023) (FRL–8206–01–OCSPP), EPA fulfilled TSCA section 26(h) by using scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science. Comments received on the proposed rule about whether EPA adequately assessed reasonably available information under TSCA section 26 on the risk evaluation, and responses to those comments, can be found in Section 10.4 of the Response to Comments document (Ref. 11).

VII. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Risk Evaluation for Carbon Tetrachloride (Methane, Tetrachloro-). EPA Document #EPA–740–R1–8014. October 2020. <https://www.regulations.gov/document/EPA-HQ-OPPT-2019-0499-0061>.
2. EPA. Correction of Dermal Acute Hazard and Risk Values in the Final Risk Evaluation for Carbon Tetrachloride. July 2022. (EPA–HQ–OPPT–2019–0499). <https://www.regulations.gov/document/EPA-HQ-OPPT-2019-0499-0064>.
3. EPA. Carbon Tetrachloride; Revision to Toxic Substances Control Act (TSCA) Risk Determination. December 2022. <https://www.regulations.gov/document/EPA-HQ-OPPT-2016-0733-0120>.
4. EPA. Memorandum of Communication between Syngenta and EPA Regarding Risk Management of Carbon Tetrachloride. October 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0024>.
5. EPA. Carbon Tetrachloride (CTC); Regulation Under the Toxic Substances Control Act (TSCA); Economic Analysis.
6. NIOSH. Hierarchy of Controls. <https://www.cdc.gov/niosh/topics/hierarchy/default.html> (accessed April 2024).
7. President Joseph R. Biden. The White House. The President and First Lady’s Cancer Moonshot: Ending Cancer As We Know It. <https://www.whitehouse.gov/>

[cancermoonshot/](https://www.whitehouse.gov/cancermoonshot/) (accessed February 26, 2024).

8. EPA. Access CDR Data: 2016 CDR Data (updated May 2020). Last Updated on May 16, 2022. <https://www.epa.gov/chemical-data-reporting/access-cdr-data#2016>.
9. EPA. Access CDR Data: 2020 CDR Data. Last Updated on May 16, 2022. <https://www.epa.gov/chemical-data-reporting/access-cdr-data>.
10. EPA. Regulatory Actions Pertaining to Carbon Tetrachloride (CTC). June 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0055>.
11. EPA. Carbon Tetrachloride (CTC); Regulation Under the Toxic Substances Control Act (TSCA); Response to Public Comments.
12. Executive Order 13985. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. **Federal Register** (86 FR 7009, January 25, 2021).
13. Executive Order 13990. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. **Federal Register** (86 FR 7037, January 25, 2021).
14. Executive Order 14008. Tackling the Climate Crisis at Home and Abroad. **Federal Register** (86 FR 7619, February 1, 2021).
15. EPA. Existing Chemical Exposure Limit (ECEL) for Occupational Use of Carbon Tetrachloride. February 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0113>.
16. EPA. Federalism Consultation on Risk Management Rulemakings for HBCD and Carbon Tetrachloride. December 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0033>.
17. EPA. Tribal Consultations on Risk Management Rulemakings for HBCD and Carbon Tetrachloride. January 6, 2021 and January 12, 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0041>.
18. EPA. Environmental Justice Consultations Risk Management Rulemakings for HBCD and Carbon Tetrachloride. February 2, 2021 and February 18, 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0034>.
19. EPA. Public Webinar on Carbon Tetrachloride: Risk Evaluation and Risk Management under TSCA Section 6. December 2020. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0006>.
20. EPA. Small Business Administration Small Business Environmental Roundtable Risk Evaluation and Risk Management under TSCA Section 6 for Carbon Tetrachloride. December 4, 2020.
21. EPA. Updated Stakeholder Meeting List for Rulemaking for Carbon Tetrachloride under TSCA Section 6(a). 2024.
22. EPA. EPA’s Policy on Children’s Health. October 5, 2021. <https://www.epa.gov/children/childrens-health-policy-and-plan#A1>.
23. EPA. Public Webinar Carbon Tetrachloride: Risk Evaluation and Risk Management under TSCA Section 6. August 15, 2023.

24. EPA. Meeting with Olin 11.20.23. December 7, 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0148>.
25. Christopher M. Kolodziej. Christopher M. Kennedy Comment. EPA-HQ-OPPT-2020-0592-0135. September 11, 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0135>.
26. Michael Kennedy. American Petroleum Institute (API) Comment. EPA-HQ-OPPT-2020-0592-0129. September 7, 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0129>.
27. Mark Ames. AIHA Comment. EPA-HQ-OPPT-2020-0592-0126. August 29, 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0126>.
28. Danielle Jones. The Chemours Company Comment. EPA-HQ-OPPT-2020-0592-0134. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0134>.
29. W. Caffey Norman. Halogenated Solvents Industry Alliance, Inc. (HSIA) Comment. EPA-HQ-OPPT-2020-0592-0133. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0133>.
30. LeaAnne Forest. American Chemistry Council (ACC) Comment. EPA-HQ-OPPT-2020-0592-0140. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0140>.
31. Paul DeLeo. American Chemistry Council (ACC) Comment. EPA-HQ-OPPT-2020-0592-0142. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0142>.
32. Martin J. Durbin. US Chamber of Commerce Comment. EPA-HQ-OPPT-2020-0592-0137. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0137>.
33. Melanie Barrett, Nancy Kahl. MilliporeSigma Comment. EPA-HQ-OPPT-2020-0592-0128. September 5, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0128>.
34. Lawrence E. Cullen. Chemical Users Coalition (CUC) Comment. EPA-HQ-OPPT-2020-0592-0130. September 8, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0130>.
35. Michael Kelly. Honeywell International Inc. (Honeywell) Comment. EPA-HQ-OPPT-2020-0592-0144. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0144>.
36. Scott Sutton. Olin Comment. EPA-HQ-OPPT-2020-0592-0127. August 31, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0127>.
37. American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and United Steelworkers (USW). AFL-CIO and USW Comment. EPA-HQ-OPPT-2020-0592-0138. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0138>.
38. James Cooper. American Fuel & Petrochemical Manufacturers (AFPM) Comment. EPA-HQ-OPPT-2020-0592-0143. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0143>.
39. William E. Allmond IV. Adhesive and Sealant Council (ASC) Comment. EPA-HQ-OPPT-2020-0592-0139. September 11, 2023. <https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0592-0139>.
40. OSHA. OSHA 1999 Multi-Employer Citation Policy. Accessed 10/27/2023. <https://www.osha.gov/enforcement/directives/cpl-02-00-124>.
41. EPA. Final Scope of the Risk Evaluation for 1,2-Dichloroethane (CASRN 107-06-2). August 2020. (EPA-HQ-OPPT-2018-0427-0048). <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0071>.
42. OSHA. Final Rule. Occupational Exposure to Methylene Chloride. **Federal Register** (62 FR 1494, January 10, 1997). <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0720-0073>.
43. OSHA. OSHA Technical Manual (OTM) Section II: Chapter 1. Personal Sampling for Air Contaminants. Last updated on September 14, 2023. <https://www.osha.gov/otm/section-2-health-hazards/chapter-1>.
44. NIOSH. Letter to Claudia Menasche from J. Raymond Wells. EPA's Carbon Tetrachloride Risk Management Rule under TSCA Section 6. June 28, 2024.
45. OSHA. Personal Protective Equipment. May 4, 2023. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0087>.
46. The Program Executive Office, Assembled Chemical Weapons Alternatives (PEO ACWA). U.S. Chemical Weapons Destruction 2018. May 2018. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0020>.
47. EPA. Guidelines for Carcinogen Risk Assessment. March 2005. <https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment>.
48. EPA. Carbon Tetrachloride: Fenceline Technical Support—Water Pathway. October 2022. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0047>.
49. EPA. Final Rule. National Emission Standards for Hazardous Air Pollutants: Carbon Black Production and Cyanide Chemicals Manufacturing Residual Risk and Technology Reviews, and Carbon Black Production Area Source Technology Review. **Federal Register** (86 FR 66096, November 19, 2021).
50. EPA. Carbon Tetrachloride: Fenceline Technical Support—Ambient Air Pathway. October 2022. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0050>.
51. EPA. Technical Support Document EPA's Air Toxics Screening Assessment 2018 AirToxScreen TSD. Document number EPA-452/B-22-002. August 2022. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0042>.
52. Weitekamp. C. et al. 2021. An Examination of National Cancer Risk Based on Monitored Hazardous Air Pollutants. *Environmental Health Perspectives*. Vol. 129, No. 3. <https://ehp.niehs.nih.gov/doi/full/10.1289/EHP8044>.
53. Myhre, G., D. Shindell, F.-M. Bréon, W. Collins, J. Fuglestedt, J. Huang, D. Koch, J.-F. Lamarque, D. Lee, B. Mendoza, T. Nakajima, A. Robock, G. Stephens, T. Takemura and H. Zhang, 2013: Anthropogenic and Natural Radiative Forcing. In: *Climate Change 2013: The Physical Science Basis*. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_Chapter08_FINAL.pdf.
54. Halogenated Solvents Industry Alliance, Inc. (HSIA). Comments submitted to EPA on the Carbon Tetrachloride Risk Evaluation and the Risk Management Process. April 28, 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0003>.
55. Office of Management and Budget. March 31, 1995. OMB M-95-09, Memorandum for the Heads of Executive Departments and Agencies. Guidance for Implementing Title II of S. 1. https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/1995-1998/m95-09.pdf.
56. EPA. Supporting Statement for an Information Collection Request (ICR) Under the Paperwork Reduction Act (PRA); Regulation of Carbon Tetrachloride under TSCA Section 6(a) (Final Rule; RIN 2070-AK82). 2024.
57. Kevin Ashley. 2015. Harmonization of NIOSH Sampling and Analytical Methods with Related International Voluntary Consensus Standards. *J Occup Environ Hyg*. 12(7): D107-15. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0592-0032>.

VIII. Statutory and Executive Order Reviews

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

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

This action is a “significant regulatory action” as defined in Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866

review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Economic Analysis of the Regulation of Carbon Tetrachloride Under TSCA Section 6(a)* (Ref. 5), is available in the docket and summarized in Units I.E. and V.D.

B. Paperwork Reduction Act (PRA)

The information collection activities in this final rule have been submitted to OMB for approval under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2744.02 and OMB Control No. 2070-0228 (Ref. 56). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them. There are two primary provisions of the final rule that may increase burden under the PRA. The first is downstream notification, which would be carried out by updates to the relevant SDS and which will be required for manufacturers, processors, and distributors in commerce of CTC, who will provide notice to companies downstream upon shipment of CTC about the prohibitions. The information submitted to downstream companies through the SDS will provide knowledge and awareness of the restrictions to these companies.

The second primary provision of the final rule that may increase burden under the PRA is WCPP-related information generation, recordkeeping, and notification requirements (including development of exposure control plans; exposure level monitoring and related recordkeeping; development of documentation for a PPE program and related recordkeeping; development of documentation for a respiratory protection program and related recordkeeping; development and notification to potentially exposed persons (employees and others in the workplace) about how they can access the exposure control plans, exposure monitoring records, PPE program implementation documentation, and respirator program documentation; ordinary business records, such as invoices and bills-of-lading related to the continued distribution of CTC in commerce, as well as records documenting compliance with the proposed workplace chemical protection program requirements and proposed restrictions on the laboratory use of CTC.

Respondents/affected entities:

Persons that manufacture, process, use, distribute in commerce or dispose of carbon tetrachloride (see Unit I.A.).

Respondent's obligation to respond:

Mandatory under TSCA section 6(a) and 40 CFR part 751.

Estimated number of respondents: 72.

Frequency of response: On occasion.

Total estimated burden: 86,186 hours per year. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$14,800,653 per year, including \$9,360,626 in annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses that manufacture/import, process, or distribute the chemicals subject to this final rule. The Agency identified seven small firms in the small entity analysis that are potentially subject to the rule. The names and NAICS codes of these entities can be found in Section 6.2.2 of the Economic Analysis (Ref. 5). It is estimated that five of the seven small companies would incur a rule cost-to-company revenue impact ratio of less than one percent, and two companies would experience an impact of between one and three percent. The companies estimated to experience a greater than one percent rule cost-to-revenue impact would potentially be subject to the rule under the Disposal and the Manufacturing conditions of use, both of which would require a WCPP under the final rule. To avoid understating impacts to small entities, EPA used the highest per-facility cost presented in the EA (\$615,457). Per-facility costs were estimated by dividing the total costs by the number of affected facilities for each use. Details of this analysis are in the Economic Analysis (Ref. 5), which is in the docket for this action. Based on the low number of affected small entities

and the low impact, EPA does not expect this action to have a significant impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million (in 1995 dollars and adjusted annually for inflation) or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action will affect entities that use CTC. It is not expected to affect State, local or Tribal governments because the use of CTC by government entities is minimal. The costs involved in this action are estimated not to exceed \$183 million in 2023\$ (\$100 million in 1995\$ adjusted for inflation using the GDP implicit price deflator) or more in any one year. The total quantified annualized social cost of the final rule is \$19,736,400 (at 3% discount rate) and \$18,995,752 (at 7% discount rate).

E. Executive Order 13132: Federalism

EPA has concluded that this action has federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because regulation under TSCA section 6(a) may preempt State law. EPA provides the following preliminary federalism summary impact statement. The Agency consulted with State and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. This included a consultation meeting on December 17, 2020. EPA invited the following national organizations representing State and local elected officials to this meeting: National Governors Association; National Conference of State Legislatures, Council of State Governments, National League of Cities, U.S. Conference of Mayors, National Association of Counties, International City/County Management Association, National Association of Towns and Townships, County Executives of America, and Environmental Council of States. A summary of the meeting with these organizations, including the views that they expressed, is available in the docket (Ref. 16). EPA provided an opportunity for these organizations to provide follow-up comments in writing but did not receive any such comments.

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

This action does not have Tribal implications as specified in Executive

Order 13175 (65 FR 67249, November 9, 2000) because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. CTC is not manufactured, processed, or distributed in commerce by Tribes, and therefore, this rulemaking would not impose substantial direct compliance costs on Tribal governments. Thus, Executive Order 13175 does not apply to this action.

Notwithstanding the lack of Tribal implications as specified by Executive Order 13175, EPA consulted with Tribal officials during the development of this action, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, which EPA applies more broadly than Executive Order 13175.

The Agency held a Tribal consultation from December 7, 2020, through March 12, 2021, with meetings held on January 6 and 12, 2021. Tribal officials were given the opportunity to meaningfully interact with EPA concerning the current status of risk management. During the consultation, EPA discussed risk management under TSCA section 6(a), findings from the 2020 Risk Evaluation for Carbon Tetrachloride, types of information to inform risk management, principles for transparency during risk management, and types of information EPA sought from Tribes (Ref. 17). EPA briefed Tribal officials on the Agency's risk management considerations and Tribal officials raised no related issues or concerns to EPA during or in follow-up to those meetings (Ref. 17). EPA received no written comments as part of this consultation.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not a significant regulatory action under section 3(f)(1) of Executive Order 12866, and because EPA does not believe that the environmental health or safety risks addressed by this action will have a disproportionate risk to children as reflected by the conclusions of the CTC

risk evaluation. This action's health and risk assessments and impacts on both children and adults from occupational use from inhalation and dermal exposures are described in Units II.C.3, V.A., and the 2020 Risk Evaluation for Carbon Tetrachloride (Ref. 1). While the Agency found risks to children and adults from occupational use, the Agency determined that risks to children were not disproportionate. EPA's *Policy on Children's Health* applies to this action. Information on how the Policy was applied and on the action's health and risk assessments are contained in Unit II.D.2.c., and the 2020 Risk Evaluation for CTC and the Economic Analysis for this final rule (Refs. 1, 5).

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

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

I. National Technology Transfer and Advancement Act (NTTAA)

Pursuant to the NTTAA section 12(d), 15 U.S.C. 272, the Agency has determined that this rulemaking involves environmental monitoring or measurement, specifically for occupational inhalation exposures to CTC. Consistent with the Agency's Performance Based Measurement System (PBMS), EPA will not require the use of specific, prescribed analytic methods. Rather, the Agency will allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

For this rulemaking, the key consideration for the PBMS approach is the ability to accurately detect and measure airborne concentrations of CTC at the ECEL and the ECEL action level. Some examples of methods which meet the criteria are included in the appendix of the ECEL memo (Ref. 15). EPA recognizes that there may be voluntary

consensus standards that meet the proposed criteria (Ref. 57).

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

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns in accordance with Executive Orders 12898 (59 FR 7629, February 16, 1994) and 14096 (88 FR 25251, April 26, 2023). As described more fully in the Economic Analysis for this rulemaking (Ref. 5), EPA analyzed the baseline conditions facing communities near CTC and HFO manufacturing facilities as well as those of workers in the same industry and county as CTC facilities and HFO manufacturing facilities. The analysis of local demographics found that, across the entire population within 1- and 3-miles of CTC facilities, there are higher percentages of people who identify as Black and living below the poverty line and a similar percentage of people who identify as Hispanic compared to the national averages. CTC facilities are concentrated in Texas and Louisiana, especially near Houston and Baton Rouge. As summarized in Unit V.A., the screening level fenceline analysis for CTC calculated risk estimates to select populations within the general population living or working near particular facilities exceeding the 1×10^{-6} benchmark value (Ref. 49). In cases where communities with environmental justice concerns are also fenceline communities, EPA expects that the finalized prohibition of increased emissions associated with WCPP requirements would prevent an increase in health and environmental impacts due to this rule.

The worker analysis was performed at the county and industry level. In eight of the 12 counties with CTC facilities that reported Basic Chemical Manufacturing, workers who identify as Black were over-represented compared to their percentage of the national demographics for that industry; at the national level, 11% of workers in the Basic Chemical Manufacturing industry identify as Black. In addition, there were eight counties with CTC facilities that reported Waste Treatment and Disposal; workers in that industry in those counties were more likely to earn less than the national average for that industry across several demographic

groups, as outlined in the Economic Analysis.

EPA believes that it is not practicable to assess whether this action is likely to result in disproportionate and adverse effects on communities with environmental justice concerns. EPA was unable to quantify the distributional effects of the regulatory action under consideration and compare them to baseline conditions for several reasons. Limitations include a lack of data regarding exposure reductions that will occur as a result of the rule and on the sociodemographic characteristics of workers in CTC facilities. Another key limitation that prevents evaluation of the distributional effects of the rule is a lack of knowledge of the actions regulated entities will take in response to the rule.

EPA additionally identified and addressed environmental justice concerns by conducting outreach to advocates of communities that might be subject to disproportionate exposure to CTC. On February 2 and 18, 2021, EPA held public meetings as part of this consultation. These meetings were held pursuant to and in compliance with Executive Order 12898 and Executive Order 14008, entitled “Tackling the Climate Crisis at Home and Abroad” (86 FR 7619, February 1, 2021). EPA received one written comment following these public meetings, in addition to oral comments provided during the meetings (Ref. 18). Commenters supported strong regulation of CTC to protect lower-income communities and workers. In addition, commenters recommended EPA conduct analysis of additional exposure pathways, including air and water.

The information supporting this Executive Order review is contained in Units I.E., II.D., V.D., VI.A. and in the Economic Analysis (Ref. 5). EPA’s presentations and fact sheets for the environmental justice consultations related to this rulemaking, are available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/materials-june-and-july-2021-environmental-justice>. These materials and a summary of the consultation are also available in the public docket for this rulemaking.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Michael S. Regan,
Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR chapter I is amended to read as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Add subpart H to read as follows:

Subpart H—Carbon Tetrachloride

Sec.

751.701 General.

751.703 Definitions.

751.705 Prohibition of Certain Industrial and Commercial Uses and Manufacturing, Processing, and Distribution in Commerce of Carbon Tetrachloride for those Uses.

751.707 Workplace Chemical Protection Program (WCPP).

751.709 Workplace Restrictions for the Industrial and Commercial Use as a Laboratory Chemical, Including the Use of Carbon Tetrachloride as a Laboratory Chemical by the U.S. Department of Defense.

751.711 Downstream Notification.

751.713 Recordkeeping Requirements.

§ 751.701 General.

(a) *Applicability.* This subpart sets certain restrictions on the manufacture (including import), processing, distribution in commerce, use, or disposal of carbon tetrachloride (CASRN 56–23–5) to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a).

(b) *Trace quantities exclusion.* Unless otherwise specified in this subpart, the prohibitions and restrictions of this subpart do not apply to carbon tetrachloride that is solely present unintentionally in trace quantities with another chemical substance or mixture.

(c) *Owner and operator requirements.* Any requirement for an owner or operator, or an owner and operator, is a requirement for any individual that is either an owner or an operator.

§ 751.703 Definitions.

The definitions in subpart A of this part apply to this Subpart unless otherwise specified in this section. In

addition, the following definitions apply:

ECEL has the same meaning as in § 751.5 and for CTC, is an airborne concentration of carbon tetrachloride of 0.03 parts per million (ppm) calculated as an eight (8)-hour time-weighted average (TWA).

ECEL action level means a concentration of airborne carbon tetrachloride of 0.02 parts per million (ppm) calculated as an eight (8)-hour time-weighted average (TWA).

§ 751.705 Prohibition of Certain Industrial and Commercial Uses and Manufacturing, Processing, and Distribution in Commerce of Carbon Tetrachloride for Those Uses.

(a) Prohibitions. (1) After June 16, 2025, all persons are prohibited from manufacturing, processing, distributing in commerce (including making available) and using carbon tetrachloride for the following conditions of use:

(i) Processing condition of use: Incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride.

(ii) Industrial and commercial conditions of use:

(A) Industrial and commercial use as an industrial processing aid in the manufacture of petrochemicals-derived products except in the manufacture of vinyl chloride.

(B) Industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine.

(C) Industrial and commercial use in metal recovery.

(D) Industrial and commercial use as an additive.

(2) After December 18, 2025, all persons are prohibited from manufacturing, processing, distributing in commerce (including making available) and using carbon tetrachloride for industrial and commercial specialty uses by the U.S. Department of Defense except as provided in § 751.709.

(b) [Reserved].

§ 751.707 Workplace Chemical Protection Program (WCPP).

(a) *Applicability.* The provisions of this section apply to the following conditions of use of carbon tetrachloride, including manufacturing and processing for export, except to the

extent the conditions of use are prohibited by § 751.705:

(1) Domestic manufacture, except where carbon tetrachloride is manufactured solely as a byproduct.

(2) Import.

(3) Processing as a reactant in the production of hydrochlorofluorocarbons, hydrofluorocarbons, hydrofluoroolefins and perchloroethylene.

(4) Processing: Incorporation into formulation, mixture, or reaction products for agricultural products manufacturing, vinyl chloride manufacturing, and other basic organic and inorganic chemical manufacturing.

(5) Processing: Repackaging for use as a laboratory chemical.

(6) Processing: Recycling.

(7) Industrial and commercial use as an industrial processing aid in the manufacture of agricultural products and vinyl chloride.

(8) Industrial and commercial use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine.

(9) Disposal.

(b) *Existing chemical exposure limit (ECEL)*—(1) *Eight-hour time-weighted average (TWA) ECEL*. Beginning September 20, 2027 for Federal agencies or Federal contractors acting for or on behalf of the Federal government, or by September 9, 2026 for non-Federal owners and operators, or beginning four months after introduction of carbon tetrachloride into the workplace if carbon tetrachloride commences after June 11, 2026, the owner or operator

must ensure that no person is exposed to an airborne concentration of carbon tetrachloride in excess of the ECEL, consistent with the requirements of paragraph (d)(1)(i) of this section and, if necessary, paragraph (f) of this section.

(2) *Exposure monitoring*—(i) *General*. (A) Owners or operators must determine each potentially exposed person's exposure, without regard to respiratory protection, by either:

(1) Taking a personal breathing zone air sample of each potentially exposed person's exposure; or

(2) Taking personal breathing zone air samples that are representative of the 8-hour TWA of each exposure group.

(B) Personal breathing zone air samples are representative of the 8-hour TWA of all potentially exposed persons in an exposure group if the samples are of at least one person's full-shift exposure who represents the highest potential carbon tetrachloride exposures in that exposure group. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts.

(C) Exposure samples must be analyzed using an appropriate analytical method by a laboratory that complies with the Good Laboratory Practice Standards in 40 CFR part 792 or a laboratory accredited by the American Industrial Hygiene Association (AIHA) or another industry-recognized program.

(D) Owners or operators must ensure that methods used to perform exposure

monitoring produce results that are accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of carbon tetrachloride.

(E) Owners and operators must re-monitor within 15 working days after receipt of any exposure monitoring when results indicate non-detect, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the exposure monitoring results and determines re-monitoring is not necessary.

(ii) *Initial monitoring*. By June 21, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by June 11, 2026 for non-Federal owners and operators, or within 30 days of introduction of carbon tetrachloride into the workplace, whichever is later, each owner or operator covered by this section must perform initial monitoring of potentially exposed persons. Where the owner or operator has monitoring results from monitoring conducted within five years prior to February 18, 2025 and the monitoring satisfies all other requirements of this section, the owner or operator may rely on such earlier monitoring results to satisfy the requirements of this paragraph (b)(2)(ii).

(iii) *Periodic monitoring*. The owner or operator must establish an exposure monitoring program for periodic monitoring of exposure to carbon tetrachloride in accordance with Table 1.

TABLE 1 TO § 751.707(b)(3)(iii)—PERIODIC MONITORING REQUIREMENTS

Air concentration condition	Periodic exposure monitoring requirement
If all initial exposure monitoring is below the ECEL action level (<0.02 ppm 8-hour TWA).	Periodic exposure monitoring is required at least once every five years.
If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (> 0.03 ppm 8-hour TWA).	Periodic exposure monitoring is required within three months of the most recent exposure monitoring.
If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥0.02 ppm 8-hour TWA, ≤0.03 ppm 8-hour TWA).	Periodic exposure monitoring is required within six months of the most recent exposure monitoring.
If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart within a 6-month period, indicate exposure is below the ECEL action level (<0.02 ppm 8-hour TWA).	Periodic exposure monitoring is required within five years of the most recent exposure monitoring.
If the owner or operator engages in a condition of use for which WCPP ECEL would be required but does not manufacture, process, use, or dispose of carbon tetrachloride in that condition of use over the entirety of time since the last required monitoring event.	The owner or operator may forgo the next periodic exposure monitoring event. However, documentation of cessation of use of carbon tetrachloride is required; and periodic monitoring would be required when the owner or operator resumes the condition of use.

(iv) *Additional exposure monitoring*. (A) The owner or operator must conduct additional exposure monitoring within a reasonable timeframe whenever there has been a change in the production, process, control equipment, personnel or work practices that may reasonably be expected to result in new or additional exposures above the ECEL or when the owner or operator has any reason to believe that new or additional

exposures above the ECEL action level have occurred.

(B) Whenever start-ups or shutdowns, or ruptures, malfunctions or other breakdowns or unexpected releases occur that may lead to exposure to

potentially exposed persons, the owner or operator must conduct the additional exposure monitoring within a reasonable timeframe after the conclusion of the start-up or shutdown and/or the cleanup, repair or remedial action of the malfunction or other breakdown or unexpected release. Prior monitoring data cannot be used to meet this requirement.

(v) *Observation of monitoring.* (A) Owners and operators must provide potentially exposed persons or their designated representatives an opportunity to observe any monitoring of occupational exposure to CTC that is conducted under this section and designed to characterize their exposure.

(B) When monitoring observation requires entry into a regulated area, the owner or operator must provide the observers with the required PPE.

(C) Only persons who are authorized to have access to facilities classified in the interest of national security must be permitted to observe exposure monitoring conducted in such facilities.

(vi) *Notification of monitoring results.* (A) The owner or operator must inform each person whose exposures are monitored or who is part of a monitored exposure group and their designated representatives of any monitoring results within 15 working days of receipt of those monitoring results.

(B) This notification must include the following:

- (1) Exposure monitoring results;
- (2) Identification and explanation of the ECEL and ECEL action level;
- (3) Statement of whether the monitored airborne concentration of carbon tetrachloride exceeds the ECEL action level or ECEL;
- (4) If the ECEL is exceeded, descriptions of any exposure controls implemented by the owner or operator to reduce exposures to or below the ECEL, as required by paragraph (d)(1) of this section;
- (5) Explanation of any required respiratory protection provided in accordance with paragraphs (b)(3)(iv), (d)(1)(i), and (f) of this section;
- (6) Quantity of carbon tetrachloride in use at the time of monitoring;
- (7) Location of carbon tetrachloride use at the time of monitoring;
- (8) Manner of carbon tetrachloride use at the time of monitoring; and
- (9) Identified releases of carbon tetrachloride;

(C) Notice must be written in plain language and either provided to each potentially exposed person and their designated representatives individually in a language that the person understands, or posted in an appropriate and accessible location

outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(3) *Regulated areas*—(i) *Establishment.* By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by September 9, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, the owner or operator must establish and maintain a regulated area wherever airborne concentrations of carbon tetrachloride exceeds or can reasonably be expected to exceed the ECEL.

(ii) *Access.* The owner or operator must limit access to regulated areas to authorized persons.

(iii) *Demarcation.* The owner or operator must demarcate regulated areas from the rest of the workplace in a manner that adequately establishes and alerts persons to the boundaries of the area and minimizes the number of authorized persons exposed to carbon tetrachloride within the regulated area.

(iv) *Provisions of respirators.* (A) The owner or operator must ensure that each person who enters a regulated area is supplied with a respirator selected in accordance with paragraph (f) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever carbon tetrachloride exposures may exceed the ECEL.

(B) An owner or operator who has implemented all feasible controls as required in paragraph (d)(1)(i) of this section, and who has established a regulated area as required by paragraph (b)(3)(i) of this section where carbon tetrachloride exposure can be reliably predicted to exceed the ECEL only on certain days (for example, because of work or process schedule) must have persons use respirators in that regulated area on those days.

(v) *Prohibited activities.* (A) The owner or operator must ensure that, within a regulated area, persons do not engage in non-work activities which may increase CTC exposure.

(B) The owner or operator must ensure that while persons are wearing respirators in the regulated area, they do not engage in activities which interfere with respirator performance.

(c) *Direct dermal contact controls (DDCC).* Beginning September 20, 2027 for Federal agencies or Federal contractors acting for or on behalf of the Federal government, or by June 16, 2025 for non-Federal owners and operators,

or within 30 days of introduction of carbon tetrachloride into the workplace, whichever is later, owners or operators must ensure that all persons are separated, distanced, physically removed, or isolated to prevent direct dermal contact with carbon tetrachloride or from contact with equipment or materials on which carbon tetrachloride may exist consistent with the requirements of paragraph (d)(1)(ii) of this section and, if necessary, paragraph (f) of this section.

(d) *Exposure control procedures and plan*—(1) *Methods of compliance*—(i) *ECEL.* (A) By December 3, 2027, the owner or operator must institute one or a combination of elimination, substitution, engineering controls, or administrative controls to reduce exposure to or below the ECEL except to the extent that the owner or operator can demonstrate that such controls are not feasible, in accordance with the hierarchy of controls.

(B) If the feasible controls required under paragraph (d)(1)(i)(A) of this section that can be instituted do not reduce exposures for potentially exposed persons to or below the ECEL, then the owner or operator must use such controls to reduce exposure to the lowest levels achievable by these controls and must supplement those controls with the use of respiratory protection that complies with the requirements of paragraph (f) of this section.

(C) Where an owner or operator cannot demonstrate exposure to carbon tetrachloride has been reduced to or below the ECEL through the use of controls required under paragraphs (d)(1)(i)(A) and (B) of this section, and has not demonstrated that it has appropriately supplemented with respiratory protection that complies with the requirements of paragraph (f) of this section, this will constitute a failure to comply with the ECEL.

(D) The owner or operator must ensure that any engineering controls instituted under paragraph (d)(1)(i)(A) of this section do not increase emissions of carbon tetrachloride to ambient air outside the workplace.

(ii) *Direct dermal contact controls (DDCC).* (A) The owner or operator must institute one or a combination of elimination, substitution, engineering controls, or administrative controls to prevent all persons from direct dermal contact with carbon tetrachloride except to the extent that the owner or operator can demonstrate that such controls are not feasible.

(B) If the feasible controls required under paragraph (d)(1)(ii)(A) of this section that can be instituted do not

prevent direct dermal contact with carbon tetrachloride, then the owner or operator must use such controls to reduce direct dermal contact to the extent achievable by these controls and must supplement those controls by the use of dermal protection that complies with the requirements of paragraph (f) of this section.

(C) Where an owner or operator cannot demonstrate that direct dermal contact to carbon tetrachloride is prevented through the use of controls required under paragraphs (d)(1)(ii)(A) and (B) of this section, and has not demonstrated that it has appropriately supplemented with dermal protection that complies with the requirements of paragraph (f) of this section, this will constitute a failure to comply with the DDCC requirements.

(2) *Exposure control plan.* By December 3, 2027, each owner and operator must establish and implement an exposure control plan.

(i) *Exposure control plan contents.* The exposure control plan must include documentation of the following:

(A) Identification of exposure controls that were considered, including those that were used or not used to meet the requirements of paragraphs (d)(1)(i)(A) and (d)(1)(ii)(A) of this section, in the following sequence: elimination, substitution, engineering controls and administrative controls;

(B) For each exposure control considered, a rationale for why the exposure control was selected or not selected based on feasibility, effectiveness, and other relevant considerations;

(C) A description of actions the owner or operator must take to implement exposure controls selected, including proper installation, regular inspections, maintenance, training or other actions;

(D) A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;

(E) Attestation that exposure controls selected do not increase emissions of carbon tetrachloride to ambient air outside of the workplace and whether additional equipment was installed to capture or otherwise prevent increased emissions of carbon tetrachloride to ambient air;

(F) Description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls;

(G) An explanation of the procedures for responding to any change that may reasonably be expected to introduce

additional sources of exposure to carbon tetrachloride, or otherwise result in increased exposure to carbon tetrachloride, including procedures for implementing corrective actions to mitigate exposure to carbon tetrachloride.

(ii) *Exposure control plan requirements.* (A) The owner or operator must not implement a schedule of personnel rotation as a means of compliance with the ECEL.

(B) The owner or operator must maintain the effectiveness of any controls instituted under this paragraph (d).

(C) The exposure control plan must be reviewed and updated as necessary, but at least every five years, to reflect any significant changes in the status of the owner or operator's approach to compliance with paragraphs (b) through (d) of this section.

(iii) *Availability of exposure control plan.* (A) Owners or operators must make the exposure control plan and associated records, including ECEL exposure monitoring records, ECEL compliance records, DDCC compliance records, and workplace participation records described in § 751.713(b), available to potentially exposed persons and their designated representatives.

(B) Owners or operators must notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records within 30 days of the date that the exposure control plan is completed and at least annually thereafter.

(C) Notice of the availability of the exposure control plan and associated records must be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(D) Upon request by the potentially exposed person or their designated representative(s), the owner or operator must provide the specified records at a reasonable time, place, and manner. If the owner or operator is unable to provide the requested records within 15 days, the owner or operator must, within those 15 days, inform the potentially exposed person or designated representative(s) requesting the record(s) of the reason for the delay and the earliest date when the record will be made available.

(e) *Workplace information and training.* (1) By September 20, 2027 for

Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by September 9, 2026 for non-Federal owners and operators, the owner or operator must institute a training program and ensure that persons potentially exposed to carbon tetrachloride participate in the program according to the requirements of this paragraph (e).

(2) The owner or operator must ensure that each potentially exposed person is trained prior to or at the time of a potential exposure to carbon tetrachloride.

(3) The owner or operator must ensure that information and training is presented in a manner that is understandable to each person required to be trained and in multiple languages as appropriate, such as, based on languages spoken by potentially exposed persons in the workplace.

(4) The following information and training must be provided to all persons potentially exposed to carbon tetrachloride:

(i) The requirements of this section, as well as how to access or obtain a copy of these requirements in the workplace;

(ii) The quantity, location, manner of use, release, and storage of carbon tetrachloride and the specific operations in the workplace that could result in exposure to carbon tetrachloride, particularly noting where each regulated area is located;

(iii) Methods and observations that may be used to detect the presence or release of carbon tetrachloride in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance or odor of carbon tetrachloride when being released);

(iv) The acute and chronic health hazards of carbon tetrachloride as detailed on relevant Safety Data Sheets; and

(v) The principles of safe use and handling of carbon tetrachloride and measures potentially exposed persons can take to protect themselves from carbon tetrachloride, including specific procedures the owner or operator has implemented to protect potentially exposed persons from exposure to carbon tetrachloride, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

(5) The owner or operator must re-train each potentially exposed person as necessary, but at minimum annually, to ensure that each such person maintains the requisite understanding of the principles of safe use and handling of carbon tetrachloride in the workplace.

(6) Whenever there are workplace changes, such as modifications of tasks or procedures or the institution of new tasks or procedures, that increase exposure, and where such exposure exceeds or can reasonably be expected to exceed the ECEL action level or increase potential for direct dermal contact with carbon tetrachloride, the owner or operator must update the training as necessary to ensure that each potentially exposed person is re-trained.

(f) *Personal protective equipment (PPE).* (1) *General.* The provisions of this paragraph (f) apply to any owner or operator that is required to provide respiratory protection pursuant to paragraphs (b)(3)(iv) or (d)(1)(i)(B) of this section or dermal protection pursuant to paragraphs (c) or (d)(1)(ii)(B) of this section or § 751.709(b)(3) or (4).

(2) *Respiratory protection.* (i) By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by September 9, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, if an owner or operator is required to provide respiratory protection pursuant to paragraph (f)(1) of this section, the owner or operator must ensure that each potentially exposed person is provided with a respirator according to the requirements of this section.

(ii) For purposes of this paragraph (f)(2), cross-referenced provisions in 29 CFR 1910.134 applying to an “employee” apply equally to potentially exposed persons and cross-referenced provisions applying to an “employer” also apply equally to owners or operators. Other terms in cross-referenced provisions in 29 CFR 1910.134 that are defined in 29 CFR 1910.134(b) have the meaning assigned to them in that paragraph.

(iii) By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by September 9, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, if an owner or operator is required to provide respiratory protection pursuant to (f)(1) of this section, the owner or operator must develop and administer a written respiratory protection program consistent with the requirements of 29 CFR 1910.134(c)(1), (c)(3) and (c)(4).

(iv) Owners and operators must select respiratory protection required by paragraph (f)(2)(i) of this section based

on a medical evaluation consistent with the requirements of 29 CFR 1910.134(e). If a potentially exposed person cannot use a negative-pressure respirator that would otherwise be required by paragraph (f)(1) of this section, then the owner or operator must provide that person with an alternative respirator. The alternative respirator must have less breathing resistance than the negative-pressure respirator and provide equivalent or greater protection. If the person is unable to use an alternative respirator, then the person must not be permitted to enter the regulated area.

(v) Owners and operators must select respiratory protection that properly fits each affected person and communicate respirator selections to each affected person consistent with the requirements of 29 CFR 1910.134(f).

(vi) Owners and operators must provide, ensure use of, and maintain (in a sanitary, reliable, and undamaged condition) respiratory protection that is of safe design and construction for the applicable condition of use consistent with the requirements of 29 CFR 1910.134(g) through (j).

(vii) Prior to or at the time of initial assignment to a job involving potential exposure to carbon tetrachloride, owners and operators must provide training to all persons required to use respiratory protection consistent with 29 CFR 1910.134(k).

(viii) Owners and operators must retrain all persons required to use PPE at least annually, or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in PPE to be used render the previous training obsolete.

(ix) Owners or operators must select and provide to persons appropriate respirators as indicated by the most recent monitoring results as follows:

(A) If the measured exposure concentration is at or below the 0.03 ppm: no respiratory protection is required.

(B) If the measured exposure concentration is above 0.03 ppm and less than or equal to 0.3 ppm (10 times ECEL): Any National Institute for Occupational Safety and Health (NIOSH)-Approved air-purifying half mask respirator equipped with organic vapor cartridges or canisters; or any NIOSH Approved Supplied-Air Respirator (SAR) or Airline Respirator operated in demand mode equipped with a half mask; or any NIOSH Approved Self-Contained Breathing Apparatus (SCBA) in demand mode equipped with a half mask [APF 10].

(C) If the measured exposure concentration is above 0.3 ppm and less than or equal to 0.75 ppm (25 times ECEL): Any NIOSH Approved Powered Air-Purifying Respirator (PAPR) equipped with a loose-fitting facepiece or hood/helmet equipped with organic vapor cartridges or canisters; any NIOSH Approved continuous flow supplied air respirator equipped with a loose-fitting facepiece; or any NIOSH Approved Supplied-Air Respirator (SAR) or Airline Respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood [APF 25].

(D) If the measured exposure concentration is above 0.75 ppm and less than or equal to 1.5 ppm (50 times ECEL): Any NIOSH Approved air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved PAPR with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved SAR or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved SAR or Airline Respirator operated in a pressure-demand or other positive-pressure mode with a half mask; or any NIOSH Approved SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50].

(E) If the measured exposure concentration is above 1.5 ppm and less than or equal to 30 ppm (1,000 times ECEL): Any NIOSH Approved PAPR equipped with a full facepiece equipped with organic vapor cartridges or canisters; any NIOSH Approved SAR or Airline Respirator in a continuous-flow mode equipped with full facepiece; any NIOSH Approved SAR or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply; or any NIOSH Approved SAR or Airline Respirator in a continuous-flow mode equipped with a helmet or hood and that has been tested to demonstrated performance at a level of a protection of APF 1,000 or greater [APF 1000].

(F) If the measured exposure concentration is greater than 30 ppm (1,000 times ECEL): Any NIOSH Approved SCBA in a pressure-demand or other positive-pressure mode equipped with a full facepiece helmet/hood [APF 10,000].

(G) If the exposure concentration is unknown: Any NIOSH Approved combination supplied air respirator equipped with a full facepiece and operated in pressure demand or other positive pressure mode with an auxiliary self-contained air supply; or any NIOSH Approved SCBA operated in

pressure demand or other positive pressure mode and equipped with a full facepiece or helmet/hood [APF 1000+].

(x) Owners and operators must select and provide respirators as required in paragraph (f)(2) of this section consistent with the requirements of 29 CFR 1910.134(d)(1)(iv), and with consideration of workplace and user factors that affect respirator performance and reliability.

(xi) Owners and operators who select air-purifying respirators must either:

(A) Select respirators that have an end-of-service-life indicator (ESLI) that is NIOSH Approved® for carbon tetrachloride; or

(B) Implement a change schedule for canisters and cartridges based on objective information or data that ensures that canisters and cartridges are changed before the end of their service life. The written respiratory protection program required by paragraph (f)(2)(iii) of this section must include a description of the information and data relied upon, the basis for reliance on the information and data, and the basis for the canister and cartridge change schedule.

(xii) Owners and operators must ensure that respirators are used in compliance with the terms of the respirator's NIOSH certification.

(xiii) Owners and operators must conduct regular evaluations of the workplace, including consultations with potentially exposed persons using respiratory protection, consistent with the requirements of 29 CFR 1910.134(l), to ensure that the provisions of the written respiratory protection program required under paragraph (f)(2)(iii) of this section are being effectively implemented.

(xiv) The respiratory protection requirements in this paragraph (f)(2) represent the minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the required respirator may be used.

(3) *Dermal protection.* (i) Beginning September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by June 16, 2025 for non-Federal owners and operators, if an owner or operator is required to provide dermal protection pursuant to paragraph (f)(1), the owner or operator must ensure that each potentially exposed person is provided with dermal PPE according to the requirements of this section.

(ii) Owners or operators must supply and require the donning of dermal PPE that separates and provides a barrier to prevent direct dermal contact with carbon tetrachloride in the specific work

area where it is selected for use, selected in accordance with this paragraph and provided in accordance with 29 CFR 1910.132(h), to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact with carbon tetrachloride. For the purposes of this subsection, provisions in 29 CFR 1910.132(h) applying to an "employee" also apply equally to potentially exposed persons, and provisions applying to an "employer" also apply equally to owners or operators.

(iii) Owners or operators must select and provide dermal PPE in accordance with 29 CFR 1910.133(b) and additionally as specified in this paragraph (f)(3) to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact with carbon tetrachloride. For the purposes of this paragraph (f)(3)(iii), provisions in 29 CFR 1910.133(b) applying to an "employer" also apply equally to owners or operators.

(iv) Owners or operators must select and provide to persons appropriate dermal PPE based on an evaluation of the performance characteristics of the PPE relative to the task(s) to be performed, conditions present, and the duration of use. Replacement PPE must be provided immediately if any person is dermally exposed to CTC longer than the breakthrough time period for which testing has demonstrated that the PPE will be impermeable or if there is a chemical permeation or breakage of the PPE. Dermal PPE must include, but is not limited to, the following items:

(A) Impervious gloves selected based on specifications from the manufacturer or supplier or by individually prepared third-party testing.

(B) Impervious clothing covering the exposed areas of the body (e.g., long pants, long sleeved shirt).

(v) Owners or operators must demonstrate that each item of gloves and other clothing selected provides an impervious barrier to prevent direct dermal contact with carbon tetrachloride during normal and expected duration and conditions of exposure within the work area by evaluating the specifications from the manufacturer or supplier or individually prepared third-party testing of the dermal PPE, or of the material used in construction of the dermal PPE, to establish that the dermal PPE will be impervious to carbon tetrachloride alone and in likely combination with other chemical substances in the work area.

(vi) Dermal PPE that is of safe design and construction for the work to be

performed must be provided, used, and maintained in a sanitary, reliable, and undamaged condition. Owners and operators must select PPE that properly fits each affected person and communicate PPE selections to each affected person.

(vii) Owners or operators must provide training in accordance with 29 CFR 1910.132(f) to all persons required to use dermal protection prior to or at the time of initial assignment to a job involving exposure to carbon tetrachloride. For the purposes of this paragraph (f)(3)(vii), provisions in 29 CFR 1910.132(f) applying to an "employee" also apply equally to potentially exposed persons, and provisions applying to an "employer" also apply equally to owners or operators.

(viii) Owners and operators must retrain each person required to use dermal protection at least annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use dermal protection, or when changes in the workplace or in dermal protection to be used render the previous training obsolete.

§ 751.709 Workplace Restrictions for the Industrial and Commercial Use as a Laboratory Chemical, Including the Use of Carbon Tetrachloride as a Laboratory Chemical by the U.S. Department of Defense.

(a) *Applicability.* The provisions of this section apply to the industrial and commercial use of carbon tetrachloride as a laboratory chemical, including the U.S. Department of Defense's industrial and commercial use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction.

(b) *Laboratory chemical requirements.*

(1) After December 18, 2025 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or after June 16, 2025 for non-Federal owners and operators, owners or operators must ensure laboratory ventilation devices such as fume hoods or glove boxes are in use and functioning properly and that specific measures are taken to ensure proper and adequate performance of such equipment to minimize exposures to potentially exposed persons in the area when carbon tetrachloride is used as a laboratory chemical, except for the U.S. Department of Defense's use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction.

(2) After December 18, 2025, the U.S. Department of Defense must ensure that

advanced engineering controls are in use and functioning properly and that specific measures are taken to ensure proper and adequate performance of such equipment to minimize exposures to potentially exposed persons in the area during the industrial/commercial use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction.

(3) After December 18, 2025 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or after June 16, 2025 for non-Federal owners and operators, owners or operators must ensure that all persons reasonably likely to be exposed from direct dermal contact to carbon tetrachloride when carbon tetrachloride is used as a laboratory chemical, except for the U.S. Department of Defense's industrial and commercial use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction, are provided with dermal PPE and training on proper use of PPE in a manner consistent with § 751.707(f)(3).

(4) After December 18, 2025, U.S. Department of Defense must ensure that all persons reasonably likely to be exposed from direct dermal contact to carbon tetrachloride through the industrial and commercial use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction are provided with dermal PPE and training on proper use of PPE in a manner consistent with § 751.707(f)(3), except that the date listed in paragraph (f)(3)(i) does not apply.

§ 751.711 Downstream Notification.

(a) Beginning on February 18, 2025, each person who manufactures (including imports) carbon tetrachloride for any use must, prior to or concurrent with the shipment, notify companies to whom carbon tetrachloride is shipped, in writing, of the restrictions described in this Subpart in accordance with paragraph (c) of this section.

(b) Beginning on June 16, 2025, each person who processes or distributes in commerce carbon tetrachloride for any use must, prior to or concurrent with the shipment, notify companies to whom carbon tetrachloride is shipped, in writing, of the restrictions described in this Subpart in accordance with paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section must occur by inserting the following text in Sections 1(c) and 15 of the Safety Data Sheet (SDS) provided with the carbon tetrachloride:

After June 16, 2025, this chemical substance (as defined in TSCA section 3(2))

may not be distributed in commerce or processed in greater than trace quantities for the following purposes: Incorporation into formulation, mixture or reaction products in petrochemical-derived manufacturing except in the manufacture of vinyl chloride; Industrial and commercial use as an industrial processing aid in the manufacture of petrochemicals-derived products except in the manufacture of vinyl chloride; Industrial and commercial use in the manufacture of other basic chemicals (including manufacturing of chlorinated compounds used in solvents, adhesives, asphalt, and paints and coatings), except for use in the elimination of nitrogen trichloride in the production of chlorine and caustic soda and the recovery of chlorine in tail gas from the production of chlorine; Industrial and commercial use in metal recovery; Industrial and commercial use as an additive; and beginning December 18, 2025, industrial and commercial specialty uses by the U.S. Department of Defense.

§ 751.713 Recordkeeping Requirements.

(a) *General records.* After February 18, 2025, all persons who manufacture (including import), process, distribute in commerce, or engage in industrial or commercial use of carbon tetrachloride must maintain ordinary business records, such as downstream notifications, invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of this subpart.

(b) *Workplace Chemical Protection Program compliance.*—(1) *ECEL exposure monitoring.* For each monitoring event, owners or operators subject to the ECEL described in § 751.707(b) must document and retain records of the following:

(i) Dates, duration, and results of each sample taken;

(ii) The quantity, location(s) and manner of use of carbon tetrachloride in use at the time of each monitoring event;

(iii) All measurements that may be necessary to determine the conditions that may affect the monitoring results;

(iv) Name, workplace address, work shift, job classification, work area, and type of respiratory protection (if any) by each monitored person;

(v) Identification of all potentially exposed persons that a monitored person is intended to represent if using a representative sample, consistent with § 751.707(b)(2)(i)(A) and (B);

(vi) Sampling and analytical methods used as described in § 751.707(b)(2)(i)(D);

(vii) Compliance with the Good Laboratory Practice Standards in 40 CFR part 792, or use of laboratory accredited by the AIHA or another industry-recognized program, as required by § 751.707(b)(2)(i)(C); and

(viii) Information regarding air monitoring equipment, including: type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions;

(ix) Re-monitoring determinations conducted by an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist, if results indicated non-detect; and

(x) Notification of exposure monitoring results in accordance with § 751.707(b)(2)(v).

(2) *ECEL compliance.* Owners or operators subject to the ECEL described in § 751.707(b) must retain records of:

(i) Exposure control plan as described in § 751.707(d)(2);

(ii) Implementation of the exposure control plan as described in § 751.707(d)(2), including:

(A) Any regular inspections, evaluations, and updating of the exposure controls to maintain effectiveness;

(B) Confirmation that all persons are implementing the exposure controls; and

(C) Each occurrence and duration of any start-up, shutdown, ruptures, or malfunction of the facility that causes an exceedance of the ECEL, any subsequent corrective actions taken by the owner or operator during the start-up, shutdown, ruptures, or malfunctions to mitigate exposures to CTC, and documentation indicating that additional monitoring was completed within a reasonable timeframe.

(iii) Respiratory protection used by each potentially exposed person and PPE program implementation as described in § 751.707(f)(2) including:

(A) The name, workplace address, work shift, job classification, work area of each potentially exposed person, and the type of respiratory protection provided to each potentially exposed person;

(B) The basis for the specific respiratory protection selection in accordance with § 751.707(f)(2); and

(C) Fit testing and training in accordance with § 751.707(f)(2).

(iv) Information and training as required in § 751.707(e).

(3) *DDCC compliance.* Owners or operators subject to DDCC requirements described in § 751.707(c) must retain records of:

(i) Exposure control plan as described in § 751.707(d)(2);

(ii) Dermal protection used by each potentially exposed person and PPE program implementation as described in § 751.707(f)(3), including:

(A) The name, workplace address, work shift, job classification, and work area of each person reasonably likely to

directly handle carbon tetrachloride or handle equipment or materials on which carbon tetrachloride may be present and the type of PPE selected to be worn by each of these persons;

(B) The basis for specific PPE selection (*e.g.*, demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area);

(C) Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE;

(D) Occurrence and duration of any direct dermal contact with carbon tetrachloride that occurs during any activity or malfunction at the workplace that causes direct dermal exposures to occur and/or glove breakthrough, and corrective actions to be taken during and immediately following that activity or malfunction to prevent direct dermal contact to carbon tetrachloride; and

(E) Training in accordance with § 751.707(f)(3).

(iii) Information and training provided as required in § 751.707(e).

(4) *Workplace participation.* Owners or operators must document the notice to and ability of any potentially exposed person that may reasonably be affected by carbon tetrachloride inhalation exposure or direct dermal contact and their designated representatives to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation records, or any other information relevant to carbon tetrachloride exposure in the workplace.

(c) *Workplace requirements for laboratory use compliance.* Owners and operators subject to the laboratory chemical requirements described in § 751.709 must retain records of:

(1) Dermal protection used by each potentially exposed person and PPE program implementation, as described in § 751.713(b)(3)(ii); and

(2) Documentation identifying criteria that the owner or operator will use to determine and implement control measures to reduce potentially exposed persons' exposure to carbon tetrachloride including laboratory ventilation devices;

(3) Documentation identifying: implementation of a properly functioning laboratory ventilation devices using manufacturer's instructions for installation, use, and maintenance of the devices including inspections, tests, development of maintenance procedures, the establishment of criteria for acceptable test results, and documentation of test and inspection results, except for the U.S. Department of Defense's use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction; and

(4) For the U.S. Department of Defense's use of carbon tetrachloride as a laboratory chemical in chemical weapons destruction, documentation identifying implementation of advanced engineering controls that are in use and functioning properly and specific measures taken to ensure proper and adequate performance.

(d) *Retention.* Owners or operators must retain the records required under this section for a period of five years from the date that such records were generated.

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Part IX

Environmental Protection Agency

40 CFR Part 751

Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA); Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 751**

[EPA-HQ-OPPT-2020-0720; FRL-8329-01-OCSPP]

RIN 2070-AK84

Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is finalizing a rule to address the unreasonable risk of injury to health presented by perchloroethylene (PCE) under its conditions of use. TSCA requires that EPA address by rule any unreasonable risk of injury to health or the environment identified in a TSCA risk evaluation and apply requirements to the extent necessary so that the chemical no longer presents unreasonable risk. EPA's final rule will, among other things, prevent serious illness associated with uncontrolled exposures to the chemical by preventing consumer access to the chemical, restricting the industrial and commercial use of the chemical while also allowing for a reasonable transition period where the industrial and commercial use of the chemical is being prohibited, providing a time-limited exemption for a critical or essential use of PCE for which no technically and economically feasible safer alternative is available, and protecting workers from the unreasonable risk of PCE while on the job.

DATES: This final rule is effective on January 17, 2025.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2020-0720, is available online at <https://www.regulations.gov>. Additional information about dockets generally, along with instructions for visiting the docket in-person, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information: Kelly Summers, Existing Chemicals Risk Management Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-2201; email address: pce.tsc@epa.gov.

For general information: The TSCA-Hotline, ABVI-Goodwill, 422 South

Clinton Ave., Rochester, NY 14620-1103; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Executive Summary***A. Does this action apply to me?***1. General Applicability**

You may be affected by this rule if you manufacture, process, distribute in commerce, use, or dispose of PCE or products containing PCE. TSCA section 3(9) defines the term "manufacture" to mean "to import into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), produce, or manufacture." Therefore, unless expressly stated otherwise, importers of PCE are subject to provisions regulating manufacture of PCE. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document might apply to them. Potentially affected entities include:

- Crude Petroleum Extraction (NAICS code 211120).
- Support Activities for Oil and Gas Operations (NAICS code 213112).
- Nonwoven Fabric Mills (NAICS code 313230).
- Wood Window and Door Manufacturing (NAICS code 321911).
- Paper Bag and Coated and Treated Paper Manufacturing (NAICS code 322220).
- Commercial Screen Printing (NAICS code 323113).
- Petroleum Refineries (NAICS code 324110).
- Petroleum Lubricating Oil and Grease Manufacturing (NAICS code 324191).
- Petrochemical Manufacturing (NAICS code 325110).
- Industrial Gas Manufacturing (NAICS code 325120).
- Other Basic Inorganic Chemical Manufacturing (NAICS code 325180).
- All Other Basic Organic Chemical Manufacturing (NAICS code 325199).
- Plastics Material and Resin Manufacturing (NAICS code 325211).
- Synthetic Rubber Manufacturing (NAICS code 325212).
- Paint and Coating Manufacturing (NAICS code 325510).
- Adhesive Manufacturing (NAICS code 325520).
- Soap and Other Detergent Manufacturing (NAICS code 325611).
- Polish and Other Sanitation Good Manufacturing (NAICS code 325612).

- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS code 325998).
- Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing (NAICS code 326113).
- All Other Plastics Product Manufacturing (NAICS code 326199).
- Rubber and Plastics Hoses and Belting Manufacturing (NAICS code 326220).
- Rubber Product Manufacturing for Mechanical Use (NAICS code 326291).
- All Other Rubber Product Manufacturing (NAICS code 326299).
- Pottery, Ceramics, and Plumbing Fixture Manufacturing (NAICS code 327110).
- Glass Container Manufacturing (NAICS code 327213).
- Cement Manufacturing (NAICS code 327310).
- Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum) (NAICS code 331492).
- Metal Crown, Closure, and Other Metal Stamping (except Automotive) (NAICS code 332119).
- Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing (NAICS code 332215).
- Saw Blade and Handtool Manufacturing (NAICS code 332216).
- Other Fabricated Wire Product Manufacturing (NAICS code 332618).
- Metal Heat Treating (NAICS code 332811).
- Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers (NAICS code 332812).
- Electroplating, Plating, Polishing, Anodizing, and Coloring (NAICS code 332813).
- Industrial Valve Manufacturing (NAICS code 332911).
- Fluid Power Valve and Hose Fitting Manufacturing (NAICS code 332912).
- Plumbing Fixture Fitting and Trim Manufacturing (NAICS code 332913).
- Other Metal Valve and Pipe Fitting Manufacturing (NAICS code 332919).
- Ball and Roller Bearing Manufacturing (NAICS code 332991).
- Small Arms Ammunition Manufacturing (NAICS code 332992).
- Ammunition (except Small Arms) Manufacturing (NAICS code 332993).
- Small Arms, Ordnance, and Ordnance Accessories Manufacturing (NAICS code 332994).
- Fabricated Pipe and Pipe Fitting Manufacturing (NAICS code 332996).
- All Other Miscellaneous Fabricated Metal Product Manufacturing (NAICS code 332999).
- Other Industrial Machinery Manufacturing (NAICS code 333249).

- Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS code 333415).
- Machine Tool Manufacturing (NAICS code 333517).
- Measuring, Dispensing, and Other Pumping Equipment Manufacturing (NAICS code 333914).
- Welding and Soldering Equipment Manufacturing (NAICS code 333992).
- Packaging Machinery Manufacturing (NAICS code 333993).
- Industrial Process Furnace and Oven Manufacturing (NAICS code 333994).
- Fluid Power Cylinder and Actuator Manufacturing (NAICS code 333995).
- Fluid Power Pump and Motor Manufacturing (NAICS code 333996).
- All Other Miscellaneous General Purpose Machinery Manufacturing (NAICS code 333999).
- Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables (NAICS code 334513).
- Analytical Laboratory Instrument Manufacturing (NAICS code 334516).
- Motor Vehicle Body Manufacturing (NAICS code 336211).
- Travel Trailer and Camper Manufacturing (NAICS code 336214).
- Other Motor Vehicle Parts Manufacturing (NAICS code 336390).
- Aircraft Manufacturing (NAICS code 336411).
- Aircraft Engine and Engine Parts Manufacturing (NAICS code 336412).
- Other Aircraft Parts and Auxiliary Equipment Manufacturing (NAICS code 336413).
- Guided Missile and Space Vehicle Manufacturing (NAICS code 336414).
- Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing (NAICS code 336415).
- Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS code 336419).
- Ship Building and Repairing (NAICS code 336611).
- Surgical and Medical Instrument Manufacturing (NAICS code 339112).
- Jewelry and Silverware Manufacturing (NAICS code 339910).
- Sporting and Athletic Goods Manufacturing (NAICS code 339920).
- Doll, Toy, and Game Manufacturing (NAICS code 339930).
- Office Supplies (except Paper) Manufacturing (NAICS code 339940).
- Gasket, Packing, and Sealing Device Manufacturing (NAICS code 339991).
- Musical Instrument Manufacturing (NAICS code 339992).
- Fastener, Button, Needle, and Pin Manufacturing (NAICS code 339993).
- Broom, Brush, and Mop Manufacturing (NAICS code 339994).
- Burial Casket Manufacturing (NAICS code 339995).
- All Other Miscellaneous Manufacturing (NAICS code 339999).
- Motor Vehicle Supplies and New Parts Merchant Wholesalers (NAICS code 423120).
- Home Furnishing Merchant Wholesalers (NAICS code 423220).
- Industrial Supplies Merchant Wholesalers (NAICS code 423840).
- Service Establishment Equipment and Supplies Merchant Wholesalers (NAICS code 423850).
- Other Miscellaneous Durable Goods Merchant Wholesalers (NAICS code 423990).
- Grain and Field Bean Merchant Wholesalers (NAICS code 424510).
- Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690).
- Petroleum Bulk Stations and Terminals (NAICS code 424710).
- Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals) (NAICS code 424720).
- New Car Dealers (NAICS code 441110).
- Used Car Dealers (NAICS code 441120).
- Other Gasoline Stations (NAICS code 447190).
- Sporting Goods Stores (NAICS code 451110).
- All Other Miscellaneous Store Retailers (except Tobacco Stores) (NAICS code 453998).
- Scheduled Passenger Air Transportation (NAICS code 481111).
- Scheduled Freight Air Transportation (NAICS code 481112).
- Pipeline Transportation of Natural Gas (NAICS code 486210).
- Teleproduction and Other Postproduction Services (NAICS code 512191).
- Other Motion Picture and Video Industries (NAICS code 512199).
- Miscellaneous Intermediation (NAICS code 523910).
- Other Financial Vehicles (NAICS code 525990).
- Lessors of Other Real Estate Property (NAICS code 531190).
- Offices of Real Estate Agents and Brokers (NAICS code 531210).
- Testing Laboratories (NAICS code 541380).
- Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) (NAICS code 541715).
- Marketing Research and Public Opinion Polling (NAICS code 541910).
- All Other Professional, Scientific, and Technical Services (NAICS code 541990).
- Offices of Other Holding Companies (NAICS code 551112).
- Hazardous Waste Treatment and Disposal (NAICS code 562211).
- Solid Waste Landfill (NAICS code 562212).
- Solid Waste Combustors and Incinerators (NAICS code 562213).
- Other Nonhazardous Waste Treatment and Disposal (NAICS code 562219).
- Remediation Services (NAICS code 562910).
- Materials Recovery Facilities (NAICS code 562920).
- All Other Miscellaneous Waste Management Services (NAICS code 562998).
- General Automotive Repair (NAICS code 811111).
- Automotive Exhaust System Repair (NAICS code 811112).
- Automotive Transmission Repair (NAICS code 811113).
- Other Automotive Mechanical and Electrical Repair and Maintenance (NAICS code 811118).
- Automotive Body, Paint, and Interior Repair and Maintenance (NAICS code 811121).
- Automotive Glass Replacement Shops (NAICS code 811122).
- Automotive Oil Change and Lubrication Shops (NAICS code 811191).
- All Other Automotive Repair and Maintenance (NAICS code 811198).
- Consumer Electronics Repair and Maintenance (NAICS code 811211).
- Computer and Office Machine Repair and Maintenance (NAICS code 811212).
- Communication Equipment Repair and Maintenance (NAICS code 811213).
- Other Electronic and Precision Equipment Repair and Maintenance (NAICS code 811219).
- Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance (NAICS code 811310).
- Home and Garden Equipment Repair and Maintenance (NAICS code 811411).
- Other Personal and Household Goods Repair and Maintenance (NAICS code 811490).
- Drycleaning and Laundry Services (except Coin-Operated) (NAICS code 812320).
- Industrial Launderers (NAICS code 812332).

2. Applicability to Importers and Exporters.

This action may also affect certain entities subject to import certification and export notification requirements under TSCA (<https://www.epa.gov/tsc-import-export-requirements>). Persons who import any chemical substance in bulk form, as part of a mixture, or as part of an article (if required by rule) are subject to TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127 (see also 19 CFR 127.28(i)). Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA (see 19 CFR 12.121). The EPA policy in support of import certification appears at 40 CFR part 707, subpart B.

In addition, any persons who export or intend to export a chemical substance that is the subject of this final rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D. Any person who exports or intends to export PCE must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What is the Agency's authority for taking this action?

Under TSCA section 6(a) (15 U.S.C. 2605(a)), if the Agency determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk.

C. What action is the Agency taking?

Pursuant to TSCA section 6(b), EPA determined that PCE presents an unreasonable risk of injury to health, without consideration of costs or other nonrisk factors, including an unreasonable risk to potentially exposed or susceptible subpopulations (PESS) identified as relevant to the 2020 Risk Evaluation for PCE by EPA, under the conditions of use (Refs. 1 and 2). A description of the conditions of use that contribute to EPA's determination that PCE presents an unreasonable risk is in Unit III.B.1. of the 2023 PCE proposed rule, with a summary in Unit II.C.4. of this final rule. Accordingly, to address the unreasonable risk, EPA is finalizing a rule under TSCA section 6(a) to:

(i) Prohibit most industrial and commercial uses and the manufacture

(including import), processing, and distribution in commerce of PCE for those uses, outlined in Unit IV.D.1.;

(ii) Prohibit the manufacture (including import), processing, and distribution in commerce of PCE for all consumer use, outlined in Unit IV.D.2.;

(iii) Prohibit the manufacture (including import), processing, distribution in commerce, and commercial use of PCE in dry cleaning and spot cleaning through a 10-year phaseout, outlined in Unit IV.D.3.;

(iv) Require a Workplace Chemical Protection Program (WCPP), including an inhalation exposure concentration limit, direct dermal contact controls, and related workplace exposure controls, for many occupational conditions of use of PCE not prohibited, outlined in Unit IV.B.;

(v) Require prescriptive workplace controls for use of PCE in laboratories and energized electrical cleaners, outlined in Unit IV.C.;

(vi) Establish recordkeeping and downstream notification requirements, outlined in Unit IV.E.;

(vii) Provide a 10-year time limited exemption under TSCA section 6(g) for certain emergency uses of PCE in furtherance of National Aeronautics and Space Administration's (NASA) mission, for specific conditions of use which are critical or essential and for which no technically and economically feasible safer alternative is available, outlined in Unit IV.F.; and

(viii) Identify a regulatory threshold for products containing PCE for the prohibitions and restrictions on PCE, as outlined in Unit IV.A.

EPA notes that all TSCA conditions of use of PCE are subject to this final rule. "Conditions of use" is defined in TSCA section 3(4) to mean the circumstances, as determined by EPA, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.

In addition, EPA is amending the general provision of 40 CFR part 751, subpart A, to define "Designated representative," "Direct dermal contact," "ECEL," and "Exposure group" so that these definitions may be commonly applied to this and other rules under TSCA section 6 that would be codified under 40 CFR part 751.

D. Why is the Agency taking this action?

Under TSCA section 6(a), "[i]f the Administrator determines in accordance with subsection (b)(4)(A) that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of such activities, presents

an unreasonable risk of injury to health or the environment, the Administrator shall by rule . . . apply one or more of the [section 6(a)] requirements to such substance or mixture to the extent necessary so that the chemical substance or mixture no longer presents such risk." PCE was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in December 2020 (2020 Risk Evaluation for PCE) (Ref. 1). In addition, EPA issued a revised unreasonable risk determination in December 2022 (Ref. 2), determining that PCE, as a whole chemical substance, presents an unreasonable risk of injury to health under the conditions of use. On June 16, 2023, EPA issued a proposed rule (88 FR 39652) (FRL-8329-02-OCSP) under TSCA section 6(a) to regulate PCE, so that it no longer presents unreasonable risk (hereinafter "2023 PCE proposed rule"). The Agency received public comment on the proposal. With this action, EPA is finalizing with modifications the 2023 PCE proposed rule as described in this final rule. The conditions of use that contribute to the unreasonable risk from PCE are described in Unit III.B.1. of the 2023 PCE proposed rule.

PCE's hazards are well established. EPA's 2020 Risk Evaluation for PCE considered the hazards associated with exposure to PCE and determined that PCE presents an unreasonable risk of injury to health due to the significant adverse health effects associated with exposure to PCE. While some of the risks of adverse effects from PCE exposure are associated with acute single exposures, other risks are associated with long-term repeated exposures. The most sensitive health effect driving the unreasonable risk of PCE and selected as the basis for this rule is neurotoxicity from chronic exposure. It was selected based on the best available science and weight of scientific evidence and in consideration of the severity of the hazards, magnitude of exposure, population exposed, and uncertainties in the December 2020 Risk Evaluation for PCE and December 2022 revised risk determination for PCE. For PCE, impaired visual and cognitive function and diminished color discrimination following chronic exposures represent the most sensitive endpoint indicating neurotoxicity, based on epidemiological data reported in two studies that identified lowest observed adverse effect levels for color confusion and impaired pattern recognition and reaction time in pattern memory. Other significant adverse outcomes include kidney and liver effects, immune system toxicity,

reproductive toxicity, developmental toxicity, and cancer. For this action, EPA has determined that protecting against the most sensitive endpoint would also address the risk for other acute, chronic non-cancer, and cancer endpoints. This final rule will eliminate the unreasonable risk to human health from the TSCA conditions of use of PCE, as identified in the 2020 Risk Evaluation for PCE and the revised unreasonable risk determination for PCE in December 2022.

Although EPA is prohibiting many conditions of use of the chemical where it cannot be used without continuing to present unreasonable risk as described in Unit IV., EPA is not finalizing a complete ban on PCE. The Agency has considered the benefits of PCE for various uses as required under TSCA section 6(c)(2)(A) and (B) and recognizes that continued use of PCE for some TSCA conditions of use may provide benefits that complement the Agency's efforts to address climate-damaging hydrofluorocarbons (HFCs) under the American Innovation and Manufacturing Act of 2020 (AIM Act) (42 U.S.C. 7675), supporting human health and environmental protection under these programs, and that for these uses, strict workplace controls to address the unreasonable risk can be implemented. Therefore, this final rule allows PCE's continued use in tandem with strict workplace controls for the generation of HFC-125 and HFC-134a, two of the regulated substances that are subject to a 15-year phasedown under the AIM Act. HFCs-134a and -125 can be mixed with other substances to make lower global warming potential blends that are likely to be used to facilitate the transition away from HFC blends with higher global warming potentials in certain applications.

Additionally, the Agency recognizes that some conditions of use may be important for national security applications or for other critical needs. For example, PCE is a critical diluent (to modify the consistency or other properties in a formulation) for maskant applied to military and commercial aircraft skin panels that prevents chemical milling or industrial etching of certain areas. It is also used in petrochemical manufacturing as a processing aid in catalyst regeneration for reformate and isomerate (these are gasoline blending stocks) that make up an estimated 45% of the United States gasoline pool. Therefore, this final rule allows certain continued uses of PCE provided that sufficient worker protections are in place to address the unreasonable risk for certain occupational conditions of use. For the

conditions of use for which EPA is finalizing workplace controls under a WCPP, EPA expects that many workplaces already have stringent controls in place that reduce exposures to PCE; for some workplaces, EPA understands that these existing controls may already reduce exposures enough to meet the inhalation exposure concentration limit (called the existing chemical exposure limit (ECEL)) in this rulemaking or to prevent direct dermal contact with PCE. For many of the conditions of use for which EPA is finalizing workplace controls under a WCPP, data to support the industry's position that certain uses could meet the exposure limit and ancillary requirements of an effective WCPP in addressing unreasonable risk were submitted during the risk evaluation, the Small Business Advocacy Review (SBAR) Panel process, the comment period following publication of the 2023 PCE proposed rule, or stakeholder outreach, and are available in the corresponding public dockets (Docket ID Nos. EPA-HQ-OPPT-2020-0720; EPA-HQ-OPPT-2019-0502; EPA-HQ-OPPT-2016-0732).

Accordingly, EPA is finalizing workplace controls to address the unreasonable risk and allow continued manufacture (including import), processing for conditions of use that are not prohibited, repackaging, recycling, and disposal of PCE as well as continued use of PCE for processing as a reactant/intermediate, certain uses in vapor degreasing and cold cleaning, use as a maskant for chemical milling, use in adhesives and sealants, use as a processing aid, use as energized electrical cleaner, and use as a laboratory chemical, which comprise more than an estimated 80% of the current production volume of PCE. EPA is finalizing a prohibition or phaseout for most conditions of use of PCE, including use in dry cleaning and spot cleaning, general aerosol degreasing, paints and coatings, aerosol lubricants, and wipe cleaning, comprising less than an estimated 20% of the current production volume of PCE. Of the conditions of use that are not prohibited, EPA generally expects the production volume for those conditions of use to decline over time. For example, EPA expects the industrial and commercial use of PCE as a reactant in the generation of HFC-134a and HFC-125 to decline over time, in light of the AIM Act requirements to phase down production and consumption of listed HFCs by 85% over the next 15 years. The rationale for the final regulatory action, including the TSCA section 6

requirements considered in developing the regulatory action, is described in Units II.D. and III.

E. What are the estimated incremental impacts of this action?

EPA has prepared an Economic Analysis of the potential incremental impacts associated with this rulemaking that can be found in the rulemaking docket (Ref. 3). As described in more detail in the Economic Analysis (Ref. 3) and in Units V.D. and VIII.C., EPA was unable to quantify all incremental costs of this final rule. The quantifiable cost of the final rule is estimated to be \$43.43 million annualized over 20 years at a 2% discount rate. These costs take compliance with implementation of a WCPP into consideration, which would include meeting an ECEL of 0.14 ppm (0.98 mg/m³) for inhalation exposures as an 8-hour time-weighted average (TWA), dermal controls to prevent direct dermal contact, applicable personal protective equipment (PPE) requirements, and reformulation costs of numerous products.

The Economic Analysis notes various unquantified costs and uncertainty in the cost estimates (Sec. 7.14). The condition of use with the most expensive and uncertain compliance costs is the commercial use of PCE in energized electrical cleaning, which EPA estimates would result in about \$20 million out of \$43 million of estimated compliance costs. These estimates are based on assumptions regarding how much PCE is used for energized electrical cleaning and the types of locations of that use. Almost all of these compliance cost estimates are from respirator requirements for the use of PCE in energized electrical cleaning in confined spaces, which would require expensive respirators. Because there is no consensus industry estimate for what fraction of PCE use in energized electrical cleaning is in confined spaces, as described in Unit III.A.2.e., EPA estimated 5% of energized electrical cleaning use of PCE was in confined spaces.

In addition, EPA estimates that 6,000 dry cleaners still use PCE, a majority of which are small businesses. Overall, EPA expects few closures because EPA estimates that only about 60 PCE machines are expected to be in use at the end of the phaseout period given the age of the machines and the declining trend of use; this is detailed in section 7.7 of the Economic Analysis. Table 7-11 in that section details the age of the PCE dry cleaning machines in New York State, for which EPA has data. EPA believes that the data are generalizable to other states; industry has informed

the Agency that very few PCE machines have been purchased in recent years. See sections 7.7 and 11 of the Economic Analysis for additional detail on EPA's analysis, including uncertainties associated with estimating the economic impact.

In alignment with the goals of President Biden's Cancer Moonshot, the rule will protect people from cancer and other adverse health effects of PCE by prohibiting most uses of PCE while ensuring essential uses can safely continue (Ref. 4). The actions in this final rule are expected to achieve health benefits for the American public, some of which can be monetized and others that, while tangible and significant, cannot be monetized. The monetized benefits of this rule are approximately \$32.6 million to \$84.6 million annualized over 20 years at a 2% discount rate. The monetized benefits include potential reductions in risk of liver, kidney, brain, and testicular cancer. Non-monetized benefits include risk reduction of neurotoxicity, kidney toxicity, liver effects, immune/hematological effects, reproductive effects, and developmental effects (Ref. 3). Neurotoxic effects associated with PCE exposure in human studies include visual deficits, impaired cognition, and neurodevelopmental outcomes from prenatal and early childhood exposure to PCE such as increased affinity of engaging in drug, alcohol, and tobacco use as a teen or adult (Ref. 1). Reductions in PCE exposure therefore may also be associated with additional important, but currently unmonetized, benefits.

Additionally, the Agency expects that the dry cleaning phaseout will decrease significant adverse health risks for affected populations that may own, operate, or work at dry cleaning facilities, as well as children of workers present at dry cleaners. As described in more detail in the Economic Analysis, the Agency analyzed the demographic characteristics of several populations that would be impacted by this rulemaking, including for dry cleaning (Ref. 3). For the public's understanding, this document notes that based on reasonably available information, a significant number of members of minority populations may own or work at dry cleaning facilities.

II. Background

A. Overview of Perchloroethylene (PCE)

As described in more detail in the 2023 PCE proposed rule, PCE is a neurotoxicant and considered "likely to be carcinogenic in humans". This final rule applies to PCE (CASRN 127-18-4)

and is specifically intended to address the unreasonable risk of injury to health EPA has identified in the 2020 Risk Evaluation for PCE and the 2022 revised unreasonable risk determination, as described in Unit II.C. PCE is a colorless volatile liquid with a mildly sweet odor that is produced in and imported into the United States. PCE is manufactured, processed, distributed, used, and disposed of as part of many industrial, commercial, and consumer conditions of use.

As outlined in Unit II.C.4., PCE is used for the production of fluorinated compounds, as a solvent for dry cleaning and vapor degreasing; in catalyst regeneration in petrochemical manufacturing; and in a variety of commercial and consumer applications such as adhesives, paints and coatings, aerosol degreasers, brake cleaners, aerosol lubricants, sealants, stone polish, stainless steel polish and wipe cleaners. According to data submitted for the EPA's 2016 Chemical Data Reporting rule (CDR), the total aggregate annual production volume of PCE in the United States decreased from 388 million pounds to around 324 million pounds between 2012 and 2015 (Ref. 5). The total aggregate annual production volume ranged from 250 to 500 million pounds between 2016 and 2019 according to CDR (Ref. 6).

B. Regulatory Actions Pertaining to PCE

Because of its adverse health effects, PCE is subject to numerous Federal laws and regulations in the United States and is also subject to regulation by some States and other countries. A summary of EPA regulations pertaining to PCE, as well as other Federal, State, and international regulations, is in the docket (Refs. 1, 7).

As described in more detail in Unit II.C. of 2023 PCE proposed rule, and the Response to Public Comments document (Ref. 8), EPA considered the adequacy of the current occupational safety and health standards from the Occupational Safety and Health Administration (OSHA) (29 CFR part 1910) for protection of workers. EPA notes that the standards for chemical hazards that OSHA promulgates under the Occupational Safety and Health (OSH) Act share a broadly similar purpose with the worker protection-related regulations that EPA promulgates under TSCA section 6(a). The control measures OSHA and EPA require to satisfy the objectives of their respective statutes may also, in many circumstances, overlap or coincide. However, there are important differences between EPA's and OSHA's regulatory approaches and jurisdiction,

and EPA considers these differences when deciding whether and how to account for OSHA requirements when evaluating and addressing potential unreasonable risk to workers so that compliance requirements are clearly explained to the regulated community. TSCA risk evaluations are subject to statutory science standards, an explicit requirement to consider risks to potentially exposed or susceptible subpopulations, and a prohibition on considering costs and other non-risk factors when determining whether a chemical presents an unreasonable risk that warrants regulatory actions—all requirements that do not apply to development of OSHA regulations. As such, EPA may find unreasonable risk for purposes of TSCA notwithstanding OSHA requirements. In addition, health standards issued under section 6(b)(5) of the OSH Act must reduce significant risk only to the extent that it is technologically and economically feasible. OSHA's legal requirement to demonstrate that its section 6(b)(5) standards are technologically and economically feasible at the time they are promulgated often precludes OSHA from imposing exposure control requirements sufficient to ensure that the chemical substance no longer presents a significant risk to workers. While it is possible in some cases that the OSHA standards for some chemicals reviewed under TSCA will eliminate unreasonable risk, based on EPA's experience thus far in conducting occupational risk assessments under TSCA, EPA believes that OSHA chemical standards would in general be unlikely to address unreasonable risk to workers within the meaning of TSCA, since TSCA section 6(b) unreasonable risk determinations may account for unreasonable risk to more sensitive endpoints and working populations than OSHA's risk evaluations typically contemplate and EPA is obligated to apply TSCA section 6(a) risk management requirements to the extent necessary so that the unreasonable risk is no longer presented. Because the requirements and application of TSCA and OSHA regulatory analyses differ, it is necessary for EPA to conduct risk evaluations and, where it finds unreasonable risk to workers, develop risk management requirements for chemical substances that OSHA also regulates, and it is expected that EPA's findings and requirements may sometimes diverge from OSHA's. Additional considerations of OSHA standards in the revised unreasonable risk determination are discussed further in the 2022 Revised Unreasonable Risk

Determination for PCE, published in the **Federal Register** of December 14, 2022 (87 FR 76481 (FRL–9942–02–OCSPP)).

EPA intends for this regulation to be as consistent as possible with OSHA regulations for toxic and hazardous substances, with additional requirements as necessary to address the unreasonable risk identified under TSCA. Consistent with TSCA section 9(d), EPA consults and coordinates TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burdens of duplicative requirements.

C. Summary of EPA's Risk Evaluation Activities on PCE

EPA published the scope of the PCE risk evaluation in July 2017 (82 FR 31592 (FRL–9963–57)), and, after receiving public comments, published the problem formulation on June 11, 2018 (83 FR 26998 (FRL–9978–40)). In May 2020, EPA published a draft risk evaluation (85 FR 26464, May 4, 2020 (FRL–10008–63)), and, after public comment and peer review by the Science Advisory Committee on Chemicals (SACC), EPA issued the 2020 Risk Evaluation for PCE in December 2020 in accordance with TSCA section 6(b) (85 FR 82474, December 18, 2020 (FRL–10017–44)). EPA subsequently issued a draft revised TSCA unreasonable risk determination for PCE (87 FR 39085, June 30, 2022 (FRL–9942–01–OCSPP)), and after public notice and receipt of comments, published a Revised Risk Determination for PCE in December 2022 (87 FR 76481, December 14, 2022 (FRL–9942–01–OCSPP)). The 2020 Risk Evaluation for PCE and supplemental materials are in Docket ID No. EPA–HQ–OPPT–2019–0502, and the December 2022 revised unreasonable risk determination and additional materials supporting the risk evaluation process in Docket ID No. EPA–HQ–OPPT–2016–0732.

1. 2020 Risk Evaluation

In the 2020 Risk Evaluation for PCE, EPA evaluated risks associated with 61 conditions of use within the following categories: manufacture (including import), processing, distribution in commerce, industrial and commercial use, consumer use, and disposal (Ref. 1). Descriptions of these conditions of use are in Unit III.B.1. of the 2023 PCE proposed rule. The 2020 Risk Evaluation for PCE identified significant adverse health effects associated with short- and long-term exposure to PCE. A further discussion of the hazards of PCE

is in Unit III.B.2. of the 2023 PCE proposed rule.

2. 2022 Revised Unreasonable Risk Determination

As described in more detail in the 2023 PCE proposed rule, EPA revised the original unreasonable risk determination based on the 2020 Risk Evaluation for PCE and issued a final revised unreasonable risk determination in December 2022 (Ref. 2). EPA revised the risk determination for the 2020 Risk Evaluation for PCE pursuant to TSCA section 6(b) and consistent with Executive Order 13990 (titled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”) and other Administration priorities (Refs. 9, 10, and 11). The revisions consisted of making the risk determination based on the whole-chemical substance instead of making the risk determination for each individual condition of use, which resulted in the revised risk determination superseding the prior “no unreasonable risk” determinations for specific conditions of use (Ref. 2), the withdrawal of the associated TSCA section 6(i)(1) “no unreasonable risk” order, and clarification that the risk determination does not reflect an assumption that all workers are always provided and appropriately wear PPE (Ref. 2).

EPA determined that PCE presents an unreasonable risk of injury to health, and EPA did not identify risks of injury to the environment that contribute to the unreasonable risk determination for PCE. The PCE conditions of use that contribute to EPA's determination that the chemical substance poses unreasonable risk to health are listed in the unreasonable risk determination (Ref. 2) and also in Unit III.B.1. of the 2023 PCE proposed rule, with descriptions to aid chemical manufacturers, processors, and users in determining how their particular use or activity would be addressed under the final regulatory action.

3. Description of Unreasonable Risk

EPA has determined that PCE presents an unreasonable risk of injury to health under the conditions of use, based on acute and chronic non-cancer risks and chronic cancer risks. As described in more detail in the 2023 PCE proposed rule and as described in the TSCA section 6(b) 2020 Risk Evaluation for PCE, EPA identified non-cancer effects from both acute and chronic inhalation and dermal exposures to PCE, and cancer from chronic inhalation and dermal exposures to PCE (Ref. 1). EPA

identified neurotoxicity as the most robust and sensitive endpoint for non-cancer adverse effects from acute inhalation and dermal exposures and as the most robust and sensitive endpoint for non-cancer adverse effects from chronic inhalation and dermal exposures for all conditions of use (Ref. 1). Other adverse effects associated with exposure to PCE include kidney and liver effects, immune system toxicity, and developmental toxicity. By targeting the sensitive chronic neurotoxicity effects endpoint for risk management, EPA's final rule will also prevent the unreasonable risks from acute, chronic non-cancer and cancer endpoints associated with inhalation and dermal exposure to PCE.

EPA considered potentially exposed or susceptible subpopulations identified as relevant to the risk evaluation by the Agency, which are included in the quantitative and qualitative analyses described in the 2020 Risk Evaluation for PCE (Ref. 1) and were considered in the determination of unreasonable risk for PCE.

4. Conditions of Use Subject to This Regulatory Action

As noted in Unit I.C. “conditions of use” is defined in TSCA section 3(4). Condition of use descriptions for PCE are provided in Unit III.B.1. of the 2023 PCE proposed rule and were obtained from EPA sources such as CDR codes, the 2020 Risk Evaluation for PCE and related documents, as well as the Organisation for Economic Co-operation and Development (OECD) harmonized use codes, and stakeholder engagements. EPA received public comments requesting minor clarifications of the descriptions for some industrial and commercial uses, and EPA has clarified those descriptions in Unit IV. A description of the minor changes can be found in the response to comments document and in Unit III.D. (Ref. 8). To assist with the implementation and compliance with the final rule, in Unit IV., EPA has provided a description of the conditions of use subject to the WCPP and to prescriptive controls.

As in the 2023 PCE proposed rule, for the purposes of this final rule, “occupational conditions of use” refers to the TSCA conditions of use described in Units III.B.1.a., b., c., and e. of the 2023 PCE proposed rule. Although EPA identified both industrial and commercial uses in the 2020 Risk Evaluation for PCE (Ref. 1) for purposes of distinguishing scenarios, the Agency clarified then and clarifies now that EPA interprets the authority Congress gave to the Agency to “regulat[e] any

manner or method of commercial use” under TSCA section 6(a)(5) to reach both industrial and commercial uses. Additionally, as described in the 2023 PCE proposed rule, in the 2020 Risk Evaluation for PCE (Ref. 1), EPA identified and assessed all known, intended, and reasonably foreseen industrial, commercial, and consumer uses of PCE. EPA determined that all industrial, commercial, and consumer uses of PCE evaluated in the 2020 Risk Evaluation for PCE contribute to the unreasonable risk of injury to health. As such, for purposes of this risk management rule, “consumer use” refers to all known, intended, or reasonably foreseen PCE consumer uses. Likewise, for the purpose of this risk management rule, “industrial and commercial use” refers to all known, intended, or reasonably foreseen PCE industrial and commercial uses.

EPA further notes that this rule does not apply to any substance excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(ii) through (vi). Those exclusions include, but are not limited to, any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide; and any food, food additive, drug, cosmetic, or device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act, when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device.

D. EPA’s Proposed Rule Under TSCA Section 6(a) for PCE

1. Description of TSCA Section 6(a) Requirements

Under TSCA section 6(a), if the Administrator determines through a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the Agency’s risk evaluation, under the conditions of use, EPA must by rule apply one or more of the section 6(a) requirements to the extent necessary so that the chemical substance no longer presents such risk.

The TSCA section 6(a) requirements can include one or more of the following actions alone in or combination:

- Prohibit or otherwise restrict the manufacturing (including import), processing, or distribution in commerce

of the substance or mixture, or limit the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce (section 6(a)(1)).

- Prohibit or otherwise restrict the manufacturing, processing, or distribution in commerce of the substance or mixture for a particular use or above a specific concentration for a particular use (section 6(a)(2)).

- Limit the amount of the substance or mixture which may be manufactured, processed, or distributed in commerce for a particular use or above a specific concentration for a particular use specified (section 6(a)(2)).

- Require clear and adequate minimum warning and instructions with respect to the substance or mixture’s use, distribution in commerce, or disposal, or any combination of those activities, to be marked on or accompanying the substance or mixture (section 6(a)(3)).

- Require manufacturers and processors of the substance or mixture to make and retain certain records or conduct certain monitoring or testing (section 6(a)(4)).

- Prohibit or otherwise regulate any manner or method of commercial use of the substance or mixture (section 6(a)(5)).

- Prohibit or otherwise regulate any manner or method of disposal of the substance or mixture, or any article containing such substance or mixture, by its manufacturer or processor or by any person who uses or disposes of it for commercial purposes (section 6(a)(6)).

- Direct manufacturers or processors of the substance or mixture to give notice of the unreasonable risk determination to distributors, certain other persons, and the public, and to replace or repurchase the substance or mixture (section 6(a)(7)).

In the 2023 PCE proposed rule under TSCA section 6(a), EPA analyzed how the TSCA section 6(a) requirements could be applied to address the unreasonable risk from PCE so that it no longer presents such risk. Unit II.D.1. of this final rule summarizes the TSCA section 6 considerations for issuing regulations under TSCA section 6(a). Unit V. of the 2023 PCE proposed rule outlines how EPA applied these considerations specifically to managing the unreasonable risk from PCE.

As required, EPA developed a proposed regulatory action and alternative regulatory actions, which are described in Units IV.A. and IV.B., respectively, of the 2023 PCE proposed rule. To identify and select a regulatory action, EPA considered the two routes

of exposure driving the unreasonable risk, inhalation and dermal, and the exposed populations. For occupational conditions of use, EPA considered how it could directly regulate manufacturing (including import), processing, distribution in commerce, industrial and commercial use, or disposal to address the unreasonable risk. EPA also considered how it could exercise its authority under TSCA to regulate the manufacturing (including import), processing, and/or distribution in commerce of PCE at different levels in the supply chain to eliminate exposures or restrict the availability of PCE and PCE-containing products for consumer use in order to address the unreasonable risk.

As required by TSCA section 6(c)(2), EPA considered several factors, in addition to the identified unreasonable risk, when selecting among possible TSCA section 6(a) regulatory requirements for the 2023 PCE proposed rule. EPA’s considerations regarding TSCA section 6(c)(2)(A) for PCE are discussed in full in Unit VI. of the 2023 PCE proposed rule, including the statement of effects with respect to these considerations. After review of public comments received, EPA has revised its statement of effects considerations in Unit V. of this final rule.

Additionally, as described in more detail in the 2023 PCE proposed rule, EPA considered the availability of alternatives when finalizing a prohibition or a substantial restriction (TSCA section 6(c)(2)(C)) (Ref. 12), and in setting final compliance dates in accordance with the requirements in TSCA section 6(d)(1).

To the extent information was reasonably available, EPA considered pollution prevention strategies and the hierarchy of controls adopted by OSHA and the National Institute for Occupational Safety and Health (NIOSH) when developing its 2023 PCE proposed rule, with the goal of identifying risk management control methods that would be permanent, feasible, and effective. EPA also considered how to address the unreasonable risk while providing flexibility to the regulated community where appropriate and took into account the information presented in the 2020 Risk Evaluation for PCE (Ref. 1), input from stakeholders, insight received during consultations, and anticipated compliance strategies from regulated entities.

Taken together, these considerations led EPA to the proposed regulatory action and alternative actions described in Unit II.D.3. Additional details related to how the requirements described in

this Unit II.D.1. were incorporated into development of the 2023 PCE proposed rule and alternative actions are in Unit V. of the 2023 PCE proposed rule.

2. Consultations and Other Engagement

a. Consultations

EPA conducted consultations and outreach as part of the development of the 2023 PCE proposed rule. The Agency held a federalism consultation from July 22, 2021, to October 22, 2021, as part of the rulemaking process and pursuant to Executive Order 13132 (Ref. 13).

EPA also consulted with Tribal officials during the development of the 2023 PCE proposed rule (Ref. 14). The Agency held a Tribal consultation from May 17, 2021, to August 20, 2021, with meetings on June 15 and July 8, 2021 (Ref. 14). EPA received no written comments as part of this consultation.

EPA's Environmental Justice (EJ) consultation occurred from June 3, 2021, to August 20, 2021. On June 16, 2021, and July 6, 2021, EPA held public meetings as part of this consultation. These meetings were held pursuant to Executive Orders 12898 and 14008. EPA received five written comments following the EJ meetings, in addition to oral comments provided during the consultation (Refs. 15, 16, 17, 18, 19). The 2023 PCE proposed rule presents a brief summary of the comments in Unit III.A.1. of the 2023 PCE proposed rule.

As required by section 609(b) of the Regulatory Flexibility Act (RFA), EPA convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from small entity representatives (SERs) that potentially would be subject to the rule's requirements. EPA met with SERs before and during Panel proceedings, on September 26, 2022, and November 10, 2022. Panel recommendations were addressed in Unit X.C. of the 2023 PCE proposed rule and in the Initial Regulatory Flexibility Analysis (IRFA) (Ref. 20); the Panel report is in the docket (Ref. 21). EPA has also prepared a Final Regulatory Flexibility Analysis (FRFA) (Ref. 22).

The Agency presents more information regarding the consultations in Units X.C., X.E., X.F., and X.J. of the 2023 PCE proposed rule.

b. Other Stakeholder Consultations

For development of the 2023 PCE proposed rule, in addition to the formal consultations described in Unit X. of the 2023 PCE proposed rule, EPA held a webinar on January 14, 2021, providing an overview of the TSCA risk management process and the risk

evaluation findings for PCE (Ref. 23). EPA also presented on the TSCA risk management process and the findings in the 2020 Risk Evaluation for PCE (Ref. 24) at a Small Business Administration (SBA) Office of Advocacy Environmental Roundtable on January 15, 2021. Attendees of these meetings were given an opportunity to voice their concerns regarding the risk evaluation and risk management.

Furthermore, during development of the 2023 PCE proposed rule, EPA engaged in discussions with representatives from different industries, non-governmental organizations, organized labor, technical experts, and users of PCE. A list of external meetings held during the development of the 2023 PCE proposed rule is available in the docket (Ref. 25); meeting materials and summaries are also available in the docket. A summary of the topics discussed during these meetings is in Unit III.A.2. of the 2023 PCE proposed rule.

c. Children's Environmental Health

The Agency's 2021 Policy on Children's Health (Ref. 26) requires EPA to protect children from environmental exposures by consistently and explicitly considering early life exposures (from conception, infancy, early childhood and through adolescence until 21 years of age) and lifelong health in all human health decisions through identifying and integrating children's health data and information when conducting risk assessments. TSCA section 6(b)(4)(A) also requires EPA to conduct risk evaluations "to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment . . . including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use." In addition, TSCA section 6(a) requires EPA to apply one or more risk management requirements under TSCA section 6(a) so that PCE no longer presents an unreasonable risk (which includes unreasonable risk to any relevant potentially exposed or susceptible subpopulations). Information on how the 2021 Policy was applied and on the health and risk assessments supporting this action is available under Units II.C., II.D., and V.A., as well as in Unit III.A.3. of the 2023 PCE proposed rule, the 2020 Risk Evaluation for PCE (Ref. 1), and the Economic Analysis (Ref. 3).

3. Proposed Regulatory Action

EPA's 2023 PCE proposed rule under TSCA section 6(a) to address the

unreasonable risk presented by PCE under its conditions of use included the following:

- Prohibition of most industrial and commercial uses and the manufacture (including import), processing, and distribution in commerce, of PCE for those uses;
- Prohibition of the manufacture (including import), processing, and distribution in commerce of PCE for all consumer use;
- Prohibition of the manufacture (including import), processing, distribution in commerce, and commercial use of PCE in dry cleaning and spot cleaning through a 10-year phaseout;
- Requirements for strict workplace controls, including a PCE WCPP, which would include requirements to meet an inhalation exposure concentration limit and prevent direct dermal contact with PCE, for the 16 occupational conditions of use not prohibited;
- Requirements for prescriptive workplace controls for laboratory use;
- Establishments of recordkeeping and downstream notification requirements; and
- A 10-year time-limited exemption under TSCA section 6(g) for certain emergency uses of PCE in furtherance of NASA's mission, for specific conditions of use which are critical or essential and for which no technically and economically feasible safer alternative is available.

EPA notes that all TSCA conditions of use of PCE were subject to the 2023 PCE proposed rule and are subject to this final rule.

The 2023 PCE proposed rule included proposed timeframes for implementation. The prohibitions EPA proposed for most conditions of use would take effect in phases, beginning at the top of the supply chain, and coming into full effect after 24 months, as described in Units IV.A.1.a. and IV.A.1.b. of the 2023 PCE proposed rule. The phaseout period for dry cleaning that EPA proposed would take full effect after 10 years, as described in Unit IV.A.1.c. of the 2023 PCE proposed rule. Likewise, for the WCPP, EPA proposed timeframes for phases of compliance, beginning with monitoring at six months and full implementation after 12 months, as described in Unit IV.A.2. of the 2023 PCE proposed rule. EPA also proposed a compliance timeframe of 12 months for prescriptive controls for laboratory use.

Under TSCA section 6(c)(2)(A)(iv)(II) through (III), EPA is mandated to consider one or more alternative regulatory actions. These were included in the 2023 PCE proposed rule in Unit

IV.B. Similar to the proposed regulatory action, both the primary and second alternative regulatory actions combined prohibitions, requirements for a WCPP, and prescriptive controls to address the unreasonable risk from PCE under its conditions of use.

The primary alternative regulatory action combined prohibitions, a WCPP, and prescriptive controls to address the unreasonable risk from PCE driven by its conditions of use. At the time of publication of the 2023 PCE proposed rule, uncertainties regarding the feasibility of implementing workplace safety control measures in open systems or when worker activities require manual application or removal of PCE or PCE-containing products, availability of alternatives, or whether the use is ongoing or phased out for most of these conditions of use led EPA to propose prohibition. At the time of proposal, EPA did not have reasonably available information to confidently conclude that these conditions of use could meet requirements of a WCPP. The alternative regulatory action also considered and included WCPP for laboratory use to seek input on requiring the non-prescriptive WCPP instead of the prescriptive workplace controls included in the proposed regulatory action. The primary alternative regulatory action also considered prescriptive workplace controls where existing engineering controls, administrative controls, and PPE may already address the unreasonable risk for some conditions of use that would be subject to a WCPP under the proposed regulatory action. Additionally, the primary alternative regulatory action included requirements for a concentration limit for PCE in industrial and commercial use in solvent-based adhesives and sealants.

The primary alternative regulatory action also included longer timeframes for prohibitions and implementation of WCPP and prescriptive controls. Those timeframes were described in Unit IV.B. of the 2023 PCE proposed rule.

The second alternative regulatory action combined prohibitions, requirements for a WCPP, prescriptive controls, and two time-limited exemptions to address the unreasonable risk from PCE driven by its conditions of use. This second alternative regulatory action included prohibitions on some conditions of use that would have requirements for a WCPP under the proposed regulatory action.

The second alternative regulatory action also included shorter compliance timeframes for prohibition and a WCPP. Additionally, this second alternative regulatory action did not include

staggered prohibition compliance dates for manufacturers, processors, and distributors. The secondary alternative regulatory action compliance timeframes are described in Unit IV.B. of the 2023 PCE proposed rule.

For a comprehensive overview of the alternative regulatory actions, refer to Unit IV.B. of the 2023 PCE proposed rule, with the rationale for the alternative regulatory actions provided in Unit V.A.2. of the 2023 PCE proposed rule.

4. Public Comments Received

EPA requested comment on all aspects of the 2023 PCE proposed rule, and during the public comment period, EPA held a webinar on July 19, 2023, providing an overview of the 2023 PCE proposed rule and TSCA section 6; during the webinar, members of the public had the opportunity to share their perspectives (Ref. 27). The comment period closed on August 15, 2023. EPA received 749 public comments, with a majority received from individuals participating in mass mailer campaigns organized by non-governmental organizations. The public comments also include approximately 89 unique comments from industry stakeholders, trade associations, environmental groups, unions, academic institutions, a State government agency, a Federal Government agency, and members of the regulated community. A summary of the comments as well as EPA's responses is in the docket for this rulemaking (Ref. 8). Additionally, Unit III. contains summaries of public comments that informed EPA's regulatory approach in this final rule.

After the close of the public comment period for the 2023 PCE proposed rule, EPA held meetings with stakeholders to receive clarifying information on their comments, including affected industry and interested groups, related to the use of PCE. Topics of these meetings included exposure controls, process descriptions, monitoring data, and specific conditions of use. EPA received data as part of and following these stakeholder meetings and has made the information available to the public in the rulemaking docket (Docket ID No. EPA-HQ-OPPT-2020-0720) (Ref. 28).

After review of the public comments received on the 2023 PCE proposed rule, EPA revised certain preliminary considerations that impacted which conditions of use were proposed by EPA to be prohibited or that could continue under the WCPP or prescriptive controls (Ref. 8). Similarly, based on public comments received, EPA modified for this final rule several proposed

compliance timeframes, with details in Unit III.

III. Changes From the Proposed Rule Based on Public Comment

Unit III. summarizes the main changes from the 2023 PCE proposed rule to this final rule, based on the consideration of the public comments.

A. Changes to the Risk Management Approach for Certain Conditions of Use

As described in Units III.A.1. and 2., when compared to the 2023 PCE proposed rule, EPA's final rule prohibits two additional conditions of use (Unit III.A.1.), allows three additional conditions of use under the WCPP (Units III.A.2.a. through c.), broadens the types of prescriptive controls required for one condition of use (Unit III.A.2.d.), and allows one additional condition of use to continue under specific prescriptive controls or the WCPP (Unit III.A.2.e.).

The rationale for these changes is described in this unit. EPA emphasizes that implementation of the WCPP or prescriptive controls can fully address the unreasonable risk from PCE for the conditions of use allowed to continue, and that these changes do not significantly impact the production volume of PCE expected to remain in commerce when compared to the proposed regulatory action. Taken together, the conditions of use described in Unit III.A.1. and 2. account for less than an estimated 5% of the total production volume of PCE.

1. Additional Conditions of Use Subject to Prohibition: Industrial and Commercial Uses of PCE as a Solvent for In-Line Vapor Degreasing

EPA is finalizing a prohibition for the industrial and commercial use of PCE as a solvent for in-line conveyORIZED vapor degreasing and for in-line web cleaner vapor degreasing, which were considered for prohibition in the second alternative regulatory action of the 2023 PCE proposed rule. As described in section 6 of the Economic Analysis for the 2023 PCE proposed rule (Ref. 29), EPA estimated that approximately two conveyORIZED vapor degreasers and no web vapor degreasers use PCE. One public commenter, a critical cleaning consultant, stated they no longer encounter in-line conveyORIZED or in-line web vapor degreasers using PCE (Ref. 30). Additionally, commenters identified alternative types of degreaser technologies, such as open-top batch vapor degreasers, closed-loop batch vapor degreasers, and airless batch vapor degreasers, that clean effectively and for which monitoring data and

detailed process descriptions of PCE activities for these types of degreasers confirm that compliance with an ECEL of 0.14 ppm as an 8-hr TWA is possible (Refs. 30, 31). As described in Unit V.A.1. of the 2023 PCE proposed rule, prohibition is the preferred risk management option for occupational conditions of use where reasonably available information suggest minimal ongoing use or when feasible safer alternatives are reasonably available. Based on information provided by commenters and other information reasonably available to the Agency indicating that the use of PCE in in-line conveyORIZED and in-line web vapor degreasing is no longer ongoing, and availability of technologically feasible alternative vapor degreasing technology, EPA has determined that the unreasonable risk from PCE when used in both types of in-line vapor degreasers is best addressed with a prohibition.

2. Additional Conditions of Use Subject to Restrictions: WCPP and Prescriptive Controls

a. Processing PCE Into Formulation, Mixture, or Reaction Product in Other Chemical Products and Preparations

EPA is finalizing a WCPP for processing PCE into formulation, mixture, or reaction product in other chemical products and preparations, as included in the primary alternative regulatory action of EPA's proposal (88 FR 39652, June 16, 2023)(FRL-8329-02-OCSP). While EPA proposed to prohibit processing PCE into formulation, mixture or reaction product in other chemical products and preparations, this was because EPA proposed to prohibit the downstream industrial, commercial, and consumer uses associated with other chemical products and preparations. EPA included this condition of use under the WCPP in the primary alternative regulatory action.

EPA received several comments regarding processing PCE into formulation, mixture, or reaction product. One commenter stated that there appeared to be a disconnect between the proposed prohibitions on processing PCE versus prohibitions on distribution and/or use of PCE and requested that EPA clarify the prohibitions throughout all steps in the supply chain for each particular condition of use (Ref. 32). For example, the commenter stated that EPA proposed that PCE may be processed into a formulation, mixture, or reaction product in paint and coating mixtures but also proposed to prohibit the manufacturing, processing, distribution

in commerce, and use of PCE in solvent-based paints and coatings. The commenter also stated that EPA proposed that PCE could be used for industrial and commercial use in maskants for chemical milling but did not explicitly permit the manufacturing or processing of PCE for use in maskants. Another commenter expressed opposition to EPA's proposed prohibition on processing of PCE for other chemical products and preparations, and stated that the proposed prohibition appeared to be based on an overly broad assumption that exposures to PCE in this condition of use correspond to aerosol packing (Ref. 33).

In Unit III.B.1.b.iv. of the 2023 PCE proposed rule, EPA described how the condition of use of processing PCE into formulation, mixture, or reaction products in paint and coating products refers to when PCE is added to a paint or coating product for further distribution, including when PCE is incorporated into coating products such as maskant (88 FR 39652, June 16, 2023)(FRL-8329-02-OCSP). However, to avoid confusion regarding which processing into formulation, mixture, or reaction product condition of use of PCE is associated with each downstream industrial and commercial condition of use of PCE, and, in particular, confusion regarding which products may fall under the category of "other chemical products and preparations," EPA is finalizing WCPP for all PCE processing into formulation, mixture, or reaction products, including in other chemical products and preparations, to make clear that all processing of PCE into formulation, mixture, or reaction product conditions of use, including in cleaning and degreasing products, in adhesive and sealant products, and in paint and coating products that are not prohibited by virtue of the downstream use being prohibited, are subject to the WCPP. As in the 2023 PCE proposed rule, all manufacturing, processing, and distribution in commerce of PCE for any downstream industrial, commercial, or consumer condition of use that is prohibited under the final rule would also be prohibited. In response to a comment requesting clarity regarding prohibitions throughout all steps of the value chain for each condition of use, EPA clarifies that the final rule includes prohibitions (staggered by lifecycle stage) for the manufacture, processing, distribution in commerce, and for all consumer, industrial and commercial use of PCE and PCE-containing products, except for those industrial and commercial uses which will continue

under the WCPP or prescriptive controls, or are otherwise not prohibited. Therefore, in this final rule, WCPP applies to processing PCE for uses that are not prohibited.

b. Industrial and Commercial Use of PCE as a Processing Aid

EPA is finalizing a WCPP for industrial and commercial use of PCE as a processing aid in pesticide, fertilizer, and other agricultural manufacturing, as included in the primary alternative regulatory action of the 2023 PCE proposal rule. While EPA proposed to prohibit the industrial and commercial use of PCE as a processing aid in pesticide, fertilizer, and other agricultural manufacturing, this was due to insufficient information at the time of proposal to determine that compliance with the WCPP would be possible. For example, at the time of proposal, EPA was not aware of any monitoring data or detailed description of PCE activities for this use to confirm that compliance with an ECEL of 0.14 ppm as an 8-hr TWA would be possible. EPA requested comment on the ability of facilities in this sector to successfully implement the WCPP for this particular use because of the industrial nature of the use.

EPA received a few comments regarding the industrial and commercial use as a processing aid in pesticide, fertilizer, and other agricultural manufacturing. Two commenters disagreed with EPA's proposal to prohibit PCE use as a processing aid in the manufacture of agricultural chemicals and stated that it is unclear what information EPA relied on to conclude that this use could not meet the WCPP requirements (Refs. 33, 34). One commenter stated that this use of PCE is critical to the manufacture of certain agricultural products and described how they limit PCE exposure and manage production risks through strong product stewardship and industrial hygiene practices. Following a meeting to receive clarifying information on their comment, one commenter submitted information on worker activities and safety measures in place that provide worker protection for this use (Ref. 35). As described in the submitted information, activities associated with potential exposure to PCE include transfer, sample, and maintenance, where control measures such as purging lines/vessels prior to opening, closed sampling box, and PPE reduce exposures. Based on the information received, EPA believes such control measures that indicate the ability to comply with the WCPP requirements may be implementable for all those using PCE as a processing aid

in pesticide, fertilizer, and other agricultural chemical manufacturing.

Additionally, information submitted to EPA indicates that PCE may be used as a processing aid in industrial sectors other than petrochemical manufacturing and pesticide, fertilizer, and other agricultural chemical manufacturing (Refs. 33, 36). The 2020 Risk Evaluation assessed occupational exposures for “processing aids, specific to petroleum production—catalyst regeneration in petrochemical manufacturing” and “processing aids, not otherwise listed—pesticide, fertilizer and other agricultural chemical manufacturing” under the industrial processing aid Occupational Exposure Scenario (Ref. 1). While other specific processing aid uses of PCE were not identified in the 2020 Risk Evaluation, EPA expects the exposure assessment, including the worker activities, to be consistent across all processing aid type uses. For example, as assessed in the risk evaluation, worker activities that may result in exposure for use as a processing aid include unloading PCE into process equipment and maintenance. Similar to control measures that reduce the potential for exposure and indicate the ability to comply with the WCPP for use as a processing aid in the pesticide, fertilizer, and other agricultural chemical manufacturing sector, EPA has determined that control measures such as use occurring in a highly specialized closed system with minimal exposure to PCE during infrequent worker activity limit the potential for exposure and indicate the ability to comply with the WCPP for use as a processing aid in other industrial sectors. Therefore, EPA believes the WCPP requirements are practicable and implementable for all processing aid uses which occur at sophisticated industrial sites. EPA’s determination is based on reasonably available information included in submissions to EPA related to process descriptions, worker activities, and exposure mitigation practices for use of PCE as an industrial processing aid in sectors other than petrochemical manufacturing and pesticide, fertilizer, and agricultural chemical manufacturing (Refs. 1, 36).

The information submitted to EPA as part of the comment period regarding the industrial and commercial use of PCE as a processing aid in sectors other than petrochemical manufacturing (including industrial and commercial use as a processing aid in pesticide, fertilizer and agricultural chemical manufacturing) and supported by subsequent discussions, demonstrated the users’ ability to comply with the

WCPP. For this reason, EPA has determined that the unreasonable risk from PCE when used as a processing aid, even in sectors other than petrochemical manufacturing and pesticide, fertilizer, and agricultural chemical manufacturing, could be addressed with a WCPP. Therefore, in this final rule, EPA is finalizing a WCPP for all industrial and commercial use of PCE as a processing aid in sectors other than petrochemical manufacturing and a WCPP for industrial and commercial use of PCE as a processing aid in catalyst regeneration in petrochemical manufacturing.

c. Industrial and Commercial Use of PCE as Solvent for Cold Cleaning of Tanker Vessels

EPA is finalizing a WCPP for industrial and commercial use of PCE as solvent for cold cleaning of tanker vessels, which is a sub-use of the industrial and commercial use of PCE as solvent for cold cleaning, which EPA proposed to prohibit in the proposal (88 FR 39652, June 16, 2023) (FRL–8329–02–OCSPP). While EPA proposed to prohibit industrial and commercial use of PCE as solvent for cold cleaning, this was due to insufficient information at the time of proposal to determine that compliance with the WCPP would be possible and EPA believed alternatives were reasonably available. EPA requested comment on whether to consider a regulatory alternative that would subject more conditions of use of PCE to a WCPP, instead of a prohibition, than those contemplated in the primary alternative regulatory action. EPA also requested monitoring data and detailed descriptions of PCE-involving activities for these conditions of use to determine whether these additional conditions of use could comply with the WCPP such that risks are no longer unreasonable.

EPA received one comment regarding the industrial and commercial use of PCE in cold cleaning of tanker vessels. The commenter requested that EPA not prohibit this use because entities utilize PCE and other solvents, such as methylene chloride, ortho-dichlorobenzene, monochlorobenzene, and toluene, to clean tanks safely and effectively, when water and detergents are not compatible with the cargo material (Ref. 37). The commenter suggested that EPA establish the WCPP to maintain this use. Following a September 26, 2023, meeting with an industry user to receive clarifying information on their comment, the commenter submitted information on worker activities and safety measures in place that provide worker protection for this use (Ref. 38). As described in the

submitted information, tank cleaning with a solvent is typically infrequent (about every two years) and worker exposure occurs during sampling and connecting or disconnecting of hoses to or from the ship manifold or waste truck, activities during which control measures are in place. Based on the information submitted regarding this condition of use, and supported by subsequent discussions, EPA believes such controls and safety measures may be implementable industry wide.

EPA received two comments regarding industrial and commercial use of PCE in cold cleaning generally. One commenter stated that the empirical and modeled exposure data for cold cleaning in the risk evaluation are very similar to that for degreasing, but EPA proposed to allow continued use of PCE under the WCPP in vapor degreasing and not cold cleaning (Ref. 33). Another commenter associated with the aerospace and defense sector urged EPA to permit ongoing use under the WCPP for PCE as a cold, immersion cleaner (Ref. 32). However, for all cold cleaning other than cold cleaning of tanker vessels, EPA does not have any reasonably available information, including monitoring or detailed process description, that supports the ability to comply with a WCPP such that the risks are no longer unreasonable. EPA does not have any reasonably available information that indicates the exposure frequency, worker activities, and safety measures associated with cold cleaning of tanker vessels, as described by the commenter, are applicable to other cold cleaning operations, which may vary in equipment design or worker activities (Ref. 37, 38).

The information submitted to EPA during the comment period regarding the industrial and commercial use of PCE as a solvent for cold cleaning of tanker vessels, supported by subsequent discussions, demonstrated the users’ ability to comply with the WCPP. For this reason, EPA has determined that the unreasonable risk from PCE when used in cold cleaning of tanker vessels could be addressed with a WCPP. EPA is finalizing a prohibition for all other cold cleaning applications of PCE.

d. Industrial and Commercial Use of PCE as a Laboratory Chemical

In general, EPA is finalizing the prescriptive control requirements for the industrial and commercial use of PCE as a laboratory chemical as proposed, with some modifications, based on consideration of public comments. As described in the 2023 PCE proposed rule, to address the unreasonable risk of injury to health resulting from dermal

exposures to PCE for the industrial and commercial use as a laboratory chemical, EPA proposed to require dermal PPE in combination with comprehensive training for tasks related to the use of PCE in a laboratory setting for each potentially exposed person in direct dermal contact with PCE. EPA also proposed to require the use of fume hoods to codify the assumption of existing good laboratory practices that EPA relied upon as a key basis for its evaluation of risk from this condition of use (Ref. 1). EPA requested comment relative to the ability of owners and operators to implement laboratory chemical fume hood and dermal PPE-related requirements within 12 months of publication of the final rule. Under the primary alternative regulatory action, EPA included the WCPP for laboratory use of PCE and solicited comment on non-prescriptive requirements to meet an ECEL and Direct Dermal Contact Control (DDCC) as compared to the prescriptive workplace controls of using a fume hood and dermal PPE.

EPA received several comments regarding the industrial and commercial use of PCE as a laboratory chemical. Several commenters stated that the proposed regulation would result in confusion and duplication with the OSHA standard for occupational exposure to hazardous chemicals in laboratories under 29 CFR 1910.1450 that is already in effect (Refs. 39, 40, 41). The commenters urged EPA to more closely align its requirements for laboratory use of PCE with OSHA's laboratory standard to reduce the compliance burden. Some commenters expressed support for the use of fume hoods and other engineering controls over the WCPP and suggested that EPA include flexibility for engineering controls beyond a fume hood for consistency with the OSHA laboratory standard (Refs. 40, 42). The commenters stated that while fume hoods are considered best practice and are commonly used to reduce exposure in laboratories, some experiment designs utilizing PCE may not be able to be accommodated within a fume hood. Commenters described other alternative controls that can be designed and implemented to reduce exposure, such as glove boxes, exhausted enclosures, air-free solvent purification systems, and fume extractors. One commenter described other laboratory standards, including the American National Standards Institute (ANSI)/American Society of Safety Professionals (ASSP) Z9.5 Laboratory Ventilation standard and the ANSI/American Society of

Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) 62.1 Ventilation and Acceptable Indoor Air Quality standard, that laboratories adhere to in addition to OSHA's laboratory standard that they state meet or exceed the worker protections under EPA's proposed WCPP and prescriptive controls (Refs. 41, 43, 44).

Based on information provided by commenters related to exposure mitigation controls to comply with the OSHA laboratory standard and best management practices available to laboratories, EPA has determined that requiring laboratory ventilation devices such as fume hoods or glove boxes would better align with the OSHA laboratory standard and existing good laboratory practices. As described in Unit V.A.1. of the 2023 PCE proposed rule, EPA proposed to require fume hoods in laboratory settings to codify assumptions made in the 2020 Risk Evaluation for PCE, where EPA's risk estimates and determination that inhalation exposures from the industrial and commercial use of PCE as a laboratory chemical did not contribute to the unreasonable risk were predicated on its findings that expected safety practices of using PCE in small amounts under a fume hood reduce the potential for inhalation exposures. For the industrial and commercial use of PCE as a laboratory chemical, EPA concurs with the commenters that indicated EPA's requirements should align more closely with the OSHA laboratory standard wherever possible to prevent confusion. The requirement in this final rule that laboratory ventilation devices, such as fume hoods or glove boxes, are in use and functioning properly and that specific measures are taken to ensure proper and adequate performance of such equipment to minimize exposures to persons in the area when PCE is used in a laboratory setting aligns with existing requirements from 29 CFR 1910.1450(e)(3)(iii).

As detailed in Unit IV.C. of this final rule, EPA is finalizing as proposed the requirements for dermal PPE in combination with comprehensive training for tasks related to the use of PCE in a laboratory setting. EPA believes these requirements align with OSHA's laboratory standard and OSHA's General Requirements for Personal Protective Equipment at 29 CFR 1910.132 to the extent possible while still addressing the unreasonable risk of injury to health resulting from dermal exposures to PCE identified for the industrial and commercial use as a laboratory chemical.

e. Industrial and Commercial Use of PCE as Energized Electrical Cleaner

EPA is finalizing requirements to comply with *either* specific prescriptive controls *or* the WCPP for the industrial and commercial use of PCE as energized electrical cleaner, which is a sub-use of the industrial and commercial use of PCE as solvent for aerosol spray degreaser/cleaner, as described in Unit III.B.1.c.vi. of the 2023 PCE proposed rule. In the proposal, EPA proposed to prohibit the industrial and commercial use of PCE as solvent for aerosol spray degreaser/cleaner because the Agency was not able to identify reasonably available information such as monitoring data or detailed activity descriptions to indicate with certainty that relevant regulated entities could mitigate the identified unreasonable risk through a WCPP. EPA considered requiring a WCPP for this condition of use under the primary alternative regulatory action because of uncertainties regarding the availability of alternatives for all aerosol spray degreasing/cleaning applications, including for energized electrical cleaning. EPA requested comment on the ways PCE may be used, including the likelihood of successful compliance with the WCPP for this condition of use. EPA also requested comment on prescribing specific engineering or administrative controls that would reduce inhalation and dermal exposures enough to address the unreasonable risk across all workplaces engaged in a condition of use. Additionally, EPA requested comment on whether to include a self-certification requirement for purchasing PCE or PCE-containing products.

EPA received several comments expressing concern over the proposed prohibition on energized electrical cleaning (Refs. 45, 46, 33, 47, 48, 49). Several commenters stated that safer alternatives are not available because alternative products not containing PCE likely present a flammability safety issue (Refs. 45, 48, 47, 50). A commenter also stated that some cleaning in the electrical utility industry is conducted underground in confined spaces where respiratory protection is used and a non-flammable product, such as those containing PCE, is needed to control a potential fire hazard (Ref. 45). In addition to describing the need for PCE in energized electrical cleaning, commenters described the work practices and context that support the potential for exposure reduction to PCE through workplace controls, rather than prohibition. As an example, one commenter described work practices

and controls for energized electrical cleaning, stating that facilities that require cleaning of energized equipment rely on skilled technicians or other professional users who typically have education and training that may include two years at lineman school, time as an apprentice, licensing or certifications, and continuing education (Ref. 45).

Additionally, the commenter stated that OSHA General Industry and Construction standards include requirements specific to electrical work under 29 CFR part 1926, subparts E, K, and V. Commenters also described State-level regulations that exclude energized electrical cleaners from prohibitions on the manufacture and sale of PCE-containing general purpose degreasing products, electrical cleaners, and electronic cleaners (Refs. 45, 49). Another commenter stated that EPA should not prohibit energized electrical cleaning because petroleum refineries safely use energized electrical cleaners on a regular basis (Ref. 48).

While many commenters advocated for continued use of PCE for this condition of use, they differed in whether the WCPP or other workplace controls would be most suitable. Some commenters stated that the WCPP would be impractical for energized electrical cleaning because trained technicians often travel to different facilities to conduct work, including facilities that may not otherwise use PCE, and suggested that instead of a WCPP, a training and certification program would be sufficient to address the unreasonable risk (Refs. 45). Other commenters suggested PCE use for cleaning of energized electrical equipment should be exempt from the rule under a TSCA section 6(g) exemption (Refs. 45, 46, 33, 47).

Based on the information submitted to EPA as part of the comment period regarding this condition of use, supported by subsequent discussions, and in consideration of existing best practices and regulations for work in electrical spaces as well as the lack of reasonably available technically and economically feasible alternatives to PCE that also do not present a potential flammability concern for energized electrical cleaning, EPA has determined that the unreasonable risk from PCE when used as energized electrical cleaner could be addressed with a combination of labeling, self-certification, and either the WCPP or specific prescriptive controls, including dermal PPE and respiratory protection. EPA notes the importance of existing OSHA regulations designed to protect workers exposed to dangers such as electric shock, electrocution, fires, and

explosions. Specifically, in addition to the requirements for electrical work under OSHA General Industry and Construction standards at 29 CFR part 1926, subparts E, K, and V that one commenter mentioned in their public comment, OSHA regulates electrical work under Occupational Safety and Health standards at 29 CFR part 1910. For example, OSHA requires safety-related work practices on electrical equipment under the Electrical Standard at 29 CFR part 1910, subpart S (29 CFR 1910.301 to 1910.399), which was significantly updated in 2007. OSHA also sets forth requirements for the operation and maintenance of electrical power generation, control, transformation, transmission, and distribution lines and equipment under the Electric Power Generation, Transmission, and Distribution Standard at 29 CFR part 1910, subpart R (29 CFR 1910.269), last amended in 2015. Additionally, OSHA regulates electrical protective equipment under the Electrical Protective Equipment Standard at 29 CFR part 1910, subpart I (29 CFR 1910.137), which was significantly updated in 2014. Other standards and best practices apply to electrical safety in the workplace, for example the National Fire Protection Association 70E Standard for Electrical Safety in the Workplace (Ref. 51).

Under the Electrical Standard at 29 CFR 1910.333 and the Electric Power Generation, Transmission, and Distribution Standard at 29 CFR 1910.269, OSHA requires employers to establish minimum approach distances from exposed energized parts, depending on the voltage, that persons must maintain unless they are a qualified employee that meets certain requirements under 29 CFR 1910.269(l)(3)(iii)(A) through (C) or 29 CFR 1910.333(c)(3)(ii)(A) through (C). In instances where persons need to clean or degrease energized equipment in an area that is not considered a confined space, as defined in 29 CFR 1910.146(b), or an enclosed space (such as a manhole or vault) as described in 29 CFR 1910.269(e), for example housekeeping overhead lines, but are not permitted to approach or take conductive objects closer to the exposed energized part than the employer's established minimum approach distance, persons may be able to use tools, such as a hotstick with an aerosol spray can holder adapter or other live-line tools to clean the energized equipment (Ref. 52). In such instances where persons are maintaining the established minimum approach distance while conducting energized electrical cleaning in an area

that is not confined or enclosed, EPA believes the potential for inhalation exposures is minimal.

As noted earlier, EPA has determined that the unreasonable risk from PCE when used as energized electrical cleaner could be addressed with a combination of labeling, self-certification, and either (i) specific prescriptive controls, including dermal PPE and respiratory protection, or (ii) the WCPP. EPA's finalized requirements for industrial and commercial use of PCE as energized electrical cleaner are described in Unit IV.C.2. Other industrial and commercial use as a solvent for aerosol spray degreasers/cleaners is prohibited in the final rule, consistent with the proposal for that condition of use. EPA's workplace requirements to address the unreasonable risk for PCE as an energized electrical cleaner are consistent to the extent possible with existing regulations and best practices for work in electrical spaces such as OSHA's Electrical Standard at 29 CFR part 1910, subpart S and the Electric Power Generation, Transmission, and Distribution Standard at 29 CFR part 1910, subpart R.

In this final rule, EPA is also adding a definition of "energized electrical cleaner" to 40 CFR 751.603, consistent with the definition promulgated in States such as California (*Title 17, California Code of Regulations, Article 2, section 94508*), New York (*6 CRR-NY III A 235*), Maine (*06 ME Code Rules § 096-152*), Rhode Island (*250-RICR-120-05-31*), Connecticut (*section 22a-174-40*), Delaware (*7 Del. Admin. Code § 1141-1.0*), Washington, DC (*20 DCMR, Chapter 7, section 718*), Maryland (*COMAR 26.11.32*), New Jersey (*New Jersey Administrative Code 5:23-6.1*), Indiana (*Standards for Consumer and Commercial Products (CCP)—VOC Rule 326 IAC 8-15*), Illinois (*Administrative Cod Title 35, § 223.265*), and Massachusetts (*310 CMR 7.25*).

B. Changes to Timeframes

1. Changes to the WCPP Timeframe

For the conditions of use for which EPA proposed the WCPP, EPA proposed several compliance timeframes, including the following requirements:

- Initial exposure monitoring must be conducted within six months of publication of the final rule or within 30 days of introduction of PCE into the workplace if PCE use commences at least six months after the date of publication;
- Each owner or operator ensure that exposure to PCE does not exceed the ECEL as an 8-hour TWA for all

potentially exposed persons within nine months of publication of the final rule; and

- Owners and operators implement an exposure control plan within 12 months of publication of the final rule.

In the primary alternative regulatory action described in the 2023 PCE proposed rule, EPA described slightly longer timeframes that included the following:

- Initial exposure monitoring be conducted within 12 months of publication of the final rule;
- Each owner or operator ensures that the exposure to PCE does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons within 15 months of publication of the final rule; and

- Owners and operators implement an exposure control plan within 18 months of publication of the final rule.

EPA requested comment regarding the ability of owners or operators to comply with the various provisions of the WCPP, including initial exposure monitoring, within the compliance timelines included in the proposal, and anticipated timelines for any procedural adjustments needed to comply with the establishment of a respiratory protection program and development of an exposure control plan. EPA further requested comment on any advantages or drawbacks associated with the longer timeframes outlined in the primary alternative regulatory action, and noted that the Agency may finalize significantly shorter or longer compliance timeframes based on consideration of public comments. EPA also requested comment regarding issues around the viability of current analytical methods and detection limits for occupational PCE sampling and/or monitoring methods.

Public comments highlighted challenges with the proposed timeframes and suggested longer timeframes for initial exposure monitoring. For example, some commenters stated that the proposed 6-month timeframe within which to conduct initial exposure monitoring may not be possible because PCE use may be infrequent and occur only periodically or annually, such as in maintenance exercises or in batch manufacturing operations (Refs. 53, 54, 32). One commenter expressed concern that requirements to comply with a new exposure limit would stress industrial hygiene consultants and laboratories that analyze the samples, and urged EPA to ensure that there would be adequate time for consultant firms and laboratories to establish sufficient capacity (Ref. 55). Some commenters

described how entities need more time than what was proposed to assess exposures to various products and processes and noted that the complexity of the WCPP provisions would require taking multiple measurements for the presence of PCE in various operations across multiple facilities, which will be challenging to layer on top of the employer's OSHA compliance practices (Refs. 32, 47, 54). Other commenters stated the proposed 6-month timeframe for initial monitoring would be untenable and suggested that the deadline be extended to 12 months (Refs. 31, 33, 56, 49). Two commenters reasoned that at least 12 months would be necessary to revalidate methods and determine whether revision to corporate exposure assessment strategy would be necessary to address the new ECEL (Refs. 33, 49). Commenters stated that a corporate exposure assessment strategy or similar mechanism would necessitate the procurement of professional services, adding logistical demand for these specialized services. The commenters also noted that monitoring at the proposed ECEL and action level would likely require laboratory analysis (rather than direct measurement) that will delay the availability of results and make meeting a 6-month timeframe challenging.

In consideration of public comments and the challenges of initiating the WCPP, even for facilities with industrial hygiene programs in place, and the difference in the occupational exposure limits between the OSHA permissible exposure limit (PEL) and the EPA ECEL and the challenges associated with monitoring to new, lower EPA exposure thresholds that may spur an increase in the need for monitoring or other exposure control assessment infrastructure, EPA has determined that a longer compliance deadline of 360 days, as provided in the primary alternative regulatory action described in the proposal, is as soon as practicable to conduct initial monitoring for PCE, which likely would require regulated entities to contract new services or realign current industrial hygiene professionals towards WCPP compliance. Adopting this timeframe from the primary alternative approach (providing 360 days for initial monitoring) is intended to: (1) prevent professional safety service sectors from being overwhelmed by new EPA requirements; (2) provide time to procure the necessary services while ensuring the preservation of safety quality, standards, and practices; and (3) provide sufficient time for a comprehensive exposure evaluation,

increasing the likelihood of successful implementation of the WCPP. Following initial monitoring, EPA is finalizing the requirement that each owner or operator supply a respirator to each person who enters a regulated area within three months after the receipt of any exposure monitoring that indicates exposures exceeding the ECEL. Therefore, the requirements for each owner or operator to ensure that exposures to PCE do not exceed the ECEL as an 8-hour TWA for all potentially exposed persons, including by providing respiratory protection, take effect 450 days after publication of the final rule. Given the full WCPP requirements (including the exposure control plan) are required after owners or operators are required to ensure that no person is exposed to an airborne concentration that exceeds the TWA ECEL, EPA acknowledges that compliance with the ECEL may include temporary PPE use (e.g., respiratory protection) until comprehensive engineering and administrative controls are fully implemented. As described in the 2023 PCE proposed rule, EPA believes that three months after receipt of exposure monitoring results is as soon as practicable, while also providing a reasonable transition period for entities to evaluate exposure monitoring results, acquire the correct respiratory protection, and establish the PPE program, including training, fit-testing, and medical evaluation. Additionally, for clarity in regulatory requirements and reduced burden in implementation, EPA is finalizing a compliance date for preventing direct dermal contact, including by use of dermal PPE, that is 450 days after publication of the final rule, so that this compliance timeframe is consistent with timeframe to ensure inhalation exposures do not exceed the ECEL. EPA believes that 450 days is as soon as practicable and provides a reasonable transition period for regulated entities to evaluate potential for direct dermal contact with PCE, establish a PPE program, acquire the appropriate dermal PPE, and conduct the required training.

EPA also received public comment regarding the compliance timeframe for full implementation of the WCPP, including detailing the evaluation steps that would be required to assess a facility and develop, document, and implement an exposure control plan. To allow time for orderly transitions and training to comply with an ECEL (0.14 ppm (8-hr TWA)) that is significantly lower than the OSHA PEL of 100 ppm (8-hr TWA) and the American Conference of Governmental Industrial Hygienists (ACGIH) threshold limit

value (TLV) of 25 ppm (8-hr TWA) for PCE, some commenters suggested that EPA adopt a graduated implementation approach for ECEL implementation by first requiring entities that already meet the OSHA PEL to comply with the ACGIH TLV within two years from the effective date of the final rule and then permitting those facilities meeting the ACGIH standard two years to transition to the ECEL (Refs. 57, 54). Two commenters expressed concern that the proposed timeframes would be insufficient for owners or operators to document their efforts to implement the hierarchy of controls as required under the WCPP, and recommended that the time required to develop the exposure control plan be extended to two years from completion of initial monitoring, for a total of 24 to 36 months from the effective date of the final rule, to provide adequate time for entities to evaluate and implement appropriate compliance approaches that are the least burdensome and most effective for workers (Refs. 49, 33).

Based on comments, outreach, reasonably available information, existing OSHA standards, and industry best practices, EPA maintains that the majority of the exposure reduction and worker safety infrastructure needed for compliance is currently in place, but recognizes the fundamental challenge of building a new exposure control strategy around the new, lower EPA exposure limit. Additionally, based on consideration of public comment and given that OSHA has not promulgated a detailed standard specific to PCE, EPA has determined that a longer compliance timeframe of 900 days for development and implementation of an exposure control plan is as soon as practicable to ensure that the regulated community has adequate time to evaluate monitoring data, assess and develop an exposure strategy, procure appropriate control technology and PPE, and implement the required chemical safety program for PCE.

Therefore, EPA is finalizing the compliance timeframes for the WCPP provisions as follows: (1) The requirements for each owner or operator to conduct initial baseline monitoring must be met within 360 days of the publication date for this final rule or within 30 days of introduction of PCE into the workplace, whichever is later; (2) The requirements for each owner or operator to ensure that exposure to PCE does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons, including by providing respiratory protection to all potentially exposed persons in the regulated area must be met within 450 days of the

publication date for this final rule or within three months after receipt of the results of any exposure monitoring that indicates an exceedance of the ECEL; (3) The requirements that each owner or operator ensure all persons are separated, distanced, physically removed, or isolated from direct dermal contact with PCE, including by providing dermal PPE, must be met within 450 days of the publication date of this final rule; and (4) The requirements for development and implementation of an exposure control plan must be met within 900 days of the publication date of this final rule. EPA is also finalizing as proposed, with a slight modification, the requirement that owners and operators institute a training and information program for potentially exposed persons and assure their participation in the training and information program, and that this requirement be met within 450 days of the publication date of this final rule (see Unit IV.B.7.a.).

However, EPA understands that certain departments and agencies of the Federal government, as well as Federal contractors acting for or on behalf of the Federal government, need additional time to comply with these timeframes. For example, complying with these timeframes could impact the ability of the Department of Defense to continue to engage in vapor degreasing. While, for example, 29 CFR part 1960 sets forth procedures and guidelines for ensuring that Federal workers are protected in comparable ways to their non-Federal counterparts, EPA believes that compliance with this final rule will require increased and different preparations on the part of Federal agencies. For example, Federal agencies must follow procurement requirements which will likely result in increased compliance timelines. In addition, these requirements will require support in the Federal budget, which, for some agencies, is a multi-year process. Therefore, EPA is providing additional time for agencies of the Federal government and their contractors, when acting for or on behalf of the Federal government, to comply with the WCPP, including 915 days for initial monitoring, 1,005 days to ensure that no person is exposed to an airborne concentration of PCE that exceeds the ECEL, and 1,095 days to implement an exposure control plan.

2. Changes to Prohibition Timeframes

For most occupational conditions of use that EPA proposed to prohibit, EPA proposed that prohibitions would become effective in a staggered schedule for each stage of the supply chain and

would come into effect after the publication of this final rule: In 12 months for manufacturers, 15 months for processors, 18 months for distributors to retailers, 21 months for all other distributors (including retailers), and 24 months for industrial and commercial users. For consumer uses, EPA proposed that the prohibitions of manufacturing, processing, and distribution in commerce of PCE for consumer use would take effect after the publication of this final rule: In 12 months for manufacturers, 15 months for processors, 18 months for distributing to retailers, and 21 months for all other distributors and retailers. EPA's primary alternative regulatory action, discussed in the 2023 PCE proposed rule, included slightly longer timeframes, which begin after the publication of this final rule: In 18 months for manufacturers, 21 months for processors, 24 months for distributing to retailers, 27 months for all other distributors (including retailers), and 30 months for industrial and commercial uses. EPA requested comment regarding the proposed and alternative compliance dates for prohibitions and whether additional time is needed.

Several commenters raised concerns about the timeframe for complying with prohibitions from the proposed regulatory action, stating that EPA should consider longer timeframes for prohibition to avoid disruptions to the supply chain for continuing uses, help minimize disposal of products left on retail shelves, and provide sufficient time to identify, research, test, qualify, and implement cost-effective alternative substances or processes (Refs. 32, 50, 33). One commenter expressed concern that the proposed compliance timeframes would cause certain products containing PCE to leave the market, potentially cutting off PCE supply for continuing critical uses and creating a risk of obsolescence for essential equipment that is reliant on PCE.

Some commenters expressed that there may be circumstances in which a chemical alternative is not an exact, drop-in replacement for certain conditions of use, or in which new, additional, or modifications to existing engineering equipment could be necessary (Refs. 33, 50, 45). These commenters further expressed concerns regarding coordination with suppliers or customers across the supply chain (including with certifying entities in circumstances where a formulation change may require recertifying a product to meet performance standards, for example) that may require a

transitioning process. Due to these and other concerns, some commenters supported longer timeframes for prohibition than what was proposed, which would provide additional time that commenters described as necessary for seeking alternatives, successfully implementing their use, and mitigating supply chain impacts (Refs. 33, 50, 45). One commenter stated that the proposed 24-month prohibition is significantly shorter than for other EPA programs, such as EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) which typically provide 36 months for compliance, and suggested that EPA extend the deadlines to 12 months for manufacturing, 21 months for processing, 24 months for distribution to retailers, and 30 months for retail distribution (Ref. 50). Other commenters recommended that EPA double the proposed prohibition timeframes for manufacturers and processors, suggested longer timeframes, and suggested that EPA extend the sell-through period of products already in commerce by six months (Refs. 45, 46, 33).

After reviewing all of the comments, in this final rule EPA is modifying the proposed prohibition compliance timeframes for most uses to lengthen them to the prohibition compliance timeframes included in the primary alternative regulatory action, which will allow for successful implementation of the prohibitions in a manner that is as soon as practicable while providing for a reasonable transition period. This extension will also provide additional time for regulated entities to consult with their upstream suppliers and downstream customers and to make necessary adjustments, thereby mitigating immediate concerns for operational continuity for conditions of use identified in Units IV.B. and C. The timeframes for prohibition EPA is finalizing are described in detail in Unit IV.D.

EPA is finalizing as proposed the prohibition on the manufacturing, processing, distribution in commerce, and industrial and commercial use of PCE for dry cleaning and spot cleaning through a 10-year phaseout, as outlined in Unit IV.D.3.

C. Changes to WCPP Requirements

1. Exposure Monitoring Requirements

As part of the WCPP, EPA proposed to require owners or operators to meet certain documentation requirements for each monitoring event of PCE, including compliance with the Good Laboratory Practice (GLP) Standards in accordance with 40 CFR part 792.

Numerous commenters expressed concern regarding the requirement that the WCPP include compliance with the GLP Standards at 40 CFR part 792 (Refs. 46, 54, 53, 56, 48, 55, 49). Commenters stated that it is atypical, for industrial hygiene purposes, to use this standard for air sampling of PCE (Refs. 33, 55, 49). According to the commenters, it is common practice within the industrial hygiene community to have analyses performed by American Industrial Hygiene Association (AIHA) accredited laboratories (Ref. 49). Some commenters recommended that provisions of monitoring results and recordkeeping in the final rule be allowed from any accredited laboratory, without regard to a specific type, or allowing any number of approved monitoring methods, especially AIHA accredited laboratories (Refs. 56, 46). Commenters also suggested applying the policy described in typical TSCA section 5(e) orders that establish a New Chemical Exposure Limit under the TSCA New Chemicals Program, which state that compliance with TSCA GLP Standards is not required where exposure monitoring samples are analyzed by a laboratory accredited by either: (A) the AIHA Industrial Hygiene Laboratory Accreditation Program; or (B) another comparable program approved in advance in writing by EPA (Refs. 33, 55, 49). Another commenter reasoned the GLP Standards were not intended for air monitoring in a workplace when compliance with such standards would mean that real-time assessments could not be made, as air samples would need to be processed and analyzed in a laboratory (Ref. 53).

EPA agrees with the commenter that the WCPP is incompletely served by solely relying on the GLP Standard initially put forth in the 2023 PCE proposed rule. Given the concern from commenters regarding potential increases in demand for professional safety services and sampling laboratories having a negative impact due to anticipated industry strain and sampling limitations (Refs. 33, 55, 49), EPA has broadened the scope of laboratory accreditation accordingly. EPA has considered this laboratory capacity issue, in addition to other revisions for finalization in this rule, so that the additional infrastructure is in place for the regulated community to successfully implement the WCPP. For the final rule, EPA is requiring that exposure samples be analyzed using an appropriate analytical method, and related records retained, by a laboratory that complies with the GLP Standards in 40 CFR part 792 or that otherwise

maintains a relevant third-party laboratory accreditation (e.g., under the AIHA Laboratory Accreditation Programs, LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized programs.

Another commenter stated that EPA's proposal did not make clear that "personal breathing zone" air samples to monitor exposures are to be taken without regard to respirator use. The commenter noted that OSHA requires exposure monitoring to be conducted without regard to respirator use (citing as an example OSHA's definition of "employee exposure" at 29 CFR 1910.1052(b)) and asserted that this important element of OSHA's monitoring program was omitted from EPA's proposal (Ref. 58). EPA agrees with the commenter that exposure monitoring should be conducted without regard to respiratory protection to inform engineering control options and respiratory protection considerations. Therefore, EPA is finalizing this rule to explicitly state that air sampling is required to measure ambient concentrations for PCE without taking respiratory protections into account when being performed. This will ensure the highest degree of protection to potentially exposed persons by logging accurate ambient air concentrations of PCE, thus empowering owners or operators to appropriately consider the hierarchy of controls.

As part of the WCPP, EPA also proposed to establish an ECEL action level of 0.07 ppm as an 8-hour TWA for PCE. As described in Unit IV.A.2.b. of the 2023 PCE proposed rule, air concentrations at or above the action level would trigger more frequent periodic monitoring of exposures to PCE, consistent with the action level approach utilized by OSHA in the implementation of OSHA standards, although the values differ due to differing statutory authorities. EPA proposed an action level that would be half the 8-hour ECEL, which is in alignment with the precedented approach established under most OSHA standards. EPA solicited comment regarding an ECEL action level that is half the ECEL and any associated provisions related to the ECEL action level when the ECEL is significantly lower than the OSHA PEL. EPA also requested comment on viability of current analytical methods and detection limits for PCE sampling.

EPA received several comments regarding an action level that is half the ECEL and the viability of detecting to the action level with existing analytical methods. One commenter supported the establishment of an action level that is

one-half the ECEL as this stratified approach will impose appropriate controls based on the particulars of each workplace (Ref. 58). Other commenters expressed concern regarding the proposed ECEL action level, stating that the action level should not be included in the regulation because of challenges to reliably measure to the proposed value and suggesting EPA consider best practice for industrial hygiene exposure assessment published by the AIHA (Refs. 33, 57). Commenters warned that implementing a monitoring methodology for the proposed ECEL would not be seamless because existing monitoring methods are not adequate. As an example, commenters stated that the NIOSH 1003 method, as currently validated, will not achieve the limit of detection required for evaluating to the proposed ECEL or action limit (Refs. 33, 49). Commenters stated that passive sampling methods cannot measure to below the ECEL, and thus entities would need to rely on active sampling with a pump with samples sent out to laboratories for analysis (Refs. 45, 47). Another commenter asserts that the proposed ECEL action level of 0.07 ppm is not detectable and stated that the best way to ensure reliable and comparable results is to use a digital measuring device, which can currently detect concentrations up to 10 ppm and are in development to detect concentrations as low as 0.1 ppm, which is the lowest on the global market (Ref. 59). Additionally, other commenters stated that NIOSH recommends a detection limit of 10% of the occupational exposure limit (Refs. 33, 49, 60).

EPA acknowledges the challenges of occupational personal breathing zone monitoring to levels consistent with the ECEL action level and ECEL. As noted earlier, EPA intends for the WCPP to align with, to the extent possible, certain elements of the existing OSHA standards for regulating toxic and hazardous substances under 29 CFR part 1910, subpart Z and is therefore finalizing an action level different from the proposed 0.07 ppm ECEL action level to support a trigger for more frequent periodic monitoring. In consideration of public comment, reasonably available information, and outreach, EPA has determined that revising the ECEL action level to 0.10 ppm as an 8-hr TWA for PCE is appropriate given the limits of detection and limits of quantification for existing monitoring methods. EPA notes that while real-time monitoring with a digital measuring device is not required for rule compliance, EPA understands the practical benefits of real-time

occupational exposure monitoring. EPA also notes that the reliable limits of quantification for available analytical methods (*e.g.*, NIOSH 1003 and OSHA 5000) are below the ECEL action level of 0.10 ppm.

Additionally, as part of the WCPP, EPA proposed to require owners and operators to re-monitor within 15 working days after receipt of any exposure monitoring if results indicated non-detect or air monitoring equipment malfunction, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary. EPA received several comments disagreeing with the proposed requirement to review non-detect air monitoring samples. The commenters stated that the requirement is inconsistent with OSHA rules, is an unnecessary step that adds no value to reduce risk to workers, and could be costly, especially for smaller companies (Refs. 56, 32, 57, 33, 47, 48, 49). One commenter suggested that EPA incorporate a six-sample rolling average, as the statistical evaluation would incorporate ongoing validation of exposure levels for a particular task and thus remove any need for resampling based on a non-detect result.

EPA disagrees with commenters that expressed the opinion that re-evaluating a non-detect result adds no value and is inappropriate. While in some cases a non-detect result may accurately indicate that the chemical is not present and that air concentrations are below the ECEL action level, in other cases it may not necessarily imply negligible occupational exposure to the chemical. For example, interference from another chemical during sampling may result in an incorrect result of non-detect. This interference may not be recognized at the time of sampling or analysis. Owners and/or operators also may not be using sampling techniques or analytical procedures that are effective or appropriate for the particular chemical of interest. In each of these cases, non-detect results, along with supporting documentation about the sampling and analytical methods used to get those results, is a meaningful part of the potentially exposed person's exposure record required under the WCPP. The WCPP in the 2023 PCE proposed rule and in this final rule does not require re-monitoring in all cases. Re-monitoring may be necessary based on a professional evaluation by an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist. This flexibility allows owners or operators options in

terms of revisiting occupational sampling in the event of a non-detect result, or evaluation by a qualified professional.

From an owner/operator's perspective, a non-detect sampling result when effective sampling and analysis procedures are used is valuable in that it suggests effective implementation of exposure controls. Potentially exposed persons may also use these records in discussions with owner/operators, in collective bargaining situations, or in compliance assistance inquiries to EPA or other federal agencies. Exposure monitoring results may also improve overall workplace health and reducing owner/operator liability in the effective detection, treatment, and prevention of occupational disease or illness. All of the above scenarios are valuable for owner/operators, potentially exposed persons, and for effective mitigation of occupational exposures. In consideration of these factors, EPA has removed the air monitoring equipment malfunction from the monitoring activities that do not require resampling based on professional evaluation by an Environmental Professional or Certified Industrial Hygienist. While professional discretion may be warranted in determining whether re-monitoring is needed following results that indicate non-detect, EPA has determined this is not appropriate in the event of air monitoring equipment malfunction. This is due to the importance of air monitoring in ensuring that the requirements of the WCPP are met, and the importance of the WCPP in reducing risks from exposures to PCE in the workplace. Monitoring results from malfunctioning air monitoring equipment are not valid monitoring and therefore not sufficient to meet the monitoring requirements under the WCPP.

Additionally, while statistical methods may be useful in establishing and analyzing an occupational monitoring program, EPA is not persuaded by information commenters presented in support of relying on a six-sample rolling average of exposure measurements in place of the proposed requirement to evaluate re-monitoring. See section 5.5.3 of the Response to Comments document for a more detailed response (Ref. 8). EPA may consider developing additional guidance regarding occupational monitoring in the future. Therefore, after consideration of public comment, EPA is finalizing the requirement to re-monitor within 15 working days after receipt of any exposure monitoring if results indicated non-detect, unless an

Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the monitoring results and determines re-monitoring is not necessary. However, EPA agrees with comments that raised concern that the 2023 PCE proposed rule lacked clarity on what would suffice for justification that re-monitoring is not necessary, and has therefore updated the recordkeeping requirements associated with the WCPP exposures records required under 40 CFR 751.615(b)(1) to require documentation of the determination by the Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist to be maintained as a record. Occupational monitoring (and associated recordkeeping) is an area that EPA may develop guidance as part of final rule implementation efforts.

In the 2023 PCE proposed rule, EPA proposed to require under the WCPP that each owner or operator conduct additional exposure monitoring whenever a change in the production, process, control equipment, personnel, or work practices may reasonably be expected to result in new or additional exposures at or above the ECEL action level, or when the owner or operator has any reason to believe that new or additional exposures at or above the ECEL action level occurred. In the event of start-ups, shutdowns, spills, leaks, ruptures or other breakdowns that may lead to employee exposure, EPA proposed to require that each owner or operator conduct additional initial exposure monitoring to potentially exposed persons (using personal breathing zone sampling) after the cleanup of the spill or repair of the leak, rupture or other breakdown. EPA is finalizing the requirement to conduct this additional exposure monitoring, with a compliance timeframe requiring that this monitoring be conducted within 30 days after the relevant change or conclusion of the event and/or cleanup (see Unit IV.B.3.b.iii.), which is a clarification of the proposal, in which a timeframe was not specified.

As part of the WCPP exposure monitoring, EPA proposed to require owners or operators to determine each potentially exposed person's exposure by either taking a personal breathing zone air sample of each potentially exposed person's exposure or by taking personal breathing zone air samples that are representative of each potentially exposed person's exposure group, which EPA proposed to mean a group consisting of every person performing the same or substantially similar operations in each work shift, in each job classification, in each work area

where exposure to chemical substances or mixtures is reasonably likely to occur. EPA received a comment that suggested EPA revise the proposed definition of "exposure group" to more closely align with the similar exposure group approach used by industrial hygienists to refer to a group of workers who have common risks and similar exposure profiles (Ref. 56). EPA agrees that the definition of "exposure group" should align with standard practice for occupational safety and industrial hygiene and is therefore finalizing the definition of "exposure group" in 40 CFR 751.5 to mean a group of potentially exposed persons with a similar exposure profile to a chemical substance or mixture based on the substantial similarity of tasks performed, the manner in which the tasks are performed, and the materials and processes with which they work.

2. Designated Representative and Workplace Participation

As part of the WCPP in Unit IV.A.2.e.iii. of the 2023 PCE proposed rule, EPA proposed to require that owners or operators (*i.e.*, any person who owns, leases, operates, controls, or supervises a workplace covered by the rule) provide potentially exposed persons or their designated representatives regular access to the exposure control plans, exposure monitoring records, and PPE program implementation and documentation. Additionally, EPA proposed to require that owners or operators document the notice to and ability of any potentially exposed person that may reasonably be affected by PCE inhalation or dermal exposure to readily access the exposure controls plans, facility exposure monitoring records, PPE program implementation, or any other information relevant to PCE inhalation exposure in the workplace. EPA also requested comment on how owners and operators could engage with potentially exposed persons on the development and implementation of an exposure control plan and PPE program. Additional details of EPA's worker participation proposal can be found in Unit IV.A.2.e. of the 2023 PCE proposed rule.

EPA received public comment on the role of designated representatives in the WCPP. One commenter, a group of labor unions, urged EPA to incorporate requirements similar to OSHA's access standard at 29 CFR 1910.1020 (titled, "Access to employee exposure and medical records") in EPA's proposed requirements at 40 CFR 751.613 to ensure that exposure information is promptly and fully shared with both

potentially exposed persons and their designated representatives (Ref. 58). The commenter pointed out that while the preamble to the 2023 PCE proposed rule stated that EPA was proposing to provide designated representatives regular access to specified information, the proposed regulatory text at 40 CFR 751.613(b)(4) did not do so. The commenter also suggested that EPA include a requirement that employers provide employees or their designated representatives an opportunity to observe monitoring events. The commenter observed that workers and their designated representatives have a critical role to play in ensuring effective control of toxic substances and further noted that, often, unions are the organizations with expertise in understanding occupational exposure information. The commenter also urged EPA to require that owners and operators consult with workers and their designated representatives in developing and implementing their plans.

Following review of the comments received, EPA recognizes the importance of having the ability for potentially exposed persons and their designated representative(s), such as labor union representatives, to observe exposure monitoring and have prompt access to exposure records. EPA additionally recognizes that, in some instances, individual workers may be hesitant to ask owners or operators for information relating to their chemical exposure or may be less familiar with discipline-specific industrial hygiene practices. EPA determined that it is appropriate in this final rule to revise to some extent the requirements regarding designated representatives included in the proposal, consistent with existing OSHA precedent in certain 29 CFR part 1910, subpart Z regulations, to allow designated representatives the ability to observe occupational exposure monitoring and have access to exposure monitoring records. In EPA's final rule, the WCPP includes a requirement that owners and operators provide potentially exposed persons or their designated representatives an opportunity to observe any exposure monitoring that is designed to characterize their exposures and is conducted under the WCPP. With respect to facilities classified in the interest of national security, only persons authorized to have access to such facilities will be allowed to observe exposure monitoring.

EPA is also finalizing a requirement that designated representatives have access to relevant exposure records, similar to provisions in certain OSHA

regulations under 29 CFR part 1910, subpart Z, such as 29 CFR 1910.1200 and 29 CFR 1910.1020. EPA is requiring owners and operators to notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records of exposure monitoring and PPE program implementation within 30 days of the date that the exposure control plan is completed and at least annually thereafter. EPA is also requiring, consistent with the proposed requirement for notification of exposure monitoring results, that the notice of the availability of the exposure control plan and associated records be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English. While EPA encourages owners or operators to consult with persons that have potential for exposure and their designated representatives on the development and implementation of the exposure control plan, EPA has determined that it is not necessary to include this as a requirement in the final rule because OSHA does not typically require consultations with designated representatives. However, EPA believes that the notification of the exposure control plan and associated records may help facilitate participation from potentially exposed persons and their designated representatives in the implementation and further development of that plan.

In this final rule, EPA is defining “designated representative” in 40 CFR 751.5 to mean any individual or organization to whom a potentially exposed person gives explicit, written authorization to exercise a right of access. A recognized or certified collective bargaining agent must be treated automatically as a designated representative without regard to written authorization. Additionally, with respect to federal employees, EPA, like OSHA at 29 CFR 1960.2(e), will interpret these designated representative requirements consistent with the Federal Service Labor Management Relations Statute (5 U.S.C. 71), or collective bargaining or other labor-management arrangements that cover the affected employees.

Should a request be initiated for such records by the potentially exposed person or their designated representative(s), the owner or operator

will be required to provide the specified records at a reasonable time, place, and manner, analogous to provisions outlined in OSHA’s 29 CFR 1910.1020(e)(1)(i). If the owner or operator is unable to provide the requested records within 15 working days, the owner or operator must, within those 15 working days, inform the potentially exposed person or designated representative(s) requesting the record of the reason for the delay and the earliest date when the record can be made available. Additionally, in the event that a designated representative is observing exposure monitoring, the owner or operator must ensure that designated representatives are provided with PPE appropriate for the observation of monitoring. Finally, this rule requires owners or operators to provide notice to potentially exposed persons and their designated representatives of exposure monitoring results and of the availability of the exposure control plan and associated records. For purposes of this requirement, the owner or operator is only required to provide notice to those designated representatives that the owner or operator is aware of, such as representatives designated in writing or a recognized collective bargaining agent for the owner or operator’s own employees.

3. Other Changes to the WCPP

As part of the WCPP in the 2023 PCE proposed rule, EPA proposed various requirements for owners or operators to provide PPE, including respiratory protection and dermal protection, to potentially exposed persons and to establish a PPE program. For greater clarity in this final rule, EPA has revised the PPE requirements with respect to the cross-references to the relevant OSHA regulations. While the language appears different than the requirements included in the 2023 PCE proposed rule, it remains EPA’s intention that owners and operators implement PPE programs that are consistent with OSHA requirements. The PPE requirements as part of the WCPP in this final rule are described in Unit IV.B.6.

D. Other Changes

EPA is slightly modifying the provisions related to the de minimis regulatory threshold in the 2023 PCE proposed rule, where EPA proposed that products containing PCE at concentrations less than 0.1% by weight are not subject to the prohibitions. EPA requested comment on the de minimis concentration limit of PCE in products or formulations and received numerous comments in support of the inclusion of

a de minimis regulatory threshold (Refs. 48, 32, 46, 33, 61, 56, 47, 55, 62, 53, 54, 31, 63). One commenter urged EPA to make clear that the proposed de minimis exemption applies to all the provisions in the 2023 PCE proposed rule, and not just the prohibitions (Ref. 54). Some commenters expressed opposition to the de minimis level identified because they state EPA has not shown that a de minimis concentration is protective of workers (Refs. 64, 65, 66). EPA’s approach for a de minimis concentration of 0.1% for PCE is consistent with OSHA’s Hazard Communication Standard, as urged by several commenters who asserted that consistency with the existing hazard communication framework is important to avoid companies being out of compliance with EPA’s regulations without their knowledge, or having to engage in impractical and burdensome changes to hazard communication programs that are not necessary to protect against unreasonable risk (Ref. 33, 47, 48, 55). OSHA recently reaffirmed its approach of 0.1% threshold for carcinogens with its 2024 modification of its Hazard Communication Standard (89 FR 44144, May 20, 2024). The OSHA Hazard Communication standard, at 29 CFR 1910.1200, which requires employers to communicate to employees and downstream employers about the hazards of chemicals employees are exposed to, including through safety data sheets, defines “health hazard” as “a chemical which is classified as posing one of the following hazardous effects: acute toxicity (any route of exposure); skin corrosion or irritation; serious eye damage or eye irritation; respiratory or skin sensitization; germ cell mutagenicity; carcinogenicity; reproductive toxicity; specific target organ toxicity (single or repeated exposure); or aspiration hazard” (29 CFR 1910.1200(c)). The criteria for determining whether a chemical is classified as a health hazard are detailed in Appendix A to 29 CFR 1910.1200—Health Hazard Criteria. Section A.6.3.1 of Appendix A of 29 CFR 1910.1200 indicates that a substance is considered a health hazard if it includes greater than 0.1% of a substance that, like PCE, is classified as a carcinogen. OSHA’s Hazard Communication Standard is intended to be consistent with the United Nations Globally Harmonized System of Classification and Labelling of Chemicals (29 CFR 1910.1200(a)(1); 89 FR 44144, May 20, 2024). Other EPA programs, such as the Toxics Release Inventory (TRI) program, have adopted a de minimis threshold of 0.1% for

chemicals which are defined as carcinogens or as a potential carcinogen under the National Toxicology Program, International Agency for Research on Cancer, or OSHA, with limited exceptions not relevant to PCE (see 40 CFR 372.38(a)).

In consideration of public comment and the implementability of the PCE rule, as well as the analysis described in Unit V.A. of the 2023 PCE proposed rule, EPA is finalizing as proposed a de minimis threshold of 0.1%, which EPA is referring to in this final rule as a regulatory threshold, so that products containing PCE at concentrations less than 0.1% by weight are not subject to the prohibitions of this final rule, and is also adding clarification that products below the regulatory threshold are not subject to other restrictions of this final rule. While EPA conducted analysis regarding residual amounts of PCE in products (described in Unit V.A.1. of the 2023 PCE proposed rule), which confirmed that the use of the 0.1% value for carcinogens was an appropriate cut off, consistent with the OSHA's Hazard Communication Standard. EPA generally expects to align with the OSHA's Hazard Communication Standard approach regarding threshold amounts of chemicals going forward, with some exceptions as warranted by chemical-specific considerations (Ref. 67). EPA is confident that adopting a regulatory threshold of 0.1% for chemicals which are defined as carcinogens or as a potential carcinogen will increase regulatory certainty and enhance compliance. The manufacturing (including import), processing, and distribution in commerce of products that contain PCE at concentrations equal to or above the regulatory threshold of 0.1% are still subject to the prohibitions and restrictions of this final rule, regardless of the concentration of PCE in the end product.

As an additional change, EPA has revised its proposed description of industrial and commercial use of PCE as a laboratory chemical to provide additional clarity as suggested by a commenter (Ref. 62). The revised description for industrial and commercial use as a laboratory chemical appears in Unit IV.C.1. Similarly, for greater clarity and in response to comment that suggested EPA include terminology for "airless degreasers" in the final rule, EPA has revised its proposed description of industrial and commercial use as solvent for closed-loop batch vapor degreasing by clarifying that this use includes use of airless degreasers (Ref. 30). EPA has also revised the proposed description for

industrial and commercial use of PCE in maskant for chemical milling to provide additional clarity as recommended by a commenter (Ref. 31). Additionally, in response to a comment that EPA should ensure that uses of PCE required for environmental, health, and safety permit compliance, such as performance testing requirements in the NESHAP for hazardous waste combustors (HWCs) (40 CFR part 63, subpart EEE), are permitted to continue and are not inadvertently prohibited, EPA has revised its proposed description of disposal (Ref. 55). For purposes of this final rule, disposal includes the use of PCE to comply with requirements for HWC facilities under the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA) (40 CFR parts 260 and 270), including use of PCE as a representative principal organic hazardous constituent (POHC) in destruction and removal efficiency (DRE) tests required under 40 CFR 63.1216–63.1221 and for chlorine feedrate operating conditions during comprehensive and confirmatory performance tests required under 40 CFR 63.1207(g)(1) and 40 CFR 63.1207(g)(2). The revised descriptions for industrial and commercial use as solvent for batch vapor degreasing, industrial and commercial use in maskant for chemical milling, and for disposal appear in Unit IV.B.1.

Additionally, in this final rule, EPA is not finalizing as proposed to amend the general provision of 40 CFR part 751, subpart A, to define "authorized person," "owner or operator," "potentially exposed person," "regulated area," and "retailer," because those definitions are finalized in the TSCA section 6 final rule for methylene chloride (89 FR 39254, May 8, 2024) (FRL–8155–01–OCSP) so that these definitions may be commonly applied to this and other rules under TSCA section 6 that would be codified under 40 CFR part 751. In response to one commenter that suggested EPA describe "distribution in commerce" in the preamble, EPA is finalizing the definition for "distribute in commerce" in § 751.603 so that it has the same meaning as in section 3 of the Act, except that the term does not include retailers for purposes of §§ 751.613 and 751.615 (Ref. 33).

IV. Provisions of the Final Rule

EPA intends that each provision of this rulemaking be severable. In the event of litigation staying, remanding, or invalidating EPA's risk management approach for one or more conditions of use in this rule, EPA intends to preserve the risk management approaches in the

rule for all other conditions of use to the fullest extent possible. The Agency evaluated the risk management options in TSCA section 6(a)(1) through (7) for each condition of use and generally EPA's regulation of one condition of use to address its contribution to the unreasonable risk from PCE functions independently from EPA's regulation of other conditions of use, which may have different characteristics leading to EPA's risk management decisions. Further, the Agency crafted this rule so that different risk management approaches are reflected in different provisions or elements of the rule that are capable of operating independently. Accordingly, the Agency has organized the rule so that if any provision or element of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid.

There are many permutations of this. For example, as discussed in Unit IV.D., this final rule prohibits the industrial and commercial use of PCE in dry cleaning and spot cleaning, and also the industrial and commercial use of PCE in general aerosol degreasing/cleaning products that contain PCE (although a subset of this use is permitted to continue under specific prescriptive controls or the WCPP as described in Unit III.A.3.b.). For use of PCE in general aerosol degreasing/cleaning products as well as dry cleaning, EPA's risk management approach is prohibition. To the extent that a court were to find that EPA lacked substantial evidence to support its prohibition of general aerosol degreasing/cleaning or otherwise found legal issues with EPA's approach to that condition of use, it would have no bearing on other similarly situated conditions of use such as dry cleaning unless the specific issue also applies to the particular facts associated with dry cleaning. This is reflected in the structure of the rule, which describes these specific prohibitions separately by compliance date.

As another example, for industrial and commercial use of PCE as a processing aid in catalyst regeneration in petrochemical manufacturing and industrial and commercial use of PCE in automotive care products (e.g., engine degreaser and brake cleaner), EPA took different risk management approaches—application of the WCPP for the industrial and commercial use of PCE as a processing aid in catalyst regeneration in petrochemical manufacturing and prohibition for industrial and commercial use in automotive care products. To the extent that a court were to find a legal issue with EPA's

approach to the WCPP, impacting industrial and commercial use as a processing aid in catalyst regeneration in petrochemical manufacturing, it would have no bearing on EPA's decision to prohibit the industrial and commercial use in automotive care products, and vice versa. This is reflected in the structure of the rule, which organizes the prohibitions and the WCPP into different sections of the regulation.

EPA also intends all TSCA section 6(a) risk management elements in this rule to be severable from each regulatory exclusion from those requirements, including each TSCA section 6(g) exemption. EPA has the authority to promulgate TSCA section 6(g) exemptions "as part of a rule promulgated under [TSCA section 6(a)]." However, EPA's risk management decisions under TSCA sections 6(a) and 6(c) are independent from EPA's consideration of whether it is appropriate, based on the factors in TSCA section 6(g), to exempt specific conditions of use from the requirements of the TSCA section 6(a) risk management elements in the rule. In other words, EPA first decides whether and how to regulate each condition of use, per TSCA sections 6(a) through (c), and only then determines whether an exemption under TSCA section 6(g) is appropriate. Accordingly, the underlying TSCA section 6(a) risk management elements would not be impacted if a TSCA section 6(g) exemption is determined by judicial review or operation of law to be invalid. Rather, the exempted condition of use would become subject to the underlying TSCA section 6(a) risk management element(s). Similarly, to the extent a court were to find a legal issue with the regulatory threshold established in the rule, the underlying risk management requirements would not be impacted. Rather, the excluded products would become subject to the underlying TSCA section 6(a) risk management requirements applicable to the condition of use. EPA further notes that the specific examples of severability described in this Unit are not intended to be exhaustive, but rather illustrative of a wide variety of scenarios that reflect EPA's overarching intent that each provision of this rulemaking be severable.

To that end, EPA acknowledges that after the issuance of this rule, Federal agencies, their contractors, and other related entities may become aware of important information which indicates a particular use, that would otherwise be prohibited, could meet the criteria of section 6(g) or the requirements of a

WCPP. EPA also notes that there are multiple avenues to ask EPA to revisit issues in this TSCA section 6(a) rulemaking, both before and after the mandatory compliance dates are set consistent with TSCA section 6(d). EPA has the authority under TSCA section 6(g) to consider whether a time limited exemption is appropriate and consistent with TSCA section 6(g)(1), could expeditiously promulgate such exemptions independently from this rulemaking, including consideration of emergency or interim rulemaking. EPA has initiated a notice of proposed rulemaking for public comment on this topic, included in the Spring 2024 Regulatory Agenda (RIN 2070-AL17). Additionally, any person could petition EPA to request that EPA issue or amend a rule under TSCA section 6.

A. Applicability

This final rule sets prohibitions and restrictions on the manufacture (including import), processing, distribution in commerce, commercial use, and disposal of PCE to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a), 15 U.S.C. 2605(a).

Additionally, pursuant to TSCA section 12(a)(2), this rule applies to PCE even if being manufactured, processed, or distributed in commerce solely for export from the United States because EPA has determined that PCE presents an unreasonable risk to health within the United States. Several commenters expressed concern that an unclear statement in the 2023 PCE proposed rule preamble, and a proposed regulatory requirement for downstream notification of permissible purposes for distribution in commerce, appeared to indicate that manufacture, processing, and distribution for export would be prohibited under the 2023 PCE proposed rule if the intended use in the destination country is prohibited in the United States, even if it is permissible under other risk mitigation rules in the destination country (Refs. 47, 33, 55, 49, 68). This was not EPA's intent. Because distribution in commerce did not contribute to EPA's unreasonable risk determination for PCE, and because this final rule permits manufacturing and processing, including recycling, for various uses to continue under the WCPP, EPA intends this final rule to permit manufacturing and processing in compliance with the WCPP for export, as well as distribution in commerce for export, without regard for the intended use in the destination country. EPA has clarified the regulatory text accordingly.

As discussed in Unit III.D., EPA is finalizing a regulatory threshold of 0.1%

to account for impurities and the unintended presence of PCE (in the 2023 proposed rule, this was referred to as a de minimis threshold). In other words, the provisions of this rulemaking only apply when PCE is present in a formulation at 0.1% or greater. Additionally, the provisions of this final rule only apply to chemical substances as defined under TSCA section 3. Notably, TSCA section 3(2) excludes from the definition of chemical substance "any food, food additive, drug, cosmetic, or device (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321]) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device" and "any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 *et seq.*]) when manufactured, processed, or distributed in commerce for use as a pesticide." Additional details regarding TSCA statutory authorities can be found in section 2 of the response to comments document (Ref. 8).

EPA uses the term "potentially exposed person" in Unit IV. and in the regulatory text to include workers, occupational non-users, employees, independent contractors, employers, and all other persons in the work area where PCE is present and who may be exposed to PCE under the conditions of use for which a WCPP or specific prescriptive controls would apply. (EPA notes that this definition is intended to apply to occupational workspaces as part of implementation of the WCPP and other restrictions, and recognizes that other individuals or communities may be exposed to PCE as consumers, members of fence-line communities, or members of the general population.) For certain conditions of use, EPA requires a comprehensive WCPP or specific prescriptive controls to address the unreasonable risk from PCE to workers directly handling the chemical or in the area where the chemical is being used. Similarly, the 2020 Risk Evaluation for PCE (Ref. 1) did not distinguish between employers, contractors, or other legal entities or businesses that manufacture, process, distribute in commerce, use, or dispose of PCE. For this reason, EPA uses the term "owner or operator" to describe the entity responsible for implementing the WCPP or specified prescriptive controls in any workplace where an applicable condition of use is identified in Unit IV. and subject to the WCPP or prescriptive controls is occurring. The term includes any person who owns, leases, operates, controls, or supervises such a workplace. While

owners or operators remain responsible for ensuring compliance with the WCPP or prescriptive controls requirements in the workplace, they may contract with others to provide training or implement a respiratory protection program, for example. EPA is also clarifying its intent that for the provisions in this rule, any requirement for an owner or operator, or an owner and operator, is a requirement for any individual that is either an owner or an operator.

EPA emphasizes that this approach is essential for addressing the unreasonable risk presented by PCE, including to individuals who may not be covered by OSHA requirements, such as volunteers, self-employed persons, and state and local government workers who are not covered by a state plan. EPA uses the term “owner or operator” in TSCA programs because the term is used in other EPA programs to describe persons with responsibilities for implementing statutory and regulatory requirements at particular locations. See, for example, CAA section 113, 42 U.S.C. 7412, which defines “owner or operator” as a person who owns, leases, operates, controls, or supervises a stationary source. There is a similar definition in section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316. EPA understands that the use of this term may result in multiple persons’ bearing responsibility for complying with provisions of this final rule, including the WCPP. However, this is also the case for workplaces regulated by OSHA, including those regulated under OSHA’s general industry standards at 29 CFR part 1910. OSHA’s 1999 Multi-Employer Citation Policy explains which employers should be cited for a hazard that violates an OSHA standard (Ref. 69). The OSHA Policy describes four different roles that employers may fill at a workplace and describes who should be cited for a violation based on factors such as whether the employer created the hazard, had the ability to prevent or correct the hazard, and knew or should have known about the hazard. More than one employer may be cited for the same hazard. This final rule will have similar results, in that more than one owner or operator may be responsible for compliance.

The OSHA multi-employer citation policy is an example of a guidance governing situations where more than one regulated entity is present. EPA has received several requests for clarification of the applicability of the term “owner or operator” to sites where more than one entity owns, leases, or controls a workplace where a PCE condition of use is ongoing and where implementation of the WCPP or

prescriptive controls is required. EPA understands that there are a wide variety of situations where these questions could arise, and plans to issue guidance consistent with TSCA authorities that explains how EPA will approach the issue of responsibility for implementation of, and compliance with, the WCPP requirements in practice.

B. Workplace Chemical Protection Program (WCPP)

1. Applicability

EPA is finalizing the WCPP for most of the conditions of use for which it was proposed, as well as for additional conditions of use for which prohibition was proposed. EPA has removed from the WCPP two conditions of use proposed to be included, as described in Unit III.A.1. EPA’s descriptions of changes from the 2023 PCE proposed rule are in Unit III. and EPA’s rationale for why the WCPP addresses the unreasonable risk for certain conditions of use is in Unit V. of the 2023 PCE proposed rule. EPA is additionally requiring that uses receiving an exemption under TSCA section 6(g), as outlined in Unit IV.F., comply with the WCPP to the extent feasible.

EPA is finalizing the WCPP for the following conditions of use where manufacture and processing are not otherwise prohibited: domestic manufacturing; import; processing as a reactant/intermediate; processing into formulation, mixture, or reaction product; processing by repackaging; recycling; industrial and commercial use as solvent for open-top batch vapor degreasing; industrial and commercial use as solvent for closed-loop batch vapor degreasing; industrial and commercial use in maskant for chemical milling; industrial and commercial use in solvent-based adhesives and sealants; industrial and commercial use as a processing aid in catalyst regeneration in petrochemical manufacturing; industrial and commercial use as a processing aid in sectors other than petrochemical manufacturing; industrial and commercial use for cold cleaning of tanker vessels; and disposal. This Unit provides a description of the uses subject to the WCPP to assist with compliance.

a. Manufacturing (Includes Import)

i. Domestic Manufacture

This condition of use refers to the making or producing of a chemical substance within the United States (including manufacturing for export), or the extraction of a component chemical substance from a previously existing

chemical substance or a complex combination of substances. For purposes of this rule, this description does not apply to PCE production as a byproduct, including during the manufacture of 1,2-dichloroethane, which EPA intends to consider in the risk evaluation for 1,2-dichloroethane (Ref. 70).

ii. Import

This condition of use refers to the act of causing a chemical substance or mixture to arrive within the customs territory of the United States.

b. Processing

i. Processing as a Reactant/Intermediate

This condition of use refers to processing PCE in chemical reactions for the manufacturing of another chemical substance or product. Through processing as a reactant or intermediate, PCE serves as a feedstock in the production of another chemical product via a chemical reaction in which PCE is completely consumed. For example, PCE is processed as a reactant in the production of HFCs, hydrochlorofluorocarbons, and chlorofluorocarbons. This condition of use includes reuse of PCE, including PCE originally generated as a byproduct or residual PCE, as a reactant.

ii. Processing Into Formulation, Mixture, or Reaction Product

This condition of use refers to when PCE is added or incorporated into a product (or product mixture) prior to further distribution of the product, including in cleaning and degreasing products, adhesive and sealant products, paint and coating products, and other chemical products and preparations.

iii. Processing by Repackaging

This condition of use refers to the preparation of PCE for distribution in commerce in a different form, state, or quantity. This includes transferring the chemical from a bulk container into smaller containers.

iv. Recycling

This condition of use refers to the process of treating generated waste streams (*i.e.*, which would otherwise be disposed of as waste) that are collected, either onsite or transported to a third-party site, for commercial purpose. Waste solvents can be restored to a condition that permits reuse via solvent reclamation/recycling. The recovery process may involve an initial vapor recovery or mechanical separation step followed by distillation, purification, and final packaging.

c. Industrial and Commercial Uses

i. Industrial and Commercial Use as Solvent for Open-Top Batch Vapor Degreasing

This condition of use refers to the industrial and commercial use of PCE as a solvent for cleaning and degreasing through the process of heating PCE to its volatilization point and using its vapors to remove dirt, oils, greases, and other surface contaminants from metal and other parts using batch open-top vapor degreaser systems.

ii. Industrial and Commercial Use as Solvent for Closed-Loop Batch Vapor Degreasing

This condition of use refers to the industrial and commercial use of PCE as a solvent for cleaning and degreasing through the process of heating PCE to its volatilization point and using its vapors to remove dirt, oils, greases, and other surface contaminants from metal and other parts using batch closed-loop or airless vapor degreasing systems.

iii. Industrial and Commercial Use in Maskant for Chemical Milling

This condition of use refers to the industrial and commercial use of PCE as a solvent in maskants or elastomer-based coatings that are used to protect a substrate during exposure to a chemical process, such as chemical milling, plating, and anodizing. This condition of use includes use of peelable maskant to act as temporary protection during transportation.

iv. Industrial and Commercial Use in Solvent-Based Adhesives and Sealants

This condition of use refers to the industrial and commercial use of PCE as a solvent in adhesive and sealant products to promote bonding between other substances, promote adhesion of surfaces, or prevent seepage of moisture or air.

v. Industrial and Commercial Use as a Processing Aid in Catalyst Regeneration in Petrochemical Manufacturing

This condition of use refers to the industrial and commercial use of PCE to improve processing characteristics or the operation of process equipment during the production of oil, gas, and other similar products. For example, PCE is used in both reforming and isomerization processes at refineries. In the reforming process, PCE is added directly to a regenerator in a Continuous Catalytic Regeneration reforming unit, and in the isomerization process, PCE is added to the hydrocarbon feed. In both processes, PCE provides chlorine ions to

regenerate the catalysts and is consumed in the process.

vi. Industrial and Commercial Use as a Processing Aid in Sectors Other Than Petrochemical Manufacturing

This condition of use refers to the industrial and commercial use of PCE outside of petrochemical manufacturing to improve the processing characteristics or the operation of process equipment or to alter or buffer the pH of the substance or mixture, when added to a process or to a substance or mixture to be processed. For example, PCE is used in pesticide, fertilizer and other agricultural manufacturing during the production of non-pesticidal products used to increase the productivity and quality of plant, animal, and forestry crops produced on a commercial scale. Processing aids are not intended to remain in or become part of the product or product mixture or affect the function of a substance or article created.

vii. Industrial and Commercial Use as Solvent for Cold Cleaning of Tanker Vessels

This condition of use refers to the industrial and commercial use of PCE as a non-boiling solvent in cold cleaning to remove dirt, oils, greases, and other surface contaminants from tanker vessels.

d. Disposal

This condition of use refers to the process of disposing waste streams of PCE that are collected either onsite or and transported to a third-party site for treatment or their final disposition, such as waste incineration or landfilling. This condition of use includes the use of PCE to comply with requirements for HWC facilities under the CAA (40 CFR part 63, subpart EEE) and RCRA (40 CFR parts 260 and 270), including as a representative POHC in DRE tests required under 40 CFR 63.1216–63.1221 and for chlorine feedrate operating conditions during comprehensive and confirmatory performance tests required under 40 CFR 63.1207(g)(1) and 40 CFR 63.1207(g)(2).

2. Overview

The WCPP for PCE encompasses an inhalation exposure limit and action level, DDCC, and the associated implementation requirements described in this unit to ensure that the chemical substance no longer presents unreasonable risk. Under a WCPP, owners or operators have some flexibility, within the parameters outlined in this unit, regarding how they prevent exceedances of the

identified EPA exposure limit thresholds or prevent direct dermal contact. In the case of PCE, meeting the EPA exposure limit threshold and implementing the DDCC requirements for certain occupational conditions of use would address the unreasonable risk to potentially exposed persons from inhalation and dermal exposure.

EPA is finalizing the WCPP requirements to start to take effect by December 15, 2025 for non-Federal owners or operators, or by June 21, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or within 30 days of introduction of PCE into the workplace, whichever is later, at which point entities would be required to complete initial monitoring (as described in Unit IV.B.3.b.). Additionally, EPA requires that each owner or operator ensure that no person is exposed to an airborne concentration of PCE that exceeds the ECEL as an 8-hour TWA, including by providing respirators to potentially exposed persons in the regulated area, no later than March 13, 2026 for non-Federal owners or operators, or no later than September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or beginning four months after introduction of PCE into the workplace, whichever is later. EPA also requires each owner or operator to ensure all persons are separated, distanced, physically removed, or isolated from direct dermal contact with PCE, including by providing dermal PPE, by March 13, 2026 for non-Federal owners or operators, or no later than September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government. EPA also requires implementation of any needed exposure controls based on initial monitoring and development of an exposure control plan, which requires consideration and documented application of the hierarchy of controls, no later than June 7, 2027 for non-Federal owners or operators, or December 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government (as described in Unit IV.B.5).

EPA's implementation of the requirement to meet an ECEL as part of a WCPP aligns with, to the extent possible, certain elements of the existing OSHA standards for regulating toxic and hazardous substances under 29 CFR part 1910, subpart Z. However, EPA is finalizing as proposed a new, lower occupational exposure limit, derived from the TSCA 2020 Risk Evaluation for PCE (Refs. 1, 71). For PCE, this final rule

will eliminate the unreasonable risk from PCE contributed to by the conditions of use subject to the WCPP, enable continued industry use where appropriate, and provide the familiarity of a pre-existing framework for the regulated community.

EPA's requirements include specific exposure limits and ancillary requirements necessary for successful implementation of an ECEL as part of a WCPP. Taken together, these WCPP requirements apply to the extent necessary so that the unreasonable risk from PCE under the conditions of use listed earlier in this Unit would no longer be presented.

Unit IV. includes a summary of the WCPP, including a description of the finalized exposure limits including an ECEL and ECEL action level; implementation requirements including monitoring requirements; a description of potential exposure controls in accordance with the hierarchy of controls, including engineering controls, administrative controls, and PPE as it relates to respirator selection; and additional finalized requirements for recordkeeping and workplace participation. Additionally, Unit IV. describes DDCC requirements for PCE, including potential exposure controls, which consider the hierarchy of controls; PPE as it relates to dermal protection; and additional requirements finalized for recordkeeping. Unit IV. also describes compliance timeframes revised from the 2023 PCE proposed rule, changes by EPA to certain provisions of the WCPP based on public comments, and addition of new provisions in the WCPP based on public comments used to inform this final rule.

3. Existing Chemical Exposure Limit (ECEL)

To reduce exposures in the workplace and address the unreasonable risk of injury to health resulting from inhalation exposures to PCE identified under the occupational conditions of use in the TSCA 2020 Risk Evaluation for PCE, EPA is requiring an ECEL and ancillary requirements for all of the conditions of use identified in Unit IV.B.1. except recycling and disposal. As described in Unit V.A.1.b. of the 2023 PCE proposed rule, for recycling and disposal, EPA did not identify human health risk from inhalation exposure as contributing to the unreasonable risk of PCE and is therefore not requiring an ECEL and related implementation measures identified in Unit IV. for recycling and disposal activities.

a. ECEL and ECEL Action Level (AL)

EPA is finalizing as proposed an ECEL under TSCA section 6(a) of 0.14 ppm (0.98 mg/m³) as an 8-hour TWA based on the chronic non-cancer human equivalent concentration for neurotoxicity. EPA has determined that ensuring exposures remain at or below the 8-hour TWA ECEL of 0.14 ppm will eliminate the unreasonable risk of injury to health resulting from acute and chronic inhalation exposures for certain occupational conditions of use of PCE (Ref. 71). If ambient exposures are kept at or below the 8-hour TWA ECEL of 0.14 ppm, a potentially exposed person will be protected against the effects described in Unit IV., including effects resulting from acute exposure, chronic non-cancer effects, and cancer. EPA is finalizing requirements that each owner or operator ensure that exposure to PCE does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons within 450 days after publication of the final rule or beginning four months after introduction of PCE into the workplace, whichever is later.

EPA is finalizing an ECEL action level at 0.10 ppm as an 8-hour TWA, which is a modification from the ECEL action level EPA proposed, as described in Unit III.C.1. Below the ECEL action level, certain compliance activities, such as periodic monitoring, would be required less frequently, as described further in this Unit. In this way, EPA's WCPP for PCE is consistent with the familiar framework that is in place in OSHA standards for regulating toxic and hazardous substances under 29 CFR part 1910, subpart Z that establish an action level, although the values differ due to differing statutory authority. As explained by OSHA, the action level provides employers and employees with greater assurance that their employees will not be exposed to concentrations above the PELs (Ref. 72).

In summary, EPA is finalizing with slight modification that owners or operators must ensure the airborne concentration of PCE within the personal breathing zone of potentially exposed persons remains at or below 0.14 ppm as an 8-hour TWA ECEL, with an action level finalized as 0.10 ppm as an 8-hour TWA. For purposes of this rulemaking, the personal breathing zone is consistent with how OSHA defines it as a hemispheric area forward of the shoulders within a six-to-nine-inch radius of a worker's nose and mouth and requires that exposure monitoring air samples be collected from within this space (Ref. 73). EPA is finalizing the ECEL for certain occupational conditions of use to ensure that no

person is exposed to inhalation of PCE in excess of these concentrations resulting from those conditions of use. For the identified conditions of use for which the concentration thresholds are being finalized, EPA recognizes that the regulated community has the ability to detect the values for the ECEL and ECEL action level because of viable detection limits and analytical methods of PCE for monitoring devices that are available in commerce, currently in use, and approved by EPA, NIOSH, and OSHA, which can range from ≤0.5 parts per billion (ppb) to 9 ppm (Ref. 71). Based on the ECEL and ECEL action level established in this final rule, EPA confirmed there are adequate sampling methods available for personal breathing zone monitoring for PCE based on consultation with NIOSH and OSHA (Refs. 74, 75). While sampling methods may have some limitations, EPA notes that new and alternative methods may be developed as long as they are consistent with the performance criteria in the final PCE rule (accurate to a confidence level of 95% and are within (plus or minus) 25% of airborne concentrations of PCE above the 8-hour TWA ECEL). Multiple existing methods are available. OSHA, NIOSH, and EPA have available sampling methods (both active and passive) with sufficient limits of quantification to support WCPP implementation.

b. Monitoring Requirements

i. Exposure Sampling

Initial monitoring for PCE is critical for establishing a baseline of exposure for potentially exposed persons; similarly, periodic exposure monitoring assures continued compliance over time so that potentially exposed persons are not exposed to levels that would result in an unreasonable risk of injury to health. Exposure monitoring could be suspended if certain conditions described in Unit IV. are met. Also, in some cases, a change in workplace conditions with the potential to impact exposure levels would warrant additional monitoring, which is also described.

EPA is finalizing with modifications from proposal its requirement that owners or operators determine each potentially exposed person's exposure by either taking a personal breathing zone air sample of each potentially exposed person's exposure or by taking personal breathing zone air samples that are representative of each potentially exposed person with a similar exposure profile to a chemical substance or mixture based on the substantial

similarity of tasks performed, the manner in which the tasks are performed, and the materials and processes with which they work (hereinafter identified as an "exposure group"). Personal breathing zone air samples are representative of the 8-hour TWA of all potentially exposed persons in an exposure group if the samples are of the full shift-exposure of at least one person who represents the highest potential PCE exposures in that exposure group. In addition, the initial monitoring will be required when and where the operating conditions are best representative of each potentially exposed person's work-shift exposures. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts. Additionally, air sampling is required to measure ambient concentrations for PCE without taking respiratory protections into account as sampling is being performed. For purposes of exposure monitoring requirements, owners and operators are only required to monitor potentially exposed persons that are expected to be present in the workplace.

EPA is also finalizing requirements that the owner or operator ensure that their exposure monitoring methods are accurate to a confidence level of 95% and are within (plus or minus) 25% of airborne concentrations of PCE above the 8-hour TWA ECEL. To ensure compliance for monitoring activities, EPA is finalizing recordkeeping requirements and will require that owners or operators document their choice of monitoring method outlined in this Unit. As described in Unit III.C.1., EPA is finalizing the requirement that owners or operators meet certain documentation requirements for each monitoring event of PCE, including compliance with GLP Standards in accordance with 40 CFR part 792 or use of a laboratory accredited by the AIHA (e.g., AIHA LAP, LLC Policy Module 2A/B/E of Revision 17.3), or other analogous industry-recognized program. Additionally, as described in Unit III.C.1., EPA is finalizing the requirement that owners or operators must re-monitor within 15 working days after receipt of any exposure monitoring when results indicate non-detect, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the

monitoring results and determines re-monitoring is not necessary.

EPA is also finalizing the requirement that each owner or operator maintain exposure monitoring records that include the following information for each monitoring event:

- Dates, duration, and results of each sample taken.
- The quantity, location(s) and manner of PCE use at the time of each monitoring event.
- All measurements that may be necessary to determine the conditions (e.g., work site temperatures, humidity, ventilation rates, monitoring equipment type and calibration dates) that may affect the monitoring results.
- Name, workplace address, work shift, job classification, work area, and type of respiratory protection (if any) of each monitored person.
- Identification of all potentially exposed persons that a monitored person is intended to represent if using a representative sample.
- Use of appropriate sampling and analytical methods.
- Compliance with GLP Standards in accordance with 40 CFR part 792 or use of a laboratory accredited by AIHA (e.g., AIHA LAP, LLC Policy Module 2A/B/E of Revision 17.3), or another analogous industry-recognized program.
- Information regarding air monitoring equipment, including: Type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions.
- Notification of exposure monitoring results to each person whose exposures are monitored or who is part of a monitored exposure group.

ii. Initial Exposure Monitoring

Under the final regulation, each non-Federal owner or operator of a facility that is engaged in one or more of the conditions of use listed in Unit IV.B.1., except recycling and disposal, will be required to perform initial exposure monitoring within 360 days of the publication of this final rule or within 30 days of introduction of PCE into the workplace, whichever is later, to determine the extent of exposure of potentially exposed persons to PCE. As discussed in Unit III.B.1., EPA is providing additional time for Federal agencies and Federal contractors acting for or on behalf of the Federal government to comply with the provisions of the WCPP, so they will be required to conduct initial monitoring within 915 days after publication. Initial monitoring will notify owners and operators of the magnitude of possible exposures to potentially exposed persons with respect to their work

conditions and environments. Based on the magnitude of possible exposures in the initial exposure monitoring, the owner or operator may need to increase or decrease the frequency of future periodic monitoring or adopt new exposure controls (such as engineering controls, administrative controls, and/or a respiratory protection program). In addition, the initial monitoring will be required when and where the operating conditions are best representative of each potentially exposed person's work-shift exposures. If the owner or operator chooses to use a sample that is representative of potentially exposed persons' full shift exposures (rather than monitor every individual), such sampling should be representative (*i.e.*, taken from the breathing zone of potentially exposed persons and reflect duration appropriate exposure) of the most highly exposed persons in the workplace. Additionally, EPA expects that owners and operators will conduct initial exposure monitoring representative of all tasks that a potentially exposed person will be expected to do. EPA understands that certain tasks may occur less frequently or may reflect accidental exposure (for example, due to malfunction).

EPA also recognizes that some entities may already have objective exposure monitoring data. If the owner or operator has monitoring data conducted within five years prior to 60 days following publication of the final rule in the **Federal Register** and the monitoring satisfies all other requirements in Unit IV., including the requirement that the data represents the highest PCE exposures likely to occur under reasonably foreseeable conditions of use the owner or operator may rely on such earlier monitoring results for the initial baseline monitoring sample. Prior monitoring data cannot be used where there has been a change in work conditions or practices that is expected to result in new or additional exposures.

As described in more detail later in Unit IV., the owner or operator must conduct periodic monitoring at least once every five years since its last monitoring. This periodic monitoring must be representative of all the potentially exposed persons in the workplace and the tasks that they are expected to do.

iii. Periodic Exposure Monitoring

EPA is finalizing as proposed the following periodic monitoring for owners or operators. These finalized requirements are also outlined in table 1.

- If samples taken during the initial exposure monitoring reveal a

concentration below the ECEL action level (<0.10 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring at least once every five years.

- If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.14 ppm 8-hour TWA), the owner or operator must repeat the periodic exposure monitoring within three months of the most recent exposure monitoring.
- If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level (≥ 0.10 ppm 8-hour TWA) but at or below the ECEL (≤ 0.14 ppm 8-hour

TWA), the owner or operator must repeat the periodic exposure monitoring within six months of the most recent exposure monitoring.

- If the most recent (non-initial) exposure monitoring indicates that airborne exposure is below the ECEL action level, the owners or operators must repeat such monitoring within six months of the most recent monitoring until two consecutive monitoring measurements, taken at least seven days apart, are below the ECEL action level (<0.10 ppm 8-hour TWA), at which time the owner or operator must repeat the periodic exposure monitoring at least once every five years.

- In instances where an owner or operator does not manufacture, process, use, or dispose of PCE for a condition of use for which the WCPP is required over the entirety of time since the last required periodic monitoring event, EPA is requiring that the owner or operator would be permitted to forgo the next periodic monitoring event. However, documentation of cessation of use of PCE would be required and periodic monitoring would be required to resume when the owner or operator restart any of the conditions of use listed in Unit IV.B.1., except recycling and disposal.

TABLE 1—PERIODIC MONITORING REQUIREMENTS

Air concentration condition	Periodic monitoring requirement
If initial exposure monitoring is below the ECEL action level (<0.10 ppm 8-hour TWA).	Periodic exposure monitoring is required at least once every five years.
If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.14 ppm 8-hour TWA).	Periodic exposure monitoring is required within three months of the most recent exposure monitoring.
If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥ 0.10 ppm 8-hour TWA, ≤ 0.14 ppm 8-hour TWA).	Periodic exposure monitoring is required within six months of the most recent exposure monitoring.
If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart within a 6-month period, indicate exposure is below the ECEL action level (<0.10 ppm 8-hour TWA).	Periodic exposure monitoring is required within five years of the most recent exposure monitoring.
If the owner or operator engages in a condition of use for which WCPP ECEL is required but does not manufacture, process, use, or dispose of PCE in that condition of use over the entirety of time since the last required monitoring event.	The owner or operator may forgo the next periodic monitoring event. However, documentation of cessation of use of PCE is required and periodic monitoring is required when the owner or operator resumes the condition of use.

Table Note: Additional scenarios in which monitoring may be required are discussed in Unit IV.B.3.b.iv.

iv. Additional Exposure Monitoring

EPA is finalizing that each owner or operator conduct additional exposure monitoring within 30 days after there has been a change in the production, process, control equipment, personnel or work practices that may reasonably be expected to result in new or additional exposures at or above the ECEL action level, or when the owner or operator has any reason to believe that new or additional exposures at or above the ECEL action level have occurred, for example if an owner or operator receives information from potentially exposed person(s) suggesting that such new or additional exposures may have occurred. In the event of start-up or shutdown, or spills, leaks, ruptures, or other breakdowns or unexpected releases that may lead to exposure to potentially exposed persons, EPA is finalizing that each owner or operator must conduct exposure monitoring of potentially exposed persons (using personal breathing zone sampling) within 30 days after the conclusion of the start-up or shutdown and/or the cleanup of the spill or repair of the leak, rupture, or other breakdown. An additional exposure monitoring event

may result in an increased frequency of periodic monitoring. For example, if the initial monitoring results from a workplace are above the ECEL action level, but below the ECEL, periodic monitoring is required every six months. If additional monitoring is performed because increased exposures are suspected, and the results are above the ECEL, subsequent periodic monitoring would have to be performed every three months. The required additional exposure monitoring should not delay implementation of any necessary cleanup or other remedial action to reduce the exposures to persons in the workplace.

c. Regulated Area

EPA is finalizing its requirement that the owner or operator demarcate any area where airborne concentrations of PCE exceed, or are reasonably expected to exceed, the ECEL. To provide more clarity regarding how regulated areas must be demarcated, EPA has incorporated the language analogous to OSHA's regulated area requirements under the standards for toxic and hazardous substances (29 CFR part 1910, subpart Z) into this final rule.

Owners and operators must demarcate regulated areas from the rest of the workplace in any manner that adequately establishes and alerts potentially exposed persons to the boundaries of the area and minimizes the number of authorized persons exposed to PCE within the regulated area. This can be accomplished using administrative controls (e.g., highly visible signifiers) in multiple languages as appropriate (e.g., whenever potentially exposed persons who are primarily Spanish-speaking are likely to be present, owners and operators should post additional highly visible signifiers in Spanish), placed in conspicuous areas. The owner or operator is required to restrict access to the regulated area from any potentially exposed person that lacks proper training or is otherwise unauthorized to enter.

d. Notification of Monitoring Results

EPA is finalizing the requirement that the owner or operator must, within 15 working days after receipt of the results of any exposure monitoring, notify each potentially exposed person whose exposure is represented by that monitoring and their designated

representatives in writing, either individually to each potentially exposed person or by posting the information in an appropriate and accessible location, such as public spaces or common areas, for potentially exposed persons outside of the regulated area. The notice would be required to identify the exposure monitoring results, the ECEL and ECEL action level and what they mean in plain language, statement of whether the monitored airborne concentration of PCE exceeds the ECEL and the ECEL action level, and any corresponding respiratory protection required. If the ECEL is exceeded, the notice must also include a description of the actions taken by the owner or operator to reduce inhalation exposures to or below the ECEL. The notice must also include the quantity, location, manner of PCE use, and identified releases of PCE that could result in exposure to PCE at the time of monitoring. The notice must be posted in multiple languages if necessary (*e.g.*, notice must be in a language that the potentially exposed person understands, including a non-English language version representing the language of the largest group of workers who cannot readily comprehend or read English).

4. Direct Dermal Contact Control (DDCC)

To reduce exposures in the workplace and address the unreasonable risk of injury to health resulting from dermal exposures to PCE identified under the occupational conditions of use in the TSCA 2020 Risk Evaluation for PCE, EPA is finalizing largely as proposed, with modification to the compliance timeframe as described in Unit III.B., the DDCC requirements for all of the conditions of use identified in Unit IV.B.1. EPA is finalizing requirements that owners or operators must separate, distance, physically remove, or isolate all person(s) from direct handling of PCE or from skin contact with surfaces that may be contaminated with PCE (*i.e.*, equipment or materials on which PCE may be present) under routine conditions in the workplace (hereafter referred to as direct dermal contact) within 450 days after publication of the final rule. For purposes of this rulemaking, direct dermal contact with PCE does not include vapor exposures through the skin, although EPA recommends and encourages owners and operators to implement control measures to prevent or reduce dermal exposures to airborne PCE vapors. The 2020 Risk Evaluation for PCE identified that unreasonable risk to workers is also driven by the dermal exposure, specifically from direct skin contact with PCE; risk exceeding the benchmark

was identified even when considering use of chemically resistant gloves in most commercial and industrial conditions of use. EPA has determined that preventing direct dermal contact will eliminate the unreasonable risk of injury to health resulting from dermal exposures for certain occupational conditions of use of PCE. See EPA's description for how the requirements related to DDCC would address the unreasonable risk resulting from dermal exposures and the rationale for this regulatory approach in Units III.B.3. and V.A. of the 2023 PCE proposed rule.

5. Exposure Control Plan

EPA is finalizing its requirement that owners or operators implementing the WCPP use feasible exposure controls, including one or a combination of elimination, substitution, engineering controls, and administrative controls, prior to requiring the use of PPE (*i.e.*, respirators or gloves) as a means of controlling exposures below EPA's ECEL and/or prevent direct dermal contact with PCE for all potentially exposed persons, in accordance with the hierarchy of controls (Ref. 76). If an owner or operator chooses to replace PCE with a substitute, EPA recommends careful review of the available hazard and exposure information on the potential substitutes to avoid a substitute chemical that might later be found to present an unreasonable risk of injury to health or the environment or be subject to regulation (sometimes referred to as a "regrettable substitution"). EPA expects that, for conditions of use for which EPA is finalizing a WCPP, compliance at most workplaces would be part of an established industrial hygiene program that aligns with the hierarchy of controls.

Examples of engineering controls that may prevent or reduce the potential for direct dermal contact include automation, physical barriers between contaminated and clean work areas, enclosed transfer liquid lines (with purging mechanisms in place (*e.g.*, nitrogen, aqueous) for operations such as product changes or cleaning), and design of tools (*e.g.*, a closed-loop container system providing contact-free connection for unloading fresh and collecting spent solvents, pneumatic tools, tongs, funnels, glove bags, *etc.*). Examples of administrative controls that may prevent or reduce the potential for direct dermal contact include adjusting work practices (*i.e.*, implementing policies and procedures) such as providing safe working distances from areas where direct handling of PCE may occur.

EPA is finalizing the requirement that regulated entities use the hierarchy of controls, instituting one or a combination of controls to the extent feasible, and supplement such protections using PPE, where necessary, including respirators for potentially exposed persons at risk of inhalation exposure above the ECEL and dermal PPE for persons potentially exposed through direct dermal contact to PCE. If efforts of elimination, substitution, engineering controls, and administrative controls are not sufficient to reduce exposures to or below the ECEL or prevent direct dermal contact for all potentially exposed persons in the workplace, EPA requires that the owner or operator use feasible controls to reduce PCE concentrations in the workplace to the lowest levels achievable and supplement these controls with respiratory protection and dermal PPE as needed to achieve the ECEL or prevent direct dermal contact. In such cases, EPA requires that the owner or operator provide potentially exposed persons reasonably likely to be exposed to PCE by inhalation to concentrations above the ECEL with respirators affording sufficient protection against inhalation risk and appropriate training on the proper use of such respirators, to ensure that their exposures do not exceed the ECEL as described in Unit IV. EPA also requires that the owner or operator provides potentially exposed persons reasonably likely to be exposed to PCE by direct dermal contact with dermal protection affording sufficient protection against dermal risk and appropriate training on the proper use of dermal protection, as described in Unit IV. As part of the training requirement, the owner or operator is required to provide information and comprehensive training in an understandable manner (*i.e.*, plain language), considering factors such as the skills required to perform the work activity and the existing skill level of the staff performing the work, and in multiple languages as appropriate (*e.g.*, based on languages spoken by potentially exposed persons) to potentially exposed persons. This training must be provided prior to or at the time of initial assignment to a job involving potential exposure to PCE. Furthermore, EPA also requires that the owner or operator document their efforts in using elimination, substitution, engineering controls, and administrative controls to reduce exposure to or below the ECEL in an exposure control plan.

EPA is finalizing its requirement that the owner or operator include and

document in the exposure control plan or through any existing documentation of the facility's safety and health program developed as part of meeting OSHA requirements or other safety and health standards, the following:

- Identification in the exposure control plan of available exposure controls that were considered and rationale for using or not using available exposure controls in the following sequence (*i.e.*, elimination and substitution, then engineering controls and administrative controls) to reduce exposures in the workplace to either at or below the ECEL or to the lowest level achievable and to prevent or reduce direct dermal contact with PCE in the workplace;
- For each exposure control considered, exposure controls selected based on feasibility, effectiveness, and other relevant considerations;
- A description of actions the owner or operator must take to implement exposure controls selected, including proper installation, regular inspections, maintenance, training, or other steps taken;
- A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;
- A description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls; and
- An explanation of the procedures for responding to any change that may reasonably be expected to introduce additional sources of exposure to PCE, or otherwise result in increased exposure to PCE, including procedures for implementing corrective actions to mitigate exposure to PCE.

Under this final rule, owners or operators are prohibited from using rotating work schedules to comply with the ECEL 8-hour TWA, in alignment with certain elements of existing OSHA's standards for toxic and hazardous substances under 29 CFR part 1910, subpart Z. Owners or operators must maintain the effectiveness of any engineering controls and administrative controls instituted as part of the exposure control plan. They must also review and update the exposure control plan as necessary, but at least every five years, to reflect any significant changes in the status of the owner or operator's approach to compliance with the exposure control requirements. EPA intends that the exposure control plan identify the available exposure controls

and, for the exposure controls not selected, document the efforts identifying why these are not feasible, not effective, or otherwise not implemented. For entities for which significant amounts of time are needed to verify suitability of alternatives or procure funds or authorization for additional engineering controls, for example, EPA expects that as those controls become available the exposure control plan would be updated accordingly. EPA requires that the exposure control plan be revisited under certain conditions (and at least every five years) and encourages updates as more sophisticated controls are available.

This final rule requires owners or operators to make the exposure control plan and associated records, including ECEL exposure monitoring records, ECEL compliance records, DDCC compliance records, and workplace participation records, available to potentially exposed persons and their designated representatives. Owners or operators must notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records within 30 days of the date that the exposure control plan is completed and at least annually thereafter. The notice of the availability of the plan and associated records must be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English version representing the language of the largest group of workers who do not read English. This final rule also requires the owner or operator to provide the exposure control plan and associated records at a reasonable time, place, and manner to a potentially exposed person or their designated representative upon request. As explained in Unit III.C.2., if the owner or operator is unable to provide the specified records within 15 working days, the owner or operator must inform the potentially exposed person or designated representative requesting the record within 15 working days that reason for the delay and the earliest date when the record can be made available.

6. Personal Protective Equipment (PPE)

Where elimination, substitution, engineering controls, and administrative controls are not feasible to reduce the air concentration to or below the ECEL and/or prevent direct dermal contact with PCE for all potentially exposed persons, EPA is finalizing as proposed

with slight modifications to improve clarity or for greater consistency with OSHA's regulations to require owners and operators to provide PPE, including respiratory protection and dermal protection selected in accordance with the guidelines described in this unit, and to implement a PPE program. Unit IV. includes a description of the PPE Program, including required PPE as it relates to respiratory protection, required PPE as it relates to dermal protection, and other requirements such as additional training for respirators and recordkeeping to support implementation of a PPE program.

a. Respiratory Protection

Where elimination, substitution, engineering, and administrative controls are not feasible or sufficiently protective to reduce the air concentration to or below the ECEL, or if inhalation exposure above the ECEL is still reasonably likely, EPA is finalizing, with slight modification from the proposal, minimum respiratory PPE requirements based on an owner or operator's most recent measured air concentration for one or more potentially exposed persons and the level of PPE needed to reduce exposure to or below the ECEL. In those circumstances, EPA is finalizing requirements for a respiratory protection PPE program with worksite-specific procedures and elements for required respirator use. Owners or operators must develop and administer a written respiratory protection program in accordance with OSHA's Respiratory Protection Standard under 29 CFR 1910.134(c)(1), (c)(3), and (c)(4). EPA is finalizing requirements that owners and operators provide training to all persons required to use respiratory protection consistent with 29 CFR 1910.134(k) prior to or at the time of initial assignment to a job involving potential exposure to PCE. Owners and operators must retrain all persons required to use PPE at least annually, or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in PPE to be used render the previous training obsolete.

EPA is finalizing requirements that each owner or operator supply a respirator, selected in accordance with requirements described in Unit IV., to each person who enters a regulated area within 450 days after publication of the final rule, or within three months after the receipt of any exposure monitoring that indicates exposures exceeding the ECEL, and thereafter must ensure that

all persons within the regulated area are using the provided respirators whenever PCE exposures exceed or can reasonably be expected to exceed the ECEL.

EPA is also finalizing requirements that owners or operators who are required to administer a respiratory protection PPE program must supply a respirator selected based on a medical evaluation consistent with the requirements of 29 CFR 1910.134(e). If a potentially exposed person cannot use a negative-pressure respirator, then the owner or operator must provide that person with an alternative respirator. The alternative respirator must have less breathing resistance than the negative-pressure respirator and provide equivalent or greater protection. If the person is unable to use an alternative respirator, then the person must not be permitted to enter the regulated area. Additionally, EPA is requiring owners and operators to select respiratory protection that properly fits each affected person and communicate respirator selections to each affected person in accordance with the requirements of 29 CFR 1910.134(f). Consistent with requirements of 29 CFR 1910.134(g) through (j), EPA is requiring owners and operators to provide, ensure use of, and maintain (in a sanitary, reliable, and undamaged condition), respiratory protection that is of safe design and construction. EPA is also requiring owners and operators to provide training to all persons required to use respiratory protection consistent with the requirements of 29 CFR 1910.134(k).

EPA is finalizing the requirements to establish minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the following requirements may be used. EPA is finalizing the following requirements for respiratory protection, based on the most recent exposure monitoring concentrations results measured as an 8-hour TWA that exceed the ECEL (0.14 ppm):

- If the measured exposure concentration is at or below 0.14 ppm: no respiratory protection is required.
- If the measured exposure concentration is above 0.14 ppm and less than or equal to 1.4 ppm (10 times ECEL): Any NIOSH Approved® air-purifying half mask respirator equipped with organic vapor cartridges or canisters; or any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator operated in demand mode equipped with a half mask; or any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in a demand mode equipped with a half

mask [Assigned Protection Factor (APF) 10].

- If the measured exposure concentration is above 1.4 ppm and less than or equal to 3.5 ppm (25 times ECEL): Any NIOSH Approved® Powered Air-Purifying Respirator (PAPR) equipped with a loose-fitting facepiece or hood/helmet equipped with organic vapor cartridges or canisters; or any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood [APF 25].

- If the measured exposure concentration is above 3.5 ppm and less than or equal to 7.0 ppm (50 times ECEL): Any NIOSH Approved® air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved® PAPR with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved® SAR or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved® SAR or Airline Respirator operated in a pressure-demand or other positive-pressure mode with a half mask; or any NIOSH Approved® SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50].

- If the measured exposure concentration is above 7.0 ppm and less than or equal to 140 ppm (1,000 times ECEL): Any NIOSH Approved® PAPR equipped with a full facepiece equipped with organic vapor cartridges or canisters; any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with full facepiece; any NIOSH Approved® SAR or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply; or any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with a helmet/hood and has been tested to demonstrate performance at a level of a protection of APF 1,000 or greater. [APF 1,000].

- If the measured exposure concentration is greater than 140 ppm (1,000+ times ECEL): Any SCBA in a pressure-demand or other positive-pressure mode equipped with a full facepiece or helmet/hood [APF 10,000].

- If the exposure concentration is unknown: Any NIOSH Approved® combination supplied air respirator equipped with a full facepiece and operated in pressure demand or other positive pressure mode with an auxiliary self-contained air supply; or any NIOSH Approved® SCBA operated in pressure demand or other positive pressure mode and equipped with a full facepiece or helmet/hood [APF 1000+].

Additionally, EPA is finalizing requirements that owners or operators select and provide respirators in accordance with the requirements of 29 CFR 1910.134(d)(1)(iv) and with consideration of workplace and user factors that affect respirator performance and reliability.

EPA is requiring that the owner or operator must ensure that all filters, cartridges, and canisters used in the workplace are labeled and color coded with the NIOSH approval label and that the label is not removed and remains legible. Consistent with 29 CFR 1910.134(d)(3)(iii), EPA is requiring either the use of respirators with an end-of-life service indicator certified by NIOSH for the contaminant, in this case PCE, or implementation of a change schedule for canisters and cartridges that ensures that they are changed before the end of their service life. EPA is also requiring owners and operators to ensure that respirators are used in compliance with the terms of the respirator's NIOSH certification.

EPA is finalizing requirements that owners and operators must conduct regular evaluations of the workplace, including consultations with potentially exposed persons using respiratory protection, consistent with the requirements of 29 CFR 1910.134(l), to ensure that the provisions of the written respiratory protection program described in this Unit are being effectively implemented.

EPA is finalizing the requirement that owners and operators document respiratory protection used and PPE program implementation. EPA is finalizing requirements that owners and operators document in the exposure control plan or other documentation of the facility's safety and health program information relevant to the respiratory program, including records on the name, workplace address, work shift, job classification, work area, and type of respirator worn (if any) by each potentially exposed person, maintenance, fit-testing, and training as described in this unit.

b. Dermal Protection

As described in Unit III.B.1., EPA is finalizing requirements that each owner or operator supply dermal PPE that separates and provides a barrier to prevent direct dermal contact with PCE, selected in accordance with requirements described in this Unit, to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact, to be effective within 450 days of the publication of this final rule. Where elimination, substitution, engineering

controls, and administrative controls are not feasible or sufficient to fully prevent direct dermal contact with PCE, EPA is finalizing requirements that appropriate dermal PPE be provided by owners and operators to, and be worn by, persons potentially exposed to direct dermal contact with PCE. EPA is requiring owners and operators to provide dermal PPE that is of safe design and construction for the work to be performed. EPA is also requiring owners and operators ensure each potentially exposed person who is required to wear PPE to use and maintain PPE in a sanitary, reliable, and undamaged condition. Additionally, EPA is requiring owners and operators to select and provide PPE that properly fits each potentially exposed person who is required to use PPE and communicate PPE selections to each affected person.

In choosing appropriate dermal PPE, EPA is requiring owners and operators to select gloves, clothing, and protective gear (which covers any exposed dermal area of arms, legs, torso, and face) based on specifications from the manufacturer or supplier or individually prepared third party testing that demonstrate an impervious barrier to PCE during expected durations of use and normal conditions of exposure within the workplace, accounting for potential chemical permeation or breakthrough times. EPA is also requiring that owners and operators demonstrate that the selected PPE will be impervious for the expected duration and conditions of exposure, such as using the format specified in ASTM F1194–99 (2010) “Standard Guide for Documenting the Results of Chemical Permeation Testing of Materials Used in Protective Clothing Materials,” reporting cumulative permeation rate as a function of time, or equivalent manufacturer- or supplier-provided testing. In alignment with the OSHA Hand Protection PPE Standard (29 CFR 1910.138), EPA is requiring owners and operators to select dermal PPE based on an evaluation of the performance characteristics of the PPE relative to the task(s) to be performed, conditions present, and the duration of use. EPA is also requiring owners and operators to consider likely combinations of chemical substances to which the clothing may be exposed in the work area when selecting the appropriate PPE such that the PPE will prevent direct dermal contact to PCE. Further information related to choosing appropriate PPE can be found in the summary of suitable gloves for PCE memo (Ref. 67).

For example, owners and operators can select gloves that have been tested in accordance with the American

Society for Testing and Materials (ASTM) F739 “Standard Test Method for Permeation of Liquids and Gases through Protective Clothing Materials under Conditions of Continuous Contact.” EPA is finalizing as proposed that PPE be provided for use for a time period only to the extent and no longer than the time period for which testing has demonstrated that the PPE will be impervious during expected durations of use and conditions of exposure. EPA is finalizing requirements that owners and operators also consider other factors when selecting appropriate PPE, including effectiveness of glove type when preventing exposures from PCE alone and in likely combination with other chemical substances used in the work area or when used with glove liners, permeation, degree of dexterity required to perform task, and temperature, as identified in the Hand Protection section of OSHA’s Personal Protective Equipment Guidance (Ref. 77). EPA is also finalizing requirements that replacement PPE must be provided immediately if any person is dermally exposed to PCE longer than the breakthrough time period for which testing has demonstrated that the PPE will be impermeable or if there is a chemical permeation or breakage of the PPE.

Additionally, EPA is finalizing as proposed requirements that owners and operators subject to this rule comply with provisions of 29 CFR 1910.133(b) for requirements on selection and use of eye and face protection.

Additionally, as part of the PPE program, EPA is also finalizing as proposed that owners and operators must comply with OSHA’s general PPE training requirements at 29 CFR 1910.132(f) for application of a PPE training program, including providing training on proper use of dermal PPE (e.g., when and where PPE is necessary, proper application, wear, and removal of PPE, maintenance, useful life, and disposal of PPE). EPA is finalizing that owners and operators provide PPE training to all persons required to use dermal PPE prior to or at the time of initial assignment to a job involving potential exposure to PCE. Owners and operators have to re-train each affected person at least once annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in the PPE to be used render the previous training obsolete.

EPA is also finalizing as proposed requirements that owners and operators retain records of dermal PPE used and

program implementation. EPA is requiring that owners and operators document in the exposure control plan or other documentation of the facility’s safety and health program, information relevant to any dermal PPE program, as applicable, including:

- The name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle PCE or handle equipment or materials on which PCE may be present and the type of PPE selected to be worn by each of these persons;
- The basis for specific PPE selection (e.g., demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area);
- Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE;
- Occurrence and duration of any direct dermal contact with PCE that occurs during any activity or malfunction at the workplace that causes direct dermal exposures to occur and/or glove breakthrough, and corrective actions to be taken during and immediately following that activity or malfunction to prevent direct dermal contact to PCE; and
- Training described in this unit.

7. Additional Finalized Requirements

a. Workplace Information and Training

EPA is also finalizing its requirements to implement a training program in alignment with the OSHA Hazard Communication Standard (29 CFR 1910.1200) and the OSHA General Industry Standard for Methylene Chloride (29 CFR 1910.1052). To ensure that potentially exposed persons in the workplace are informed of the hazards associated with PCE exposure, EPA is finalizing as proposed with slight modification to require that owners or operators of workplaces subject to the WCPP institute a training and information program for potentially exposed persons and assure their participation in the training and information program within 450 days after publication of the final rule. For purposes of workplace information and training, owners and operators are only required to train potentially exposed persons that are expected to be present in the workplace or to directly handle PCE or handle equipment or materials on which PCE may be present.

As part of the training and information program, the owner or operator is required to provide information and comprehensive training in an understandable manner (*i.e.*, plain language) and in multiple languages as appropriate (*e.g.*, based on languages spoken by potentially exposed persons) to potentially exposed persons prior to or at the time of initial assignment to a job involving potential exposure to PCE. Owners and operators are required to provide information and training, as referenced in the OSHA Hazard Communication Standard, to all potentially exposed persons that includes:

- The requirements of the PCE WCPP and how to access or obtain a copy of the requirements of the WCPP, including but not limited to the exposure control plan, monitoring requirements, and PPE program;
- The quantity, location, manner of use, release, and storage of PCE and the specific operations in the workplace that could result in PCE exposure, particularly noting where each regulated area is located;
- Principles of safe use and handling of PCE in the workplace, including specific measures the owner or operator has implemented to reduce inhalation exposure at or below the ECEL or prevent dermal contact with PCE, such as work practices and PPE used;
- The methods and observations that may be used to detect the presence or release of PCE in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance, or odor of PCE when being released, *etc.*); and
- The acute and chronic health hazards of PCE as detailed on relevant Safety Data Sheets (SDSs).

In addition to providing training at the time of initial assignment to a job involving potential exposure to PCE, owners and operators subject to the PCE WCPP are required to re-train each potentially exposed person annually to ensure they understand the principles of safe use and handling of PCE in the workplace. EPA is finalizing its requirements that owners update the training as necessary whenever there are changes in the workplace, such as new tasks or modifications of tasks, in particular, whenever there are changes in the workplace that increase exposure to PCE or where potentially exposed persons' exposure to PCE can reasonably be expected to exceed the action level or increase the potential for direct dermal contact with PCE. To support compliance, EPA is finalizing as proposed that each owner or operator of a workplace subject to the WCPP would

be required to provide to the EPA, upon request, all available materials related to workplace information and training.

b. Workplace Participation

EPA encourages owners and operators to consult with potentially exposed persons and their designated representatives on the development and implementation of exposure control plans and PPE/respirator programs. EPA is finalizing the requirement that owners and operators provide potentially exposed persons and their designated representatives regular access to the exposure control plans, exposure monitoring records, and PPE program implementation. To ensure compliance with workplace participation, EPA is finalizing its requirement that the owner or operator document the notice to and ability of any potentially exposed person that may reasonably be affected by PCE exposure to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation, or any other information relevant to PCE exposure in the workplace.

c. Recordkeeping

For owners and operators to demonstrate compliance with the WCPP provisions, EPA is requiring that owners and operators must retain compliance records for five years (although this requirement does not supplant any longer recordkeeping retention time periods such as those required under 29 CFR 1910. 1020 or other applicable regulations). EPA is requiring the owner or operator to retain records of:

- Exposure control plan;
 - PPE program implementation and documentation, including as necessary, respiratory protection and dermal protection used and related PPE training; and
 - Information and training provided to each person prior to or at the time of initial assignment and any retraining.
- In addition, EPA is finalizing as proposed requirements that owners and operators subject to the WCPP ECEL requirements maintain records to include:

- Regulated areas and authorized personnel;
- The exposure monitoring records;
- Notification of exposure monitoring results; and
- To the extent that the owner or operator relies on prior exposure monitoring data, records that demonstrates that it meets all of the requirements of this section.

The owners and operators, upon request by EPA, are required to make all records that are maintained as described

in Unit IV. available to EPA for examination and copying in accordance with EPA requirements. EPA emphasizes that all records required to be maintained can be kept in the most administratively convenient form such as electronic record form or paper form.

8. Compliance Timeframes

With regard to the compliance timeframe for those occupational conditions of use which are subject to the WCPP, EPA is not finalizing the timeframes proposed. Rather, as discussed in Unit III.B.1, based on consideration of public comments and reasonably available information, EPA is finalizing longer timeframes for non-Federal owners or operators, and is providing Federal agencies and Federal contractors acting for or on behalf of the Federal government additional time to comply with each of the provisions of the WCPP. Specifically, EPA is finalizing its requirement that non-Federal owners and operators perform initial exposure monitoring according to the process outlined in Unit IV. within 360 days after publication of the final rule in the **Federal Register**, or within 30 days of introduction of PCE into the workplace, whichever is later. Federal agencies and Federal contractors acting for or on behalf of the Federal government must conduct initial exposure monitoring within 915 days after the date of publication, or within 30 days of introduction of PCE into the workplace, whichever is later. EPA is also finalizing its requirement that each non-Federal owner or operator ensure that exposure to PCE does not exceed the ECEL as an 8-hour TWA for all potentially exposed persons within 450 days after publication of the final rule, while Federal agencies and Federal contractors acting for or on behalf of the Federal government must comply with the ECEL within 1005 days after the date of publication. If applicable, each owner or operator must provide respiratory protection sufficient to reduce inhalation exposures to below the ECEL to all potentially exposed persons in the regulated area within three months after receipt of the results of any exposure monitoring that indicates an exceedance of the ECEL. For non-Federal owners or operators, this will be within 450 days after publication of the final rule in the **Federal Register**. For Federal agencies and Federal contractors acting for or on behalf of the Federal government, this will be within 1005 after the date publication. EPA is also finalizing the requirement that owners and operators demarcate a regulated area within three months after receipt of any exposure

monitoring that indicates exposures exceeding the ECEL. Additionally, EPA is finalizing requirements that each non-Federal owner or operator ensure all persons are separated, distanced, physically removed, or isolated from direct dermal contact with PCE, including by providing dermal PPE within 450 days after publication of the final rule, while Federal agencies and Federal contractors acting for or on behalf of the Federal government must comply with dermal controls no later than 1005 days after publication of the final rule. Non-Federal owners or operators shall proceed accordingly to implement an exposure control plan, including institution of feasible exposure controls other than PPE, within 900 days of the publication of this final rule, while Federal agencies and Federal contractors acting for or on behalf of the Federal government must implement an exposure control plan within 1095 days after the date of publication.

C. Prescriptive Controls

In contrast to the non-prescriptive requirements of the WCPP, including DDCC, where regulated entities would have flexibility to select controls in accordance with the hierarchy of controls to comply with the parameters outlined in Unit IV.B., EPA has found it appropriate in certain circumstances to require specific prescriptive controls for certain occupational conditions of use. In general, EPA is finalizing the prescriptive controls as proposed, with some modifications, for the industrial and commercial use of PCE as a laboratory chemical, as described in Unit III.A.2.d. Additionally, EPA is finalizing prescriptive controls for the industrial and commercial use in energized electrical cleaning. The rationale for these changes from the 2023 PCE proposed rule, after consideration of public comments, is in Unit III.A.2.e. This unit provides a description of the conditions of use subject to specific prescriptive controls, the specific prescriptive control requirements, and the compliance timeframes for the requirements.

1. Workplace Requirements for Laboratory Use

a. Applicability

The industrial and commercial use of PCE as a laboratory chemical refers to the industrial or commercial use of PCE, often in small quantities, in a laboratory process or in specialized laboratory equipment for instrument calibration/maintenance, chemical analysis, chemical synthesis, extracting and

purifying other chemicals, dissolving other substances, executing research, development, test and evaluation methods, and similar activities, such as use as a solvent, reagent, analytical standard, or other experimental use.

EPA recognizes that potentially exposed persons in a laboratory setting may include students, researchers, visiting scholars, or others whose job classifications may vary, such as depending on the academic period in university laboratories. The requirements described in Unit IV. apply to all potentially exposed persons in all laboratory settings, including academic and research laboratories, regardless of job classification.

b. Workplace Requirements

To address the unreasonable risk of injury to health resulting from dermal exposures to PCE identified for the industrial and commercial use as a laboratory chemical, EPA is requiring dermal PPE, including impermeable gloves and protective clothing, in combination with comprehensive training for tasks particularly related to the use of PCE in a laboratory setting as specified in this unit for each potentially exposed person with direct dermal contact to PCE in the work area through direct handling of the substance or from contact with surfaces that may be contaminated with PCE. For dermal PPE, EPA is requiring that each owner or operator comply with the requirements outlined in Units IV.B.6.b. for selection of dermal PPE and training for all potentially exposed persons. EPA's description for how the requirements for the industrial and commercial use as a laboratory chemical address the unreasonable risk resulting from dermal exposures under the conditions of use and the rationale for this regulatory approach is outlined in Unit V. of the 2023 PCE proposed rule.

In addition, EPA is requiring the use of laboratory ventilation devices, such as fume hoods, glove boxes, air handling units, exhaust fans, biological safety devices, airflow controls, and other local exhaust devices, in workplace laboratory settings for the industrial and commercial use of PCE as a laboratory chemical, to codify existing good laboratory practices. EPA is requiring each owner or operator of a workplace laboratory setting, to ensure laboratory ventilation devices are in use and functioning properly to minimize exposures to persons in the area where PCE is used as a laboratory chemical. EPA suggests owners or operators refer to OSHA's 29 CFR 1910.1450, Appendix A, for National Research Council recommendations concerning laboratory

chemical hood ventilation system characteristics and practices and to ANSI's and ASSP's Z9.5–2022 for recommendations on additional laboratory ventilation controls to minimize exposures to potentially exposed persons in the work area.

c. Recordkeeping

To support and demonstrate compliance, EPA is requiring that each owner or operator of a laboratory workplace subject to the requirements of this unit retain compliance records for five years. In alignment with 29 CFR 1910.1450(e)(3)(ii) and (iii) and 29 CFR 1910.132(d)(2), EPA is requiring that owners and operators must retain records of:

- Dermal protection used by each potentially exposed person and PPE program implementation as outlined in this unit;
- Criteria that the owner or operator will use to determine and implement control measures to reduce potentially exposed persons' exposure to PCE including laboratory ventilation devices as outlined in this unit; and
- Implementation of properly functioning laboratory ventilation devices using manufacturer's instructions for installation, use, and maintenance of the systems, including inspections, tests, development of maintenance procedures, the establishment of criteria for acceptable test results, and documentation of test and inspection results.

Every five years, the owner or operator must re-assess and update these records.

d. Compliance Timeframes

With regards to the compliance timeframe, EPA is requiring that each owner or operator of a workplace engaged in the industrial and commercial of PCE as a laboratory chemical ensure laboratory ventilation devices are in use and functioning properly and that dermal PPE is provided to all potentially exposed persons with direct dermal contact with PCE within 360 days after publication of the final rule.

2. Workplace Requirements for Energized Electrical Cleaner

To address the unreasonable risk of injury to health resulting from inhalation and dermal exposures to PCE identified for the industrial and commercial use as an energized electrical cleaner, which is a sub-use of the industrial and commercial use as an aerosol spray degreaser/cleaner, and in consideration of the lack of reasonably available technically and economically

feasible alternatives to PCE for energized electrical cleaning, EPA is requiring (i) specific prescriptive controls outlined in this Unit, including dermal PPE and respiratory protection, or (ii) implementation of the WCPP outlined in Unit IV.B. EPA is also requiring labels and self-certification. As described in Unit III.A.2.e., EPA's workplace requirements to address the unreasonable risk for industrial and commercial use as an energized electrical cleaner are consistent to the extent possible with existing regulations and best practices for work in electrical spaces. EPA acknowledges the existing OSHA requirements for electrical protective equipment under 29 CFR 1910.137 and does not believe the requirements in this rule interfere with a potentially exposed person's ability to safely use electrical protective equipment, such as rubber insulating gloves and rubber insulating sleeves, as required under OSHA.

a. Applicability

The industrial and commercial use of PCE as an energized electrical cleaner refers to the use of PCE in a product that meets both of the following criteria: (1) the product is labeled to clean and/or degrease electrical equipment, where cleaning and/or degreasing is accomplished when electrical current exists, or when there is a residual electrical potential from a component, such as a capacitor; and; (2) the product label clearly displays the statements: "Energized Equipment use only. Not to be used for motorized vehicle maintenance, or their parts."

b. Workplace Requirements for Energized Electrical Cleaner

EPA is requiring that owners or operators must either implement (i) specific prescriptive controls that provide dermal PPE and respiratory protection, or (ii) implement the WCPP for industrial and commercial use as energized electrical cleaner. Owners and operators must maintain a statement regarding whether the business is complying with the specified prescriptive controls or with the WCPP.

i. Prescriptive Controls

A. Dermal protection. To address the unreasonable risk of injury to health resulting from dermal exposures to PCE identified for the industrial and commercial use as an energized electrical cleaner, EPA is requiring dermal PPE, including impermeable gloves and protective clothing, in combination with comprehensive training for each potentially exposed person with direct dermal contact to

PCE in the work area through direct handling of the substance or from contact with surfaces that may be contaminated with PCE. For dermal PPE, EPA is requiring that each owner or operator comply with the requirements outlined in Unit IV.B.6.b. for selection of dermal PPE and training for all potentially exposed persons.

B. Respiratory protection. Based on the 2020 Risk Evaluation for PCE, EPA determined that the use of respirators with an APF of 50 could control PCE air concentrations to levels that address the unreasonable risk from inhalation exposure based on high-end exposures for the industrial and commercial use in aerosol spray degreaser/cleaner. Therefore, EPA is requiring use of specific respiratory protection, in combination with comprehensive training, for use of an energized electrical cleaner containing PCE in confined spaces, as defined in 29 CFR 1910.146(b), or in an enclosed space (such as a manhole or vault), as described in 29 CFR 1910.269(c). Specifically, EPA is requiring owners or operators to provide to potentially exposed persons, and potentially exposed persons to use, the following: any NIOSH Approved® air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved® Powered Air-Purifying Respirator (PAPR) with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator operated in a pressure-demand or other positive-pressure mode with a half mask; or any NIOSH Approved® SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50]; or any respirator affording a higher degree of protection. In providing the specified respirators and training to potentially exposed persons, EPA is requiring owners or operators to administer a PPE program with procedures and elements for required respirator use as outlined in Unit IV.B.6.a. for proper respirator use, maintenance, fit-testing, medical evaluation, and training. EPA is requiring that the owner or operator must ensure that all filters, cartridges, and canisters used in the workplace are labeled and color coded with the NIOSH approval label and that the label is not removed and remains legible.

For energized electrical cleaning in spaces that are not enclosed or confined, EPA is requiring use of respiratory protection described in Unit IV. if the

potentially exposed person is permitted to approach exposed energized parts closer than the employer's established minimum approach distance by meeting the requirements of 29 CFR 1910.269(l)(3)(iii)(A) through (C) or 29 CFR 1910.333(c)(3)(ii)(A) through (C), or if there is no established minimum approach distance.

ii. WCPP

EPA understands that there may be instances where a performance-based standard is more appropriate to address the unreasonable risk for the industrial and commercial use of PCE as an energized electrical cleaner, instead of the specific prescriptive dermal and respiratory protection requirements described in Unit IV.C.2.b.i. For example, the WCPP may be preferred by owners or operators that regularly use PCE to clean energized electrical equipment onsite at their facility or by owners or operators that are implementing the WCPP at their facility for another condition of use of PCE. In these instances, EPA is requiring owners or operators to comply with the WCPP requirements, including the ECEL, direct dermal contact controls, and ancillary provisions, outlined in Unit IV.B. Owners and operators who choose to follow the WCPP as an alternative to the specific prescriptive controls must also document and maintain a statement that they are electing to comply with the WCPP.

c. Labeling Requirements for Energized Electrical Cleaner

To prevent the use of an energized electrical cleaner containing PCE for unintended applications, such as automotive maintenance or electrical cleaner, EPA is requiring that all manufacturers (including importers), processors, and distributors in commerce of energized electrical cleaner containing PCE provide a label securely attached to each product. Label information is required to be clearly displayed in an easily readable font size, and containing the following text: "This product contains perchloroethylene (PCE) (CASRN 127-18-4), a chemical determined by the Environmental Protection Agency to present unreasonable risk of injury to health under the Toxic Substances Control Act (TSCA), based on neurotoxicity and other adverse health effects. The use of PCE is restricted under 40 CFR part 751, subpart G. This product is for Energized Equipment use only. Not to be used for motorized vehicle maintenance, or their parts."

d. Self-Certification for Energized Electrical Cleaner

To ensure safe and appropriate use of PCE as an energized electric cleaner and to prevent use of an energized electrical cleaner containing PCE for unintended applications, EPA is requiring a point-of-sale self-certification requirement in order to purchase and subsequently use PCE as an energized electrical cleaner. Under this self-certification requirement, EPA is requiring owners or operators, or persons specifically authorized by the owner or operator to purchase energized electrical cleaner, to submit a self-certification to the distributor each time energized electrical cleaner containing PCE is purchased. The self-certification consists of a statement indicating the owner or operator is implementing the prescriptive controls described in Unit IV. or the WCPP described in Unit IV.B. at their business. The self-certification must be signed and presented by a person authorized to do so by the owner or operator of the business entity. EPA is requiring that copies of the self-certification be maintained as records by both the owner or operator and the distributor where PCE was purchased.

Owners or operators who wish to continue or begin purchasing energized electrical cleaners containing PCE must self-certify that the business is implementing and complying with all aspects of the workplace controls (specified respiratory and dermal PPE or the WCPP) described in Unit IV., with the self-certification statement set forth in 40 CFR 751.611(d)(1). This self-certification statement includes, among other information, that the business entity has complied with the rule's requirements and understands the significant penalties for noncompliance with these requirements.

The self-certification statement must be signed and dated by the owner or operator, including a name, title, email address, and phone number for the owner or operator who is self-certifying. The self-certification statement must also list the name and address of the business entity that is being certified and indicate if this is the business entity's first purchase of energized electrical cleaner containing PCE, after publication of the final rule. The self-certification statement would be valid for one year, unless the business entity has changed processes or there is an indication that exposures to PCE have changed.

To ensure distributors are only selling PCE to owners or operators, or to persons specifically authorized by the owner or operator to purchase energized

electrical cleaners, of business entities able to implement and comply with the workplace requirements for energized electrical cleaner, EPA is requiring owners or operators who self-certify to provide a copy of the business entity's current self-certification statement to the distributor from whom energized electrical cleaner containing PCE is being purchased, for every purchase of PCE. EPA is also requiring the distributors to collect, maintain, and retain a copy of the self-certification statement. EPA is also requiring distributors to keep records, such as invoices, that indicate the name of the purchaser and business entity, date of sale, and quantity of PCE purchased. Distributors of PCE as an energized electrical cleaner may only distribute to those companies that provide the correct self-certification statement for purchasing. EPA realizes that some companies may not engage in or use energized electrical cleaners containing PCE at the time this rule is finalized. Owners or operators that may wish to purchase energized electrical cleaners containing PCE after the publication of the final rule are required to submit the self-certification statement to the distributor from whom PCE was initially purchased in order to purchase PCE, certifying that the business for which PCE is being purchased will implement and comply with the workplace requirements for industrial and commercial use as an energized electrical cleaner. EPA is also requiring that sellers and distributors review the self-certification statement to ensure it is appropriately completed to include the business entity's information, as outlined in Unit IV. Distributors of PCE for use in energized electrical cleaners must have a complete and valid self-certification statement in accordance with this section for each sale of PCE for such use. EPA is requiring that the distributors and owners or operators maintain and retain the self-certification statement and related invoices in the most administratively convenient form (electronic or paper) and retain the statement and supporting documentation for five years.

e. Recordkeeping

To support and demonstrate compliance, EPA is requiring that each owner or operator subject to the requirements of this Unit retain compliance records for five years. EPA is requiring that owners and operators must retain records of:

- The self-certification statement and related invoices, including: (A) the written statement required in Unit IV.C.2.d.; (B) printed name and

signature, job classification, email address, and phone number of the owner or operator who is self-certifying; (C) date of self-certification; and (D) name and address of business entity; and

- Statement regarding whether the owner or operator is complying with the prescriptive dermal and respiratory protection requirements or with the WCPP.

Additionally, for owners or operators that elect to comply with the prescriptive dermal and respiratory protection requirements outlined in Unit IV.C.2.b.i., EPA is requiring that owners and operators must retain records of:

- Dermal protection used by each potentially exposed person and program implementation;
- Respiratory protection used by each potentially exposed person and program implementation;

For owners or operators that elect to comply with the WCPP instead of the prescriptive dermal and respiratory protection outlined in Unit IV.C.2.b.i., owners and operators must retain the records described in Unit IV.B.7.c.

EPA is also requiring sellers and distributors of energized electrical cleaner containing PCE to retain the following:

- Invoices that include: (A) name of purchaser; (B) date of sale; and (C) quantity of PCE or PCE containing products sold; and
- Self-certification statement for each purchase of PCE; and
- Copies of the labels required in Unit IV.C.2.c.

f. Compliance Timeframes

With regards to the compliance timeframe, EPA is requiring that each owner or operator of a business entity engaged in the industrial and commercial use of PCE as an energized electrical cleaner either: (1) Implement the specific prescriptive controls of dermal and respiratory protection for energized electrical cleaner described in this unit within 450 days of the publication of this final rule or (2) implement the WCPP in accordance with the compliance timeframes described in Unit IV.B.8., which includes requiring owners and operators to establish initial monitoring within 360 days of the publication of this final rule and providing PPE within 450 days of the publication of this final rule. Additionally, EPA is requiring that the labeling requirement take effect 450 days after publication of this final rule for manufacturers (including importers), processors, and distributors of energized electrical cleaner containing PCE. EPA

is also requiring the self-certification requirements take effect 450 days after publication of this final rule for owners or operators and distributors.

D. Prohibition of Manufacture, Processing, Distribution, and Use of PCE

1. Prohibition of Certain Industrial and Commercial Uses and Manufacturing, Processing, and Distribution in Commerce of PCE for Those Uses

In general, EPA is finalizing the prohibitions as proposed, with some modifications, including for compliance timeframes to provide for reasonable transitions, based on consideration of the public comments. The rule prohibits the manufacture, processing, distribution in commerce, and use of PCE for all industrial and commercial use, except for those industrial and commercial uses which would continue under the WCPP (as identified in Unit IV.A.2.), laboratory use (as identified in Unit IV.A.3.) and use as an energized electrical cleaner (as identified in Unit IV.A.3). Based on comments, EPA is finalizing timeframes longer than proposed for prohibitions of manufacture, processing, distribution, and most industrial and commercial use of PCE broadly. The rationale for these changes from the 2023 PCE proposed rule is in Unit III.B.2. EPA is also finalizing as proposed the phaseout timeframes for the industrial and commercial use of PCE in dry cleaning and related spot cleaning as described in Unit IV.D.3.

As discussed in Unit II.C.4., the prohibitions do not apply to any substance that is excluded from the definition of “chemical substance” under TSCA section 3(2)(B)(ii) through (vi) (Ref. 8).

The final regulation will impose prohibitions in a staggered timeframe, beginning at the top of the supply chain, as proposed. As discussed in Unit III.B.2., in response to comments received, EPA is finalizing timeframes for prohibitions according to the following staggered timeframe:

- Within 540 days of publication of this final rule for prohibitions on manufacturers;
- Within 630 days of publication of this final rule for prohibitions on processors;
- Within 720 days of publication of this final rule for prohibitions on distributing to retailers;
- Within 810 days of publication of this final rule for prohibitions on all other distributors (including retailers); and
- Within 900 days of publication of this final rule for prohibitions on industrial and commercial users.

Additionally, EPA had proposed a WCPP for the industrial and commercial use of PCE for in-line conveyORIZED and web vapor degreasing. After receiving public comments that clarified that these uses are no longer ongoing, EPA is finalizing the prohibition of these uses.

2. Prohibition of Manufacturing, Processing and Distribution in Commerce of PCE for Consumer Use

The final rule prohibits the manufacture, processing, and distribution in commerce of PCE and PCE-containing products for all consumer use. As discussed in the 2023 PCE proposed rule and in this final rule, “consumer use” refers to all known, intended, or reasonably foreseen PCE consumer uses.

EPA is also finalizing the proposed prohibitions on distributing in commerce to retailers, and on retailers from distributing in commerce, PCE and all PCE-containing products for any use (with the exception of dry cleaning, which is subject to a separate phaseout described in Unit IV.D.3), in order to prevent products intended for industrial and commercial use under the WCPP or prescriptive controls from being purchased by consumers. The prohibitions described in this unit will take effect in the following timeframes:

- Within 540 days of publication of this final rule for prohibitions on manufacturers;
- Within 630 days of publication of this final rule for prohibitions on processors, within 720 days of publication of this final rule for prohibitions on distributing to retailers; and
- Within 810 days of publication of this final rule for prohibitions on all other distributors (including retailers).

A retailer is any person or business entity that distributes or makes available products to consumers, including through e-commerce internet sales or distribution. If a person or business entity distributes or makes available any product to at least one consumer, then it is considered a retailer (40 CFR 751.5). For a distributor not to be considered a retailer, the distributor must distribute or make available products solely to commercial or industrial end-users or businesses. Prohibiting manufacturers (including importers), processors, and distributors from distributing PCE, or any products containing PCE, to retailers prevents retailers from making these products available to consumers, which helps address that part of the unreasonable risk from PCE contributed by consumer use.

3. Prohibition and Phaseout of PCE in Dry Cleaning

EPA is finalizing as proposed the prohibition on the manufacturing, processing, distribution of commerce, and industrial and commercial use of PCE for dry cleaning and spot cleaning, including in 3rd generation (dry-to-dry machines with refrigerated condenser) and 4th/5th generation (dry-to-dry machines with refrigerated condenser and carbon adsorber process controls) machines. A prohibition on the manufacturing, processing, distribution in commerce, and industrial and commercial use of PCE in dry cleaning and spot cleaning addresses the unreasonable risk for the following conditions of use as described in Unit III.B.1 of the 2023 PCE proposed rule:

- *Industrial and commercial use in dry cleaning and spot cleaning post-2006 dry cleaning.* This condition of use refers to industrial and commercial use of PCE in products for spot cleaning and as a solvent in degreasing and cleaning applications to remove dirt, grease, stains, spots, and foreign matter from garments at dry cleaning facilities that use PCE dry cleaning machines after the promulgation of the 2006 PCE NESHAP for Dry Cleaning Facilities (40 CFR part 63, subpart M). This includes dry cleaning facilities using third generation (dry-to-dry, non-vented machines with refrigerated condensers), fourth generation (dry-to-dry, non-vented machines with both refrigerated condensers and carbon adsorbers as secondary vapor controls), or fifth generation (dry-to-dry, non-vented machines with secondary vapor controls, a monitor inside the machine drum, and an interlocking system to ensure the concentration is below approximately 300 ppm before the loading door can be opened) PCE dry cleaning machines.

- *Industrial and commercial use in dry cleaning and spot cleaning 4th/5th generation only dry cleaning.* This condition of use refers to industrial and commercial use of PCE in products for spot cleaning and as a solvent in degreasing and cleaning applications to remove dirt, grease, stains, spots, and foreign matter from garments at dry cleaning facilities that use fourth generation or fifth generation PCE machines. In addition to use as a solvent in dry cleaning equipment, PCE is found in products to spot clean garments to remove stains or spots before and after dry cleaning treatment.

- *Consumer use in dry cleaning solvent (i.e., exposure to clothing or articles recently dry cleaned with PCE).* This condition of use refers to consumer

exposure to PCE used to remove dirt, grease, stains, spots, and foreign matter from garments via dry cleaning, in particular the transportation, storage, and wear of articles that were dry cleaned with PCE. For example, garments that are dry cleaned at facilities that use PCE as a dry cleaning solvent have residual concentrations of PCE remaining in the article after a dry cleaning event.

EPA is finalizing a phaseout period following the publication of the final rule. The phaseout starts with a prohibition on the industrial or commercial use of PCE in any dry cleaning machine acquired 180 days or later after publication of the final rule, followed by a prohibition on the industrial or commercial use of PCE in 3rd generation machines 3 years after publication of the final rule. Full implementation of the phaseout will be achieved with a prohibition on the industrial or commercial use of PCE in all dry cleaning and spot cleaning, including in 4th and 5th generation machines, 10 years after publication of the final rule and a prohibition on the manufacturing, processing, and distribution in commerce of PCE for use in dry cleaning solvent 10 years after publication of the final rule. EPA understands that the use of PCE in dry cleaning is currently declining and that very few PCE machines are being produced or sold in the United States market (Ref. 21). As described more fully in the Economic Analysis (Ref. 3), EPA assumes dry cleaning machines are retired 15 to 25 years after the manufactured date. A 3-year phaseout of the use of PCE in 3rd generation dry cleaning machines takes into consideration the age of existing 3rd generation dry cleaning machines as well as public comments submitted on the proposed amendments to the PCE Dry Cleaning NESHAP (December 27, 2021, 86 FR 73207) recommending a 3- to 5-year compliance timeframe at minimum to account for supply issues related to those machines. A 10-year phaseout of the use of PCE in dry cleaning and spot cleaning takes into account that, while the average projected useful lifespan of dry cleaning machines is 15 to 25 years, the purchase of new PCE dry cleaning machines has been in decline. EPA believes that the 180-day and 3-year compliance dates for the start of the phaseout, and the 10-year compliance date for full implementation of the phaseout, are consistent with requirements in TSCA section 6(d)(1)(C) and (D), respectively, to specify mandatory compliance dates for the start of phaseout requirements

that are as soon as practicable but not later than five years after the date of promulgation of the rule, and to specify mandatory compliance dates for full implementation of phaseout requirements that are as soon as practicable. EPA also believes that these compliance dates provide for a reasonable transition period, consistent with TSCA section 6(d)(1)(E).

E. Other Requirements

1. Recordkeeping

For conditions of use that are not otherwise prohibited under this final rule, EPA is finalizing as proposed the requirement that manufacturers, processors, distributors, and commercial users maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions, restrictions, and other provisions of this proposed regulation; and to maintain such records for a period of 5 years from the date the record is generated. This requirement begins 60 days following publication of the final rule in the **Federal Register**. For enforcement purposes, EPA will have access to such businesses records plus additional records required under 40 CFR 751.615. Recordkeeping requirements would ensure that owners or operators can demonstrate compliance with the regulations if necessary.

2. Downstream Notification

For conditions of use that are not otherwise prohibited or are subject to delayed prohibition compliance timeframes under this final regulation, EPA is finalizing as proposed, with slight modification, the requirements that manufacturers (including importers), processors, and distributors, excluding retailers, of PCE and PCE-containing products provide downstream notification of the prohibitions through the SDSs by adding to sections 1(c) and 15 of the SDS the language set forth in 40 CFR 751.613(c). This notification spreads awareness throughout the supply chain that PCE and PCE-containing products can only be distributed in commerce or processed with a concentration of PCE equal to or greater than 0.1% by weight for uses that are not prohibited and for dry cleaning until the prohibition dates come into effect.

To provide adequate time to update the SDS and ensure that all products in the supply chain include the revised SDS, EPA's final rule requires manufacturers to revise their SDS within two months of rule publication and processors and distributors to revise

their SDS within six months of rule publication. EPA did not receive public comments asserting that these compliance dates for updating the SDS were impracticable, and is therefore finalizing the compliance dates as proposed. The intention of downstream notification is to spread awareness throughout the supply chain of the restrictions on PCE under TSCA and to provide information to commercial end-users about allowable uses of PCE.

F. TSCA Section 6(g) Exemptions

EPA is finalizing with minor clarifications the proposed 10-year exemption for emergency use of PCE in furtherance of NASA's mission for the following specific conditions of use: Industrial and commercial use as solvent for cold cleaning; and Industrial and commercial use in wipe cleaning. The exemption includes conditions, pursuant to TSCA section 6(g)(4), including required notification and controls for exposure, to the extent feasible. Specifically, this regulation requires the following: (1) NASA and its contractors must provide notice to the EPA Assistant Administrators of both the Office of Enforcement and Compliance Assurance and the Office of Chemical Safety and Pollution Prevention of each instance of emergency use within 15 days; and (2) NASA and its contractors must comply with the WCPP described in Unit IV.B to the extent feasible. The notification must include a description of the specific use of PCE in the context of one of the conditions of use for which this exemption is being finalized, an explanation of why the use described qualifies as an emergency, and an explanation with regard to the lack of availability of technically and economically feasible safer alternatives. EPA notes that in the event that sensitive information clearly marked as such relating to national security or critical infrastructure is submitted to EPA at any point during the TSCA section 6 process, the Agency will protect such information in accordance with applicable authorities.

EPA expects NASA and its contractors have the ability to implement a WCPP as described in Unit IV.B. for the identified uses in the context of an emergency, to some extent even if not to the full extent of WCPP implementation. Therefore, NASA must comply with the WCPP to the extent technically feasible in light of the particular emergency. NASA and its contractors would still be subject to the general recordkeeping requirements discussed in Unit IV.E.1.

V. TSCA Section 6(c)(2) Considerations**A. Health Effects of PCE and the Magnitude of Human Exposure to PCE**

EPA's analysis of the health effects of PCE and the magnitude of human exposure to PCE are in the 2020 Risk Evaluation for PCE and the 2022 revised unreasonable risk determination for PCE (Refs. 1, 2). A summary is presented in Unit V.

The 2020 Risk Evaluation for PCE identified potential health effects of PCE including non-cancer adverse health effects such as neurotoxicity and central nervous system effects, kidney and liver effects, immune system toxicity, reproductive toxicity, and developmental toxicity and cancer hazards from carcinogenicity as well as genotoxicity.

Among the non-cancer adverse health effects, EPA identified visual deficits indicative of neurotoxicity as a primary effect of PCE in humans following acute and chronic inhalation and dermal exposures. Identified symptoms of neurotoxicity include color confusion, changes in visual contrast detection, and alteration of visual-spatial function. Impaired visual and cognitive function and diminished color discrimination are the most sensitive adverse effects driving the unreasonable risk of PCE exposure. Prenatal and early childhood exposure to PCE has also been linked to statistically significant increased risk of engaging in risky behaviors. Additionally, the 2020 Risk Evaluation for PCE identified that PCE exposure is associated with several types of cancer, including liver tumors, brain gliomas, kidney cancer, and testicular cancer. By the criteria presented in EPA's Guidelines for Carcinogen Risk Assessment (Ref. 78), PCE is characterized as "likely to be carcinogenic to humans by all routes of exposure" based on conclusive evidence in mice and rats and suggestive evidence in humans.

Other adverse health effects identified in the 2020 Risk Evaluation for PCE identified include central nervous system depression, kidney nephrotoxicity and proximal tubule nuclear enlargement, liver necrosis and extreme dilation of blood or lymph vessels, reduced sperm quality, reduced red blood cells and hemoglobin, increased immune cells, decreased fetal/placental weight, developmental neurotoxicity, and skeletal effects from chronic exposures (Ref. 1).

Regarding the magnitude of human exposure, one factor EPA considers for the conditions of use that drive unreasonable risk is the size of the exposed population which, for PCE,

EPA estimates is 259,609 workers and 31,449 occupational non-users (ONUs) (Ref. 3). The number of consumers that use the approximately 115 types of products containing PCE each year is unknown. See section 6.1.9 of the Economic Analysis and section 8.4.1 of the response to comment document for additional detail, including a description of changes made from the 2023 PCE proposed rule to EPA's estimates in response to public comment (Refs. 3, 8).

For the conditions of use that drive the unreasonable risk for PCE, PESS include workers, ONUs, consumer users, and bystanders to consumers using products containing PCE. Children of workers present at dry cleaners are also a PESS group exposed to PCE during industrial and commercial use of PCE in dry cleaning and spot cleaning.

In addition to these estimates of numbers of workers, occupational non-users, consumers, and bystanders to consumer use directly exposed to PCE, EPA recognizes there is exposure to the general population from air and water pathways for PCE. (While bystanders are individuals in proximity to a consumer use of PCE, fenceline communities are a subset of the general population who may be living in proximity to a facility where PCE is being used in an occupational setting). EPA separately conducted a screening approach to assess whether there may be potential risks to the general population from these exposure pathways. This analysis is summarized in full in the 2023 PCE proposed rule, which includes information on the SACC peer review. This unit addresses those areas where some risk was indicated at the fenceline, and the condition of use will be continuing under the rule.

EPA's analysis methodology was presented to the SACC peer review panel in March 2022, and EPA is including SACC recommendations, as appropriate, in assessing general population exposures in upcoming risk evaluations. EPA's fenceline analysis for the water pathway for PCE, based on methods presented to the SACC, did not find risks from drinking water, incidental oral ingestion of surface water, or incidental dermal exposure to surface water (Ref. 79). EPA therefore does not intend to revisit or conduct an analysis of the water pathway for PCE as part of a supplemental risk evaluation.

EPA's analysis for the air pathway for PCE using methodology presented to SACC and the multi-year analysis conducted in response indicated potential exposure and associated risks

to select populations within the general population at particular facilities (Ref. 80). As described in Unit VI.A. of the 2023 PCE proposed rule, EPA's fenceline analysis for the air pathway for PCE indicates that EPA is not able to conclude that there are no potential risks to fenceline communities. Additionally, based on the fenceline analysis for the ambient air pathway for PCE, including the strengths, limitations, and uncertainties associated with the information used to inform the analysis, EPA is unable to determine with this screening analysis whether those risks drive the unreasonable risk of injury to health presented by PCE. Although EPA did not make a determination of unreasonable risk based on the fenceline screening analysis, this final regulatory action is expected to reduce the risks identified in the screening approach. Additionally, while the fenceline screening analysis identified facilities with some indication of releases and potential exposures with associated increased cancer risk that exceeds the 1×10^{-6} benchmark, the analysis did not identify any facilities exceeding the 1×10^{-4} benchmark; the highest risk estimate identified is in the 1×10^{-5} range (Ref. 80). Standard cancer benchmarks used by EPA and other regulatory agencies are an increased cancer risk above benchmarks ranging from 1 in 1,000,000 to 1 in 10,000 (*i.e.*, 1×10^{-6} to 1×10^{-4}). For example, when setting standards under CAA section 112(f)(2), EPA uses a two-step process, with "an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual risk (MIR) of approximately 1-in-10 thousand" (Ref. 81, referencing the interpretation set forth in the 1989 final National Emission Standards for Benzene rule (54 FR 38044 Sept. 14, 1989)).

EPA believes that the prohibitions being finalized for manufacturing (including importing), processing, and distribution in commerce for all consumer use and most commercial use would reduce exposures to the general population, including fenceline communities. Of the 29 facilities which indicated potential exposure and associated increased cancer risk to fenceline communities, under the final regulation, 20 may be associated with conditions of use that EPA is not prohibiting, and thus exposures at the fenceline at the remaining 9 facilities would be addressed.

Under the final rule, only 16 conditions of use will continue (see

Units IV.B. and IV.C. for a summary). For many of these conditions of use, EPA expects use and associated production volume of PCE to decline over time. For example, the manufacturing and processing; incorporation into a formulation, mixture, or reaction product conditions of use can reasonably be expected to decline. While EPA is permitting the continued manufacturing and processing of PCE subject to the WCPP, the downstream distribution and use of formulations, mixtures, or reaction products for most conditions of use would be prohibited. Exceptions include the distribution and use of products for conditions of use that EPA is not prohibiting in this final regulation, including certain degreasing applications (e.g., vapor degreasing, cold cleaning, and energized electrical cleaning), chemical milling, adhesives and sealants, processing aid, and laboratory use. Additionally, EPA expects the processing of PCE as a reactant in the generation of HFC-134a and HFC-125 to decline over time, in light of the AIM Act requirements to phase down production and consumption of listed HFCs by 85% over the next 15 years. HFC-125 and HFC-134a are two of the regulated substances that are subject to the AIM Act phasedown.

For the conditions of use that are not prohibited, this final rule requires exposure controls via implementation of a WCPP or prescriptive controls as described in Units IV.B. and IV.C. While it is possible that efforts to reduce exposures in the workplace to levels below the ECEL could lead to adoption of engineering controls that ventilate more PCE outside, EPA predicts that this potential exposure would be limited as a result of the existing NESHAP that cover PCE for these conditions of use under the CAA. Applicable NESHAPs include: 40 CFR part 63, subpart F, Synthetic Organic Chemical Manufacturing Industry; 40 CFR part 63, subpart DD, Off-Site Waste and Recovery Operations; 40 CFR part 63, subpart VVV, Publicly Owned Treatment Works; 40 CFR part 63, subpart VVVVVV, Chemical Manufacturing Area Sources; 40 CFR part 63, subpart GG, Aerospace Manufacturing and Rework Facilities; 40 CFR part 63, subpart T, Halogenated Solvent Cleaning, and any exceedances would be an enforcement issue. The CAA establishes a two-phase process for the EPA's development, review, and potential revision of NESHAP that impose emission standards and work practice requirements on subject

categories of sources of hazardous air pollutants. First, the EPA sets technology-based or performance-based standards reflecting the maximum achievable control technology (MACT) for major sources (CAA section 112(d)(2)-(3)) and generally available control technology (GACT) for area or non-major sources (CAA section 112(d)(5)). In the second phase, eight years after adoption of the first phase standards, the EPA performs a residual risk review of major source MACT standards to ensure that they provide an ample margin of safety to protect public health (CAA section 112(f)(2)), and a technology review of all NESHAP to account for developments in practices, processes and control technologies (CAA section 112(d)(6)). The CAA only requires the EPA to conduct the residual risk review one time for each MACT standard, although the EPA has discretion to conduct additional risk reviews where warranted. The technology review, instead, is a recurring duty, and the EPA must perform it no less often than every eight years.

Thus, the prohibitions and restrictions on PCE in this final rule, combined with the expected decline in production volume for PCE and the CAA requirements described above, are expected to sufficiently address the emissions of PCE, and thus the resulting risks identified in the screening analysis to any general population or fence-line communities close to facilities engaging in PCE use. EPA therefore does not intend to revisit or conduct an analysis of the air pathway for PCE as part of a supplemental risk evaluation.

B. Environmental Effects of PCE and the Magnitude of Environmental Exposure to PCE

EPA's analysis of the environmental effects of PCE and the magnitude of exposure of the environment to PCE are in the 2020 Risk Evaluation for PCE and the 2022 revised unreasonable risk determination for PCE (Refs. 1, 2). The unreasonable risk determination for PCE is based solely on risks to human health; based on the TSCA 2020 Risk Evaluation for PCE, EPA determined that exposures to the environment did not drive the unreasonable risk. A summary is presented in Unit V.

The manufacturing, processing, use, and disposal of PCE can result in releases to the environment, including aquatic releases of PCE from facilities that manufacture, use, or process PCE. Fate, exposure, and environmental hazard were evaluated in the 2020 Risk Evaluation for PCE in order to characterize environmental risk of PCE.

PCE has low bioaccumulation potential and moderate potential to accumulate in wastewater biosolids, soil, or sediment. Releases of PCE to the environment are likely to volatilize to the atmosphere, where it will slowly photooxidize. It may migrate to groundwater, where it will slowly hydrolyze. Additionally, the bioconcentration potential of PCE is low.

Potential effects of PCE exposure described in the literature for aquatic life include mortality, developmental deformities, immobilization, reproductive effects, growth effects, and biomass effects. EPA concluded that PCE poses a hazard to environmental aquatic organisms, including aquatic invertebrates, fish, amphibians, and aquatic plants (algae). For acute exposures, PCE is a hazard to aquatic invertebrates based on immobilization, to fish based on immobilization of midge larvae at 7.0 mg/L, to fish based on mortality of rainbow trout as the most sensitive species with acute toxicity values as low as 4.8 mg/L, and amphibians based on developmental effects to the wood frog as the most sensitive species with acute toxicity values as low as 7.8 mg/L. For chronic exposures, PCE is a hazard to aquatic invertebrates, with a toxicity value of 0.5 mg/L; and a chronic toxicity value of 0.84 mg/L for fish. PCE is also a hazard for green algae with a toxicity value of 3.6 mg/L. EPA incorporated modeled exposure data from the Exposure and Fate Assessment Screening Tool (Ref. 82), as well as monitored data from the Water Quality Portal (Ref. 83), to characterize the exposure of PCE to aquatic species.

In the 2020 Risk Evaluation for PCE, the indicators evaluated for risk of injury to the environment include immobilization from acute exposure, growth effects from chronic exposure, and mortality to algae (Ref. 1). Based on the 2020 Risk Evaluation for PCE, EPA did not identify risk of injury to the environment that drive the unreasonable risk determination for PCE.

C. Benefits of PCE for Various Uses

As described in the 2023 PCE proposed rule, PCE is a solvent used in a variety of industrial, commercial, and consumer use applications, including as a feedstock in the production of fluorinated compounds, cleaning and degreasing, adhesives and sealants, paints and coatings, lubricants and greases, processing aid, and other uses. The physical and chemical properties of PCE, such as non-flammability, high volatility, low global warming potential, low vapor pressure, high chloride

density, high boiling point, and high solvency of oils, waxes, and greases, as well as relatively low cost, make it a popular and effective solvent for many applications (Refs. 1, 84).

D. Reasonably Ascertainable Economic Consequences of the Final Rule

1. Likely Effect of the Rule on the National Economy, Small Business, Technological Innovation, the Environment, and Public Health

The reasonably ascertainable economic consequences of this final rule include several components, all of which are described in the Economic Analysis (Ref. 3). With respect to the anticipated effects of this final rule on the national economy, EPA considered the number of businesses and workers that would be affected and the costs and benefits to those businesses and workers and did not find that there would be an impact on the national economy (Ref. 3). The economic impact of a regulation on the national economy becomes measurable only if the economic impact of the regulation reaches 0.25% to 0.5% of Gross Domestic Product (GDP). Given the current GDP, this is equivalent to a cost of \$40 billion to \$80 billion. Therefore, because EPA has estimated that the monetized cost of the final rule would be \$43.4 million annualized over 20 years at a 2% discount rate, EPA has concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). In addition, EPA considered the employment impacts of this final rule, and found that the direction of change in employment is uncertain, but EPA expects the short-term and longer-term employment effects to be small.

There are an estimated 154,683 small entities affected by the final rule with a per firm and total estimated cost impact of \$177 and \$27.4 million, respectively. Of the small businesses potentially impacted by this final rule, almost 100% (154,671 out of 154,683) are expected to have impacts of less than 1% to their firm revenues, 8 (0.00005%) are expected to have impacts between 1 and 3% to their firm revenues, and 5 (0.00003%) are expected to have impacts greater than 3% to their firm revenues. Most of these small entities (94%) are users of PCE in aerosol degreasing with an estimated 119,523 small entities using PCE in energized electrical cleaning and an estimated 26,050 small entities using PCE in other aerosol spray cleaning/degreasing uses like brake cleaning.

EPA estimates that there are 6,000 firms currently using PCE dry cleaning machines but estimates that only 62

would still be using PCE for dry cleaning by the end of the proposed 10-year phaseout. As described further in the Economic Analysis, EPA maintains that almost no new PCE machines have been brought into service in recent years and therefore most existing dry cleaning machines using PCE are old and will no longer be in service by the phaseout date.

In addition to dry cleaners, other users of PCE (such as in vapor degreasing and use as maskant in chemical milling) could be strongly impacted because they may have no economical alternative to the use of PCE.

With respect to this rule's effect on technological innovation, EPA expects this rule to spur more innovation than it will hinder. A prohibition or significant restriction on the manufacture, processing, and distribution in commerce of PCE for uses covered in this final rule may increase demand for safer chemical substitutes. This rule is not likely to have significant effects on the environment because PCE does not present an unreasonable risk to the environment, though this rule does present the potential for small reductions in air emissions and soil contamination associated with improper disposal of products containing PCE. The effects of this rule on public health are estimated to be positive, due to the reduced risk of cancer and other non-cancer endpoints from exposure to PCE.

2. Costs and Benefits of the Regulatory Action and of the One or More Primary Alternative Regulatory Actions Considered by the Administrator

The costs and benefits that can be monetized for this rule are described at length in the Economic Analysis (Ref. 3). The monetized costs for this final rule are estimated to be \$43.4 million annualized over 20 years at a 2% discount rate. The monetized benefits are estimated to be \$32.6 to \$84.6 million annualized over 20 years at a 2% discount rate.

EPA considered the estimated costs to regulated entities as well as the cost to administer and enforce an alternative regulatory action. The alternative regulatory action is described in detail in Unit IV.B of the 2023 PCE proposed rule. The estimated annualized cost of the alternative regulatory action is \$62.1 million at a 2% discount rate over 20 years (Ref. 3). The monetized benefits of the alternative action are estimated to be \$32.5 to \$84.4 million annualized over 20 years at a 2% discount rate (Ref. 3).

This final rule is expected to achieve health benefits for the American public,

some of which can be monetized and others that, while tangible and significant, cannot be monetized. EPA believes that the balance of costs and benefits of this proposal cannot be fairly described without considering the additional, non-monetized benefits of mitigating the non-cancer adverse effects. These effects may include neurotoxicity, kidney toxicity, liver toxicity, immunological and hematological effects, reproductive effects, and developmental effects. The multitude of adverse effects from PCE exposure can profoundly impact an individual's quality of life, as discussed in Units II.A. (overview), III.B.2. (description of the unreasonable risk), V.A. (discussion of the health effects), and the 2020 Risk Evaluation for PCE. Chronic adverse effects of PCE exposure include both cancer and the non-cancer effects listed previously. Acute effects of PCE exposure could be experienced for a shorter portion of life but are nevertheless significant in nature. The incremental improvements in health outcomes achieved by given reductions in exposure cannot be quantified for non-cancer health effects associated with PCE exposure, and therefore cannot be converted into monetized benefits. The qualitative discussion throughout this rulemaking and in the Economic Analysis highlights the importance of these non-cancer effects. These effects include willingness-to-pay to avoid illness, which includes cost of illness and other personal costs such as pain and suffering. Considering only monetized benefits underestimates the impacts of PCE adverse outcomes and therefore underestimates the benefits of this 2023 PCE proposed rule.

3. Cost Effectiveness of the Regulatory Action and of One or More Primary Alternative Regulatory Actions Considered by the Administrator

Cost effectiveness is a method of comparing certain actions in terms of the expense per item of interest or goal. A goal of this regulatory action is to prevent unreasonable risk resulting from exposure to PCE. The regulatory action would cost \$3.1 million per potential prevented cancer case while the primary alternative regulatory action would cost \$4.4 million (using the 2% discount rate) (Ref. 3).

VI. TSCA Section 9 Analysis and Section 14 and 26 Considerations

A. TSCA Section 9(a) Analysis

TSCA section 9(a) provides that, if the Administrator determines, in the Administrator's discretion, that an unreasonable risk may be prevented or

reduced to a sufficient extent by an action taken under a Federal law not administered by EPA, the Administrator must submit a report to the agency administering that other law that describes the risk and the activities that present such risk. TSCA section 9(a) describes additional procedures and requirements to be followed by EPA and the other Federal agency after submission of the report. As discussed in Unit VI., the Administrator does not determine that unreasonable risk from PCE under the conditions of use may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA. EPA's section 9(a) analysis can be found in full in Unit VII.A. of the 2023 PCE proposed rule, and responses to comments on that 9(a) analysis can be found in the Response to Comments, section 9.1 (Ref. 8).

TSCA section 9(d) instructs the Administrator to consult and coordinate TSCA activities with other Federal agencies for the purpose of achieving the maximum enforcement of TSCA while imposing the least burden of duplicative requirements. For this rulemaking, EPA has coordinated with appropriate Federal executive departments and agencies including but not limited to OSHA and the Consumer Product Safety Commission (CPSC), to, among other things, identify their respective authorities, jurisdictions, and existing laws with regard to risk evaluation and risk management of PCE.

As discussed in more detail in the 2023 PCE proposed rule, OSHA requires that employers provide safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education, and assistance. OSHA, in 1971, established a PEL for PCE of 100 ppm of air as an 8-hour TWA with an acceptable ceiling concentration of 200 ppm and an acceptable maximum peak above the acceptable ceiling concentration for an eight-hour shift of 300 ppm, maximum duration of 5 minutes in any 3 hours. However, the exposure limits established by OSHA are higher than the exposure limit that EPA determined would be sufficient to address the unreasonable risk identified under TSCA from occupational inhalation exposures associated with certain conditions of use. Gaps exist between OSHA's authority to set workplace standards under the OSH Act and EPA's obligations under TSCA section 6 to eliminate unreasonable risk presented by chemical substances under the conditions of use. The U.S. CPSC, under authority provided to it by Congress in the Consumer Product

Safety Act (CPSA), protects the public from unreasonable risk of injury or death associated with consumer products. Under the CPSA, CPSC has the authority to regulate PCE in consumer products, but not in other sectors such as automobiles, some industrial and commercial products, or aircraft for example.

EPA therefore concludes that TSCA is the only regulatory authority able to prevent or reduce unreasonable risk of PCE to a sufficient extent across the range of conditions of use, exposures, and populations of concern. An action under TSCA is also able to address occupational unreasonable risk and would reach entities that are not subject to OSHA. Moreover, the timeframe and any exposure reduction as a result of updating OSHA or CPSC regulations for PCE cannot be estimated, while TSCA imposes a much more accelerated two-year statutory timeframe for proposing and finalizing requirements to address unreasonable risk. Regulating PCE's unreasonable risk utilizing TSCA authority will also avoid the situation where a patchwork of regulations amongst several Agencies using multiple laws and differing legal standards would occur and is therefore a more efficient and effective means of addressing the unreasonable risk of PCE. Finally, as discussed in greater detail in the 2023 PCE proposed rule, the 2016 amendments to TSCA altered both the manner of identifying unreasonable risk and EPA's authority to address unreasonable risk, such that risk management is increasingly distinct from provisions of the CPSA, Federal Hazardous Substances Act (FHSA), or OSH Act (88 FR 39652) (FRL-8329-01-OCSP). For these reasons, in the Administrator's discretion, the Administrator has analyzed this issue and does not determine that unreasonable risk from PCE may be prevented or reduced to a sufficient extent by an action taken under a Federal law not administered by EPA.

B. TSCA Section 9(b) Analysis

If EPA determines that actions under other Federal laws administered in whole or in part by EPA could eliminate or sufficiently reduce a risk to health or the environment, TSCA section 9(b) instructs EPA to use these other authorities to protect against that risk "unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk" under TSCA. In making such a public interest finding, TSCA section 9(b)(2) states: "the Administrator shall consider, based on information reasonably available to the

Administrator, all relevant aspects of the risk . . . and a comparison of the estimated costs and efficiencies of the action to be taken under this title and an action to be taken under such other law to protect against such risk."

Although several EPA statutes have been used to limit PCE exposure (Refs. 3, 5), regulations under those EPA statutes largely regulate releases to the environment, rather than occupational or consumer exposures. While these limits on releases to the environment are protective in the context of their respective statutory authorities, regulation under TSCA is also appropriate for occupational and consumer exposures and in some cases can provide upstream protections that would prevent the need for release restrictions required by other EPA statutes (e.g., RCRA, CAA, CWA). Updating regulations under other EPA statutes would not be sufficient to address the unreasonable risk of injury to the health of workers, occupational non-users, consumers, and bystanders who are exposed to PCE under its conditions of use. EPA's section 9(b) analysis can be found in full in Unit VII.B. of the 2023 PCE proposed rule, and responses to comments on that 9(b) analysis can be found in the Response to Comments, section 9.2 (Ref. 8).

For these reasons, the Administrator does not determine that unreasonable risk from PCE under its conditions of use, as evaluated in the 2020 Risk Evaluation for PCE (Ref. 1), could be eliminated or reduced to a sufficient extent by actions taken under other Federal laws administered in whole or in part by EPA.

C. TSCA Section 14 Requirements

EPA is also providing notice to manufacturers, processors, and other interested parties about potential impacts to CBI. Under TSCA sections 14(a) and 14(b)(4), if EPA promulgates a rule pursuant to TSCA section 6(a) that establishes a ban or phase-out of a chemical substance, the protection from disclosure of any CBI regarding that chemical substance and submitted pursuant to TSCA will be "presumed to no longer apply," subject to the limitations identified in TSCA section 14(b)(4)(B)(i) through (iii). Pursuant to TSCA section 14(b)(4)(B)(iii), the presumption against protection from disclosure will apply only to information about the specific conditions of use that this rule prohibits or phases out. Per TSCA section 14(b)(4)(B)(i), the presumption against protection will not apply to information about certain emergency uses that this rule exempts from a ban or phase-out

pursuant to TSCA section 6(g). Manufacturers or processors seeking to protect such information may submit a request for nondisclosure as provided by TSCA sections 14(b)(4)(C) and 14(g)(1)(E). Any request for nondisclosure must be submitted within 30 days after receipt of notice from EPA under TSCA section 14(g)(2)(A) stating EPA will not protect the information from disclosure. EPA anticipates providing such notice via the Central Data Exchange (CDX).

D. TSCA Section 26 Considerations

As explained in the 2023 PCE proposed rule, EPA fulfilled TSCA section 26(h) by using scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science. Comments received on the 2023 PCE proposed rule about whether EPA adequately assessed reasonably available information under TSCA section 26 on the risk evaluation, and responses to those comments, can be found in Section 9.3 of the Response to Comments document (Ref. 8).

VII. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not itself physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Risk Evaluation for Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0035. EPA Publication No. 740-R1-8011. December 2020. <https://www.regulations.gov/document/EPA-HQ-OPPT-2019-0502-0058>.
2. EPA. Perchloroethylene. Unreasonable Risk Determination. Document ID No. EPA-HQ-OPPT-2020-0720-0036. December 2022.
3. EPA. Economic Analysis of the Final Regulation of Perchloroethylene Under TSCA Section 6(a). RIN 2070-AK84. December 2024.
4. President Biden. The President and First Lady's Cancer Moonshot: Ending Cancer As We Know It. Accessed February 26, 2024. <https://www.whitehouse.gov/cancermoonshot/>.
5. EPA. Access Chemical Data Reporting Data: 2016 CDR Data (Updated May 2020). Document ID No. EPA-HQ-OPPT-2020-0720-0037. Last Updated on May 16, 2022. <https://www.epa.gov/chemical-data-reporting/access-cdr-data#2016>.
6. EPA. Access Chemical Data Reporting Data: 2020 CDR Data (up-to-date as of April 2022). Document ID No. EPA-HQ-OPPT-2020-0720-0038. Last Updated on May 16, 2022. <https://www.epa.gov/chemical-data-reporting/access-cdr-data>.
7. EPA. Regulatory Actions Pertaining to Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0039. 2022.
8. EPA. Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA); Response to Public Comments. December 2024.
9. Executive Order 13985. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. **Federal Register**. 86 FR 7009, January 20, 2021.
10. Executive Order 13990. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. **Federal Register**. 86 FR 7037, January 25, 2021.
11. Executive Order 14008. Tackling the Climate Crisis at Home and Abroad. **Federal Register**. 86 FR 7619, February 1, 2021.
12. EPA. An Alternatives Assessment for Use of Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0104. RIN 2070-AK84. November 2022.
13. EPA. Notes from Federalism Consultation on Forthcoming Proposed Rulemakings for Trichloroethylene, Perchloroethylene, and n-Methylpyrrolidone under TSCA Section 6(a). Document ID No. EPA-HQ-OPPT-2020-0720-0058. July 22, 2021.
14. EPA. Notes from Tribal Consultations on Forthcoming Proposed Rulemakings for Trichloroethylene (TCE) and Perchloroethylene (PCE). Document ID No. EPA-HQ-OPPT-2020-0720-0059. June 15, 2021 and July 8, 2021.
15. Peter Sinsheimer; Green Analytics. Comments on Environmental Justice Consultation for TSCA PCE Risk Management of Dry Cleaning. Document ID No. EPA-HQ-OPPT-2020-0720-0060. August 20, 2021.
16. Hans Kim; AQUA Wet Clean. Letter re: Environmental Justice Consultation USEPA TSCA PCE Risk Management. Document ID No. EPA-HQ-OPPT-2020-0720-0061. August 20, 2021.
17. W. Heiger-Bernays and G. Nielsen. Comments on Environmental Justice Consultation #2 for TCE and PCE. Document ID No. EPA-HQ-OPPT-2020-0720-0062. July 5, 2021.
18. Martin Argüello; Physicians for Social Responsibility. USEPA EJ Consultation Meeting Comments on PCE and TCE TSCA Regulations. Document ID No. EPA-HQ-OPPT-2020-0720-0063. August 20, 2021.
19. Sa Liu; School of Health Sciences Purdue University. Letter re: Environmental Justice Consultation on Forthcoming Proposed Rulemakings under TSCA Section 6(a). Document ID No. EPA-HQ-OPPT-2020-0720-0064. August 20, 2021.
20. EPA. Initial Regulatory Flexibility Analysis for Perchloroethylene; Regulation of Perchloroethylene under TSCA § 6(a) Proposed Rule; RIN 2070-AK84. Document ID No. EPA-HQ-OPPT-2020-0720-0126. February 2023.
21. EPA. Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Toxic Substances Control Act (TSCA) Section 6(a) Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0066. February 1, 2023.
22. EPA. Final Regulatory Flexibility Analysis (FRFA) for Perchloroethylene; Regulation under the Toxic Substances Control Act (TSCA). December 2024.
23. EPA. Public Webinar on Perchloroethylene: Risk Evaluation and Risk Management under TSCA Section 6. Document ID No. EPA-HQ-OPPT-2020-0720-0002. January 14, 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0720-0002>.
24. EPA. Small Business Administration Small Business Environmental Roundtable: Risk Evaluation and Risk Management under TSCA Section 6 for Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0004. January 15, 2021.
25. EPA. Stakeholder Meeting List for Proposed Rulemaking for Perchloroethylene under TSCA Section 6(a). Document ID No. EPA-HQ-OPPT-2020-0720-0067.
26. EPA. 2021 Policy on Children's Health. Document ID No. EPA-HQ-OPPT-2020-0720-0068. October 5, 2021.
27. EPA. Public Webinar on Perchloroethylene (PCE) Proposed Rulemaking under TSCA Section 6. July 19, 2023.
28. EPA. Stakeholder Meeting List for Proposed and Final Rulemaking for Perchloroethylene under TSCA Section 6(a).
29. EPA. Economic Analysis of the Proposed Regulation of Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0125. February 2023.
30. BFK Solutions LLC. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0255. August 14, 2023.
31. The Boeing Company. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0278. August 15, 2023.
32. Chemical Users Coalition. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0260. August 15, 2023.
33. American Chemistry Council. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0275. August 15, 2023.

34. Corteva Agriscience. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0276. August 15, 2023.
35. EPA. Meeting with Corteva Agriscience on Risk Management under TSCA Section 6 and Perchloroethylene (PCE). September 28, 2023.
36. Written Comments to OPPT on PCE Risk Management. Docket ID Nos.: EPA-HQ-OPPT-2019-0502; EPA-HQ-OPPT-2016-0732; EPA-HQ-OPPT-2020-0720. July 15, 2024.
37. Dow Chemical. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0284. August 15, 2023.
38. EPA. Meeting with Dow Chemical on Risk Management under TSCA Section 6 and Perchloroethylene (PCE). September 26, 2023.
39. The Campus Safety Health and Environmental Management Association (CSHEMA). Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0248. August 10, 2023.
40. Christopher Kolodziej. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0256. August 15, 2023.
41. Purdue University. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0241. July 21, 2023.
42. Kristi Ohr. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0213. June 21, 2023.
43. ANSI. ANSI/ASSP Z9.5-2022; Laboratory Ventilation. https://webstore.ansi.org/standards/asse/ansiasspz92022?source=blog&_gl=1*194rqnj*_gcl_au*MjA3NzY5MzI1MS4xNzExMDMzMDEz.
44. ANSI. ANSI/ASHRAE 62.1-2022; Ventilation and Acceptable Indoor Air Quality. <https://webstore.ansi.org/standards/ashrae/ansiashrae622022>.
45. CRC Industries. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0267. August 15, 2023.
46. Household and Commercial Products Association. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0268. August 15, 2023.
47. US Chamber of Commerce. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0279. August 15, 2023.
48. American Petroleum Institute. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0282. August 15, 2023.
49. Halogenated Solvents Industry Alliance. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0291. August 15, 2023.
50. National Steering Committee of the State Small Business Environmental Assistance Programs. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0265. August 15, 2023.
51. National Fire Protection Association (NFPA). NFPA 70E Standard for Electrical Safety in the Workplace. <https://www.nfpa.org/codes-and-standards/nfpa-70e-standard-development/70e>.
52. EPA. Meeting with CRC Industries on Risk Management under TSCA Section 6 and Perchloroethylene (PCE). October 10, 2023.
53. The Chemours Company. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0273. August 15, 2023.
54. Honeywell. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0254. August 14, 2023.
55. American Chemistry Council. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0288. August 15, 2023.
56. American Fuel & Petrochemical Manufacturers. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0277. August 15, 2023.
57. Semiconductor Industry Association. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0271. August 15, 2021.
58. NABTU AFL-CIO, and USW. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0264. August 15, 2023.
59. et al. SAFECEM. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0257. August 15, 2023.
60. NIOSH. NIOSH Manual of Analytical Methods (NMAM), 5th Edition, Section 2 (February 2020). https://www.cdc.gov/niosh/nmam/pdfs/nmam_5thed_ebook.pdf.
61. Alliance for Automotive Innovation. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0274. August 15, 2023.
62. MilliporeSigma. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0247. August 10, 2023.
63. National Association of Chemical Distributors (NACD). Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0237. July 17, 2023.
64. AIHA. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0240. July 19, 2023.
65. Earthjustice et al. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0289. August 15, 2023.
66. Environmental Defense Fund. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0280. August 15, 2023.
67. EPA. Perchloroethylene (PCE): Risk Management Support Documents. Document ID No. EPA-HQ-OPPT-2020-0720-0076. November 18, 2022.
68. Jean Warshaw. Comments on the Proposed Rulemaking for Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA). Document ID No. EPA-HQ-OPPT-2020-0720-0285. August 15, 2023.
69. OSHA. OSHA 1999 Multi-Employer Citation Policy. Accessed 10/27/2023. <https://www.osha.gov/enforcement/directives/cpl-02-00-124>.
70. EPA. Final Scope of the Risk Evaluation for 1,2-Dichloroethane. Document ID No.

- EPA-HQ-OPPT-2020-0720-0071. EPA Publication No. EPA-740-R-20-005. August 2020. <https://www.regulations.gov/document/EPA-HQ-OPPT-2018-0427-0048>.
71. EPA. Existing Chemical Exposure Limit (ECEL) for Occupational Use of Perchloroethylene. Document ID No. EPA-HQ-OPPT-2020-0720-0043. April 15, 2021. <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0720-0023>.
 72. OSHA. Final Rule. Occupational Exposure to Methylene Chloride. Document ID No. EPA-HQ-OPPT-2020-0720-0073. **Federal Register**. 62 FR 1494, January 10, 1997.
 73. OSHA. OSHA Technical Manual (OTM) Section II: Chapter 1. Personal Sampling for Air Contaminants. Last updated on September 14, 2023. <https://www.osha.gov/otm/section-2-health-hazards/chapter-1>.
 74. OSHA. Letter from OSHA. June 5, 2024.
 75. NIOSH. Letter from NIOSH. June 28, 2024.
 76. NIOSH. Hierarchy of Controls. Document ID No. EPA-HQ-OPPT-2020-0720-0042. Page last reviewed: August 11, 2022. <https://www.cdc.gov/niosh/topics/hierarchy/>.
 77. OSHA. Personal Protective Equipment. Document ID No. EPA-HQ-OPPT-2020-0720-0077. 2004. <https://www.osha.gov/sites/default/files/publications/osh3151.pdf>.
 78. EPA. Guidelines for Carcinogen Risk Assessment. Document ID No. EPA-HQ-OPPT-2020-0720-0072. March 2005. <https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment>.
 79. EPA. Perchloroethylene: Fenceline Technical Support—Water Pathway. Document ID No. EPA-HQ-OPPT-2020-0720-0091. October 6, 2022.
 80. EPA. Perchloroethylene: Fenceline Technical Support—Air Pathway. Document ID No. EPA-HQ-OPPT-2020-0720-0092. December 8, 2022.
 81. EPA. Final Rule. National Emission Standards for Hazardous Air Pollutants: Carbon Black Production and Cyanide Chemicals Manufacturing Residual Risk and Technology Reviews, and Carbon Black Production Area Source Technology Review. **Federal Register**. 86 FR 66096, November 19, 2021 (FRL-7523-03-OAR).
 82. EPA. Exposure and Fate Assessment Screening Tool Version 2014 (E-FAST 2014). Document ID No. EPA-HQ-OPPT-2020-0720-0094. Washington, DC: Office of Pollution Prevention and Toxics. Last updated: February 17, 2022. <https://www.epa.gov/tsca-screening-tools/e-fast-exposure-and-fate-assessment-screening-tool-version-2014>.
 83. National Water Quality Monitoring Council (NWQMC): Water Quality Portal. Document ID No. EPA-HQ-OPPT-2020-0720-0095. 2017. <https://www.waterqualitydata.us/>.
 84. William P.L. Carter. Development of the SAPRC-07 Chemical Mechanism and Updated Ozone Reactivity Scales. Center for Environmental Research and Technology, College of Engineering, University of California. Revised January 27, 2010.
 85. EPA. Supporting Statement for an Information Collection Request (ICR) Under the Paperwork Reduction Act (PRA); Regulation of Perchloroethylene under TSCA Section 6(a). (Final Rule; RIN 2070-AK84). EPA ICR No. 2740.02 and OMB Control No. 2070-0233. December 2024.
 86. Kevin Ashley. Harmonization of NIOSH Sampling and Analytical Methods With Related International Voluntary Consensus Standards. Document ID No. EPA-HQ-OPPT-2020-0720-0101. J Occup Environ Hyg. 12(7): D107-15. June 11, 2015. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4589148/>.
 87. EPA. Notes from Environmental Justice Consultations on Forthcoming Proposed Rulemakings for Trichloroethylene (TCE) and Perchloroethylene (PCE). June 16 and July 6, 2021.

VIII. Statutory and Executive Order Reviews

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

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

This action is a “significant regulatory action” as defined under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866 review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis (Ref. 3) is available in the docket and summarized in Unit I.E.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule will be submitted to OMB for approval under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2740.02, and OMB Control No. 2070-0233 (Ref. 85).) The ICR is available in the docket and is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

There are four primary provisions of the final rule that may increase burden under the PRA. The first is downstream notification, which would be carried out

by updates to the relevant SDS and which will be required for manufacturers, processors, and distributors in commerce of PCE, who will provide notice to companies downstream upon shipment of PCE about the prohibitions. The information submitted to downstream companies through the SDS will provide knowledge and awareness of the restrictions to these companies. The second primary provision of the rule that may increase burden under the PRA is WCPP-related information generation, recordkeeping, and notification requirements (including development of exposure control plans; exposure level monitoring and related recordkeeping; development of documentation for a PPE program and related recordkeeping; development of documentation for a respiratory protection program and related recordkeeping; development and notification to potentially exposed persons (employees and others in the workplace) about how they can access the exposure control plans, exposure monitoring records, PPE program implementation documentation, and respirator program documentation; and development of documentation demonstrating eligibility for an exemption from the proposed prohibitions, and related recordkeeping). The third primary provision of the rule that is expected to increase burden under the PRA is information generation related to workplace requirements for laboratory use-related information and generation, (including development of documentation for a PPE program, related recordkeeping, and development of documentation demonstrating implementation of a properly functioning ventilated laboratory safety device). The fourth primary provision of the rule that is expected to increase burden under the PRA is information generation related to energized electrical cleaning, including self-certification, recordkeeping, and notification requirements (including development and documentation of those requirements under the specific prescriptive controls or WCPP and related recordkeeping; development of documentation of a self-certification statement and related recordkeeping; notification of self-certification; and labeling).

Respondents/affected entities:

Persons that manufacture, process, use, distribute in commerce, or dispose of PCE or products containing PCE. See also Unit I.A.

Respondent's obligation to respond: Mandatory (TSCA section 6(a) and 40 CFR part 751).

Estimated number of respondents: 157,760.

Frequency of response: On occasion.
Total estimated burden: 432,203 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$34,515,086 (per year), includes \$2,922,680 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

Pursuant to section 603 and 609(b) of the RFA, 5 U.S.C. 601 *et seq.*, EPA prepared an IRFA for the 2023 PCE proposed rule and convened a SBAR Panel to obtain advice and recommendations from SER that potentially would be subject to the rule's requirements. Summaries of the IRFA and Panel recommendations are presented in the 2023 PCE proposed rule (88 FR 39652, June 16, 2023) (FRL-8329-02-OCSP).

As required by section 604 of the RFA, EPA prepared a FRFA for this action (Ref. 22). The FRFA addresses issues raised by public comments on the IRFA for the 2023 PCE proposed rule. The complete FRFA is available for review in the docket and is summarized here.

1. Statement of Need and Rule Objectives

Under section of TSCA 6(a) (15 U.S.C. 2605(a)), if EPA determines after a TSCA section 6(b) risk evaluation that a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation, under the conditions of use, EPA must by rule apply one or more requirements listed in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents such risk. PCE was the subject of a risk evaluation under TSCA section 6(b)(4)(A) that was issued in December 2020. In addition, in December 2022,

EPA issued a revised unreasonable risk determination that PCE as a whole chemical substance presents an unreasonable risk of injury to health under the conditions of use. As a result, EPA is taking action to the extent necessary so that PCE no longer presents such risk.

EPA developed this final rule after considering EPA's unreasonable risk determination for PCE, information provided in public comments on the 2023 PCE proposed rule, findings from and comments on the SBAR panel, other required consultations, and additional public outreach. For more information on the 2023 PCE proposed rule, SBAR panel, and outreach efforts for this action, see the docket for this rulemaking (EPA-HQ-OPPT-2020-0720).

To address the identified unreasonable risk, this rule (1) prohibits most industrial and commercial uses and the manufacture (including import), processing and distribution in commerce, of PCE for those uses; (2) prohibits the manufacture (including import), processing, and distribution in commerce of PCE for all consumer use; (3) prohibits the manufacture (including import), processing, distribution in commerce, and use of PCE in dry cleaning and related spot cleaning through a 10-year phaseout; (4) requires a WCPP, including an inhalation exposure concentration limit, direct dermal contact controls, and related workplace exposure controls for many occupational conditions of use of PCE not prohibited; (5) require prescriptive workplace controls for laboratory use and energized electrical cleaner; (6) establish recordkeeping and downstream notification requirements; (7) provides certain time-limited exemptions from requirements for uses of PCE which are critical that have no technically feasible, safer alternative available; and (8) identifies a regulatory threshold for products containing PCE for the prohibitions and restrictions on PCE.

2. Significant Issues Raised by the Public Comments in Response to the IRFA and EPA Response

A summary of significant issues raised by comments about the IRFA (Ref. 20) and EPA's response is in the Response to Comments document (Ref. 8) in section 11.3.

3. SBA Office of Advocacy Comments and EPA Response

SBA Office of Advocacy provided comments on the 2023 PCE proposed rule (EPA-HQ-OPPT-2020-0720). A summary of these comments and EPA's

response is in the Response to Comments document (Ref. 8) in sections 5.1.3, 5.3.2, 5.3.3, 5.8.2, 7.1, and 8.4.3.

4. Estimate of the Number of Small Entities to Which the Final Rule Applies

The final rule potentially affects small manufacturers (including importers), processors, distributors, retailers, users of PCE or of products containing PCE, and entities engaging in disposal. EPA estimates that the rule would affect approximately 157,760 firms using PCE, of which 154,683 small entities (based on SBA definitions in March 2023) have estimated impacts. EPA estimates that most small entities that use PCE use it in aerosol spray degreasing and cleaning; 119,523 in energized electrical cleaning and 26,050 in other aerosol spray cleaning/degreasing (include brake cleaners). An estimated 5,949 of these entities are commercial users of PCE in dry cleaning applications. Users of products containing PCE, including adhesives and sealants, liquid cleaners/degreasers, mold cleaners, and other products also account for some of the affected small entities. EPA also estimates that 69 small entities use PCE in chemical milling, 87 use PCE in recycling and disposal, and 25 incorporate PCE into other formulations, mixtures, and reaction products. For a full description of the estimated number of small entities affected by this rule, see the FRFA (Ref. 22).

5. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Final Rule

a. Compliance Requirements

EPA is prohibiting most conditions of use of PCE. As described in the final rule, EPA is prohibiting all manufacturing (including import), processing, and distribution in commerce of PCE for consumer use. After the publication of the final rule, prohibitions on manufacturing, processing, and distribution in commerce of PCE for consumer use will occur in 540 days for manufacturers, 630 days for processors, 720 days for distributing to retailers, and 810 days for all other distributors and retailers.

EPA is also prohibiting most industrial and commercial uses and the manufacture (including import), processing and distribution in commerce of PCE for those uses. The prohibitions for these commercial uses will become effective following prohibitions relevant to these uses in stages of the supply chain before the industrial and commercial use (e.g., manufacturing and processing). The restrictions follow a staggered schedule

for each stage of the supply chain. After the publication of the final rule, prohibitions come into effect in 540 days for manufacturers, 630 days for processors, 720 days for distributing to retailers, 810 days for all other distributors and retailers, and 900 days for industrial and commercial use.

EPA is finalizing a prohibition compliance date for commercial use of PCE in any dry cleaning machine acquired 180 days or later after the publication of this final rule, followed by a prohibition on the use of PCE in 3rd generation machines 3 years after the publication of this final rule. Full implementation of the phaseout will be achieved with a prohibition on the use of PCE in all dry cleaning and spot cleaning, including in 4th and 5th generation machines, 10 years after the publication of this final rule and a prohibition on the manufacturing, processing, and distribution in commerce of PCE for use in dry cleaning solvent 10 years after the publication of this final rule.

For most other conditions of use that contribute to the unreasonable risk from PCE, EPA is finalizing a WCPP to address the unreasonable risk as outlined in Unit IV.B. The WCPP includes a combination of requirements to address unreasonable risk driven by inhalation and dermal exposures in the workplace. The PCE WCPP encompasses restrictions on certain occupational conditions of use and includes provisions for an ECEL, DDCC, and ancillary requirements to support implementation of these restrictions. Due to the low exposure level and stringent requirements in the WCPP that is necessary to address the unreasonable risk from PCE, EPA identified certain conditions of use where the Agency expects a WCPP can be successfully implemented.

As described in Unit IV.B., the WCPP is non-prescriptive, in the sense that regulated entities are not required to use specific controls prescribed by EPA to achieve the exposure concentration limit. Rather, it is a performance-based exposure limit that enables owners or operators to determine how to most effectively meet the exposure limit based on conditions at their workplace.

Exposures remaining at or below the ECEL would address any unreasonable risk of injury to health driven by inhalation exposures for occupational conditions of use. EPA's requirements include the specific exposure limits that are required to meet the TSCA section 6(a) standard to apply one or more requirements to the substance so that it no longer presents unreasonable risk, and also include ancillary requirements

necessary for the ECEL's successful implementation as part of a WCPP.

EPA is also finalizing a requirement for specific prescriptive controls for the industrial and commercial use of PCE in laboratory chemicals and specific prescriptive controls for energized electrical cleaner as outlined in Unit IV.C. For laboratory use, EPA is requiring dermal PPE in combination with comprehensive training for tasks particularly related to the use of PCE in a laboratory setting for each potentially exposed person to direct dermal contact with PCE. Additionally, EPA is requiring the use of laboratory ventilation devices in workplaces engaged in the laboratory chemical condition of use. To support and demonstrate compliance, EPA is finalizing that each owner or operator of a laboratory workplace subject to the workplace controls for laboratory use requirements retain compliance records for five years. For energized electrical cleaner, EPA is requiring labeling, self-certification, and either the WCPP or prescriptive controls that include respiratory and dermal PPE in combination with comprehensive training for tasks.

EPA is not requiring reporting requirements beyond downstream notification or labeling (third-party notifications). Regarding recordkeeping requirements, three primary provisions of the final rule relate to recordkeeping. The first is recordkeeping of general records: all persons who manufacture, process, distribute in commerce, or engage in industrial or commercial use of PCE or PCE-containing products must maintain ordinary business records, such as invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of the regulation. The second is recordkeeping related to WCPP compliance: under the final rule, facilities complying with the rule through the WCPP are required to develop and maintain records associated with ECEL exposure monitoring (including measurements, compliance with GLP Standards or use of a laboratory accredited by the AIHA or another industry-recognized program and information regarding monitoring equipment); ECEL compliance (including the exposure control plan, PPE program implementation, and workplace information and training); DDCC compliance (including the exposure control plan, PPE program implementation, basis for specific PPE selection, occurrence and duration of direct dermal contact with PCE, and workplace information and training); and workplace participation. The third

is recordkeeping for business entities complying with the prescriptive controls for laboratory use or for energized electrical cleaning. To support and demonstrate compliance, EPA is finalizing that each owner or operator of a workplace subject to the WCPP or specific prescriptive controls retain compliance records for five years.

b. Classes of Small Entities Subject to the Compliance Requirements

The small entities that would be potentially directly regulated by this rulemaking are small entities that manufacture (including import), process, distribute in commerce, use, or dispose of PCE, including retailers of PCE for end-consumer uses.

c. Professional Skills Needed To Comply

Entities subject to this rule that manufacture (including import), process, or distribute PCE in commerce for consumer use would be required to cease such activity. The entity would be required to modify their SDS to inform their customers of the prohibition on manufacture, processing, and distribution of PCE for consumer use. They would also be required to maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions, restrictions, and other provisions of this final rule. None of these activities require any special skills.

Entities that use PCE in any industrial and commercial capacity that is prohibited would be required to cease that activity. Restriction or prohibition of these uses will likely require the implementation of an alternative chemical or the cessation of use of PCE in a process or equipment that may require persons with specialized skills, such as engineers or other technical experts. Instead of developing an alternative method themselves, commercial users of PCE may choose to contract with another entity to do so.

Entities that are permitted to continue to manufacture, process, distribute, use (with the exception for use as a laboratory chemical or use in energized electrical cleaning), or dispose of PCE are required to implement a WCPP and would have to meet the provisions of the program for continued use of PCE. Entities that would be permitted to continue use of PCE as a laboratory chemical or in energized electrical cleaning are required to implement prescriptive workplace controls for those uses and would have to meet the provisions of the workplace restrictions for continued use of PCE. Adaption to

a WCPP or prescriptive workplace controls may require persons with specialized skills such as an engineer, chemist, health and safety professional, or laboratory technicians to process monitoring samples. Instead of implementing the WCPP or workplace controls themselves, entities that use PCE may choose to contract with another entity to do so. Records would have to be maintained for compliance with a WCPP or workplace controls, as applicable. While this recording activity itself may not require a special skill, the information to be measured and recorded may require persons with specialized skills such as an industrial hygienist or laboratory technician. Additionally, potentially exposed persons reasonably likely to be exposed to PCE by inhalation to concentrations above the ECEL are required to be trained for the proper use of respirators. Potentially exposed persons reasonably likely to have direct dermal contact to PCE are required to be trained for proper use of dermal protection. While this does not necessarily entail a specialized skill, it does require specialized training for those handling PCE within regulated areas and includes activity-specific training for proper PPE use.

6. Steps Taken To Minimize Economic Impact to Small Entities

a. Small Business Advocacy Review Panel

As required by section 609(b) of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA conducted outreach to small entities and convened a SBAR Panel on October 27, 2022, to obtain advice and recommendations of representatives of the small entities that potentially would be subject to the rule's requirements. The Panel solicited input on all aspects of these proposed regulations. Ten potentially impacted small entities served as small-entity representatives (SERs) to the Panel, representing a broad range of small entities from diverse geographic locations. The Panel Report was signed on February 1, 2023.

Consistent with the RFA/SBREFA requirements, the Panel evaluated the assembled materials and small-entity comments on issues related to elements of the regulatory flexibility analysis. It is important to note that the Panel's findings and discussion were based on the information available at the time the final report was prepared. For the full list of Panel recommendations, see section 7.A. of the FRFA (Ref. 22).

EPA detailed the SBAR Panel's request for comment on these specific

topics in the IRFA and 2023 PCE proposed rule and solicited comment from the public. During the comment period, the public provided comment on some of these areas. Those comments and others received on the 2023 PCE proposed rule and EPA's responses are in the Response to Comments document in the docket (Ref. 8).

b. Alternatives Considered

To identify the regulatory approach that would address the unreasonable risk from PCE, EPA analyzed alternative regulatory approaches to identify which would be feasible, reduce burden to small businesses, and achieve the objective of the statute (*i.e.*, applying one or more requirements list in TSCA section 6(a) to the extent necessary so that the chemical substance or mixture no longer presents an unreasonable risk). As described in more detail in Unit V. of the 2023 PCE proposed rule, and Unit II.D. of the final rule, EPA considered several factors, in addition to identified unreasonable risk, when selecting among possible TSCA section 6(a) requirements. To the extent practicable, EPA factored into its decisions: the effects of PCE on health and the environment, the magnitude of exposure to PCE of human beings and the environment, the benefits of PCE for various uses, and the reasonably ascertainable economic consequences of the rule. As part of this analysis, EPA considered a wide variety of control measures to address the unreasonable risk from PCE such as weight fractions, prescriptive controls, and a certification and limited access program. EPA's consideration of these alternative control measures is described in detail in the IRFA for the 2023 PCE proposed rule, and throughout Unit V.A. of the 2023 PCE proposed rule.

Based on consideration of public comments received on the 2023 PCE proposed rule, EPA has made some changes from the 2023 PCE proposed rule to the final rule. These changes include the finalization of additional conditions of use under the WCPP or prescriptive controls rather than prohibition, prohibition of additional conditions of use rather than the WCPP, and changes to compliance timeframes for prohibition and the WCPP. Additional changes to the rule based on consideration of public comments are detailed Unit III. of the final rule and include modifications to provisions of the WCPP. For additional information and rationale towards alternative actions, see Unit III.D. of this final rule and section 7.B. of the FRFA (Ref. 22).

In addition, EPA is preparing a Small Entity Compliance Guide to help small

entities comply with this rule. EPA expects that this guide will be made available on the EPA website prior to the effective date of this final rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million (adjusted annually for inflation) or more (in 1995 dollars) as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action will affect entities that use PCE. It is not expected to affect state, local, or Tribal governments because the use of PCE by government entities is minimal. The costs involved in this action are estimated not to exceed \$183 million in 2023\$ (\$100 million in 1995\$ adjusted for inflation using the GDP implicit price deflator) or more in any one year.

E. Executive Order 13132: Federalism

EPA has concluded that this action has federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because regulations under TSCA section 6(a) may preempt State law. EPA provides the following federalism summary impact statement. The Agency consulted with State and local officials early in the process of developing the proposed action to permit them to have meaningful and timely input into its development. This included background presentation on September 9, 2020, and a consultation meeting on July 22, 2021. EPA invited the following national organizations representing State and local elected officials to these meetings: American Water Works Association, Association of Clean Water Administrators, Association of Metropolitan Water Agencies, Association of State Drinking Water Administrators, Environmental Council of the States, National Association of Counties, National Conference of State Legislatures, National Governors Association, National League of Cities, National Water Resources Association, and United States Conference of Mayors. A summary of the meeting with these organizations, including the views that they expressed, is available in the docket (Ref. 13). EPA provided an opportunity for these organizations to provide follow-up comments in writing but did not receive any such comments.

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

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9,

2000) because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. PCE is not manufactured, processed, or distributed in commerce by Tribes, and therefore, this rulemaking would not impose substantial direct compliance costs on Tribal governments.

Notwithstanding the lack of Tribal implications as specified by Executive Order 13175, EPA consulted with Tribal officials during the development of this action, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, which EPA applies more broadly than Executive Order 13175.

The Agency held a Tribal consultation from May 17, 2021, to August 20, 2021, with meetings on June 15, 2021, and July 8, 2021. Tribal officials were given the opportunity to meaningfully interact with EPA concerning the current status of risk management. During the consultation, EPA discussed risk management under TSCA section 6(a), findings from the 2020 Risk Evaluation for PCE, types of information to inform risk management, principles for transparency during risk management, and types of information EPA sought from Tribes (Ref. 14). EPA briefed Tribal officials on the Agency's risk management considerations and Tribal officials raised no related issues or concerns to EPA during or in follow-up to those meetings (Ref. 14). EPA received no written comments as part of this consultation.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) directs federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children as reflected by the conclusions of the PCE risk evaluation. EPA did not find that the adverse health impacts for children and for men and women of reproductive age was disproportionate in comparison to other populations. EPA's Policy on Children's Health applies to this action. Information on

how the Policy was applied and on the action's health and risk assessments are contained in Units III.A.3. and B.2., VI.A. and B., and the 2020 Risk Evaluation for PCE (Ref. 1) and the Economic Analysis for the 2023 PCE proposed rule (Ref. 3).

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

This action is not a "significant energy action" under Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

I. National Technology Transfer and Advancement Act (NTTAA)

Pursuant to the NTTAA section 12(d), 15 U.S.C. 272., the Agency has determined that this rulemaking involves environmental monitoring or measurement, specifically for occupational inhalation exposures to PCE. Consistent with the Agency's Performance Based Measurement System (PBMS), EPA will not require the use of specific, prescribed analytic methods. Rather, the Agency plans to allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

For this rulemaking, the key consideration for the PBMS approach is the ability to accurately detect and measure airborne concentrations of PCE at the ECEL and the ECEL action level. Some examples of methods which meet the criteria are included in appendix B of the ECEL memo (Ref. 71). EPA recognizes that there may be voluntary consensus standards that meet the criteria (Ref. 86).

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

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate

and adverse human health or environmental effects on communities with environmental justice concerns in accordance with Executive Order 12898 (59 FR 7629, February 16, 1994) and Executive Order 14096 (88 FR 25251, April 26, 2023). As described more fully in the Economic Analysis for this rulemaking (Ref. 3), EPA conducted an analysis to characterize the baseline conditions faced by communities and workers affected by the regulation to identify the potential for disproportionate impacts on communities with environmental justice concerns using information about the facilities, workforce, and communities potentially affected by the regulatory options under current conditions, before the regulation would go into effect. The analysis drew on publicly available data provided by EPA, U.S. Census Bureau, and Centers for Disease Control and Prevention, including data from TRI, EPA Enforcement and Compliance History Online, National Air Toxics Assessment, the American Community Survey, and the Behavioral Risk Factor Surveillance System. The baseline characterization suggests that workers in affected industries and regions, as well as residents of nearby communities, are more likely to be people of color than the general population in affected States, although this varied by use assessed. Additionally, based on reasonably available information, the Agency understands that most dry cleaning workers are members of minority populations.

EPA believes that this action is likely to reduce existing disproportionate and adverse effect on communities with environmental justice concerns. This regulatory action would apply requirements to the extent necessary so that PCE no longer presents an unreasonable risk, EPA is not able to quantify the distribution of the change in risk across affected populations due to data limitations that prevented EPA from conducting a more comprehensive analysis of such a change.

EPA additionally identified and addressed environmental justice concerns by conducting outreach to communities with environmental justice concerns. For example, on June 16 and July 6, 2021, EPA held public meetings as part of this consultation (Ref. 87). These meetings were held pursuant to and in compliance with Executive Order 12898 and Executive Order 14008, Tackling the Climate Crisis at Home and Abroad (86 FR 7619, February 1, 2021). EPA received five written comments following the EJ meetings, in addition to oral comments provided during the consultations. In general, commenters

supported strong outreach to affected communities, encouraged EPA to follow the hierarchy of controls, favored prohibitions, and noted the uncertainty, and in some cases inadequacy, of PPE. Commenters also urged the EPA to extend the rulemaking into ongoing releases from hazardous waste and disposal sites, in particular vapor intrusion of PCE from contaminated groundwater, soil, and indoor air. Additionally, commenters expressed concern that the adverse health impacts of PCE dry cleaning fall disproportionately to owners and employees of minority owned small businesses, noted the viability of professional wet cleaning as an alternative to PCE dry cleaning, and urged EPA to consider economic impacts and a financial program to offset transition costs to local communities.

The information supporting the review under Executive Order 12898 and Executive Order 14096 is contained in Units I.E., II.D., III.A.1., VI.A., and in the Economic Analysis (Ref. 3). EPA's presentations, a summary of EPA's presentation and public comments made, and fact sheets for the EJ consultations related to this rulemaking are available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsc/materials-june-and-july-2021-environmental-justice>. These materials and a summary of the consultation are also available in the public docket for this rulemaking.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Michael S. Regan,
Administrator.

Therefore, for the reasons stated in the preamble, EPA amends 40 CFR part 751 as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.5 by adding in alphabetical order definitions for "Designated representative," "Direct dermal contact," "ECEL," and "Exposure group" to read as follows:

§ 751.5 Definitions.

* * * * *

Designated representative means any individual or organization to whom a potentially exposed person gives written authorization to exercise a right of access. A recognized or certified collective bargaining agent must be treated automatically as a designated representative without regard to written authorization.

Direct dermal contact means direct handling of a chemical substance or mixture or skin contact with surfaces that may be contaminated with a chemical substance or mixture.

ECEL is an Existing Chemical Exposure Limit, and means an airborne concentration calculated as an eight (8)-hour time-weighted average (TWA).

* * * * *

Exposure group means a group of potentially exposed persons with a similar exposure profile to a chemical substance or mixture based on the substantial similarity of tasks performed, the manner in which the tasks are performed, and the materials and processes with which they work.

* * * * *

■ 3. Amend part 751 by adding Subpart G to read as follows:

Subpart G—Perchloroethylene (PCE)

Sec.

751.601 General.

751.603 Definitions.

751.605 Prohibitions of manufacturing, processing, distribution in commerce, and use.

751.607 Workplace Chemical Protection Program (WCPP).

751.609 Workplace requirements for laboratory use.

751.611 Workplace requirements for energized electrical cleaner.

751.613 Downstream notification.

751.615 Recordkeeping requirements.

751.617 Exemptions.

§ 751.601 General.

(a) *Applicability.* This Subpart establishes prohibitions and restrictions on the manufacture (including import), processing, distribution in commerce, use, and disposal of perchloroethylene (CASRN 127–18–4) (PCE), also known as tetrachloroethylene, to prevent unreasonable risk of injury to health in accordance with TSCA section 6(a).

(b) *Regulatory threshold.* Unless otherwise specified in this Subpart, the

prohibitions and restrictions of this Subpart do not apply to products containing PCE at thresholds less than 0.1 percent by weight.

(c) *Owner and operator requirements.* Any requirement for an owner or operator, or an owner and operator, is a requirement for any individual that is either an owner or an operator.

§ 751.603 Definitions.

The definitions in Subpart A of part 751 apply to this Subpart unless otherwise specified in this section. In addition, the following definitions apply to this Subpart:

3rd generation machine means a dry-to-dry machine with a refrigerated condenser, as those terms are defined in 40 CFR part 63, subpart M.

4th or 5th generation machine means a dry-to-dry machine with a carbon adsorber and refrigerated condenser, as those terms are defined in 40 CFR part 63, subpart M.

Distribute in commerce has the same meaning as in section 3 of the Act, except that the term does not include retailers for purposes of §§ 751.613 and 751.615.

ECEL has the same meaning as in § 751.5 and, for PCE, is an airborne concentration of PCE of 0.14 part per million (ppm).

ECEL action level means a concentration of airborne PCE of 0.10 part per million (ppm) calculated as an eight (8)-hour time-weighted average (TWA).

Energized electrical cleaner means a product that meets both of the following criteria: (1) the product is labeled to clean and/or degrease electrical equipment, where cleaning and/or degreasing is accomplished when electrical current exists, or when there is a residual electrical potential from a component, such as a capacitor; and (2) the product label clearly displays the statements: "Energized Equipment use only. Not to be used for motorized vehicle maintenance, or their parts."

§ 751.605 Prohibitions of manufacturing, processing, distribution in commerce, and use.

(a) *Applicability.* (1) The provisions of this section apply as indicated in paragraph (b) of this section to all manufacturing (including import), processing, and distribution in commerce of PCE for consumer use.

(2) The provisions of this section apply as indicated in paragraph (b) of this section to:

(i) All manufacturing (including import), processing, and distribution in commerce of PCE for industrial and commercial use, other than for the

industrial and commercial uses addressed under §§ 751.607(a), 751.609(a), and 751.611(a), or covered by paragraph (a)(3) of this section; and

(ii) All industrial and commercial use of PCE, other than the industrial and commercial uses addressed under §§ 751.607(a), 751.609(a), and 751.611(a), or covered by paragraph (a)(3) of this section.

(3) The provisions of this section apply as indicated in paragraph (b) of this section to all manufacturing (including import), processing, distribution in commerce, and industrial and commercial use of PCE in dry cleaning and related spot cleaning, including:

(i) Industrial and commercial use in dry cleaning and related spot cleaning in 3rd generation machines; and

(ii) Industrial and commercial use in dry cleaning and related spot cleaning in 4th and 5th generation machines.

(4) This section does not apply to the distribution in commerce or use of clothing and articles that have been commercially dry cleaned with PCE.

(5) This section does not apply to manufacturing, processing, or distribution in commerce of PCE solely for export that meets the conditions described in TSCA section 12(a)(1)(A) and (B).

(b) *Prohibitions.* (1) After June 11, 2026, all persons are prohibited from manufacturing (including importing) PCE for the uses listed in paragraphs (a)(1) and (a)(2)(ii) of this section.

(2) After September 9, 2026, all persons are prohibited from processing PCE, including any PCE-containing products, for the uses listed in paragraphs (a)(1) and (a)(2)(ii) of this section.

(3) After December 8, 2026, all persons are prohibited from distributing in commerce (including making available) PCE, including any PCE-containing products, to retailers for any use other than commercial dry cleaning.

(4) After March 8, 2027, all retailers are prohibited from distributing in commerce (including making available) PCE, including any PCE-containing products.

(5) After March 8, 2027, all persons are prohibited from distributing in commerce (including making available) PCE, including any PCE-containing products, for the uses described in paragraphs (a)(1) and (a)(2)(ii) of this section.

(6) After June 7, 2027, all persons are prohibited from industrial or commercial use of PCE, including any PCE-containing products, for the uses listed in paragraph (a)(2)(ii) of this section.

(7) All persons are prohibited from industrial or commercial use of PCE in dry cleaning machines acquired after June 16, 2025.

(8) After December 20, 2027, all persons are prohibited from industrial or commercial use of PCE for the use listed in paragraph (a)(3)(i) of this section.

(9) After December 19, 2034, all persons are prohibited from the manufacturing (including importing), processing, distribution in commerce, or industrial or commercial use of PCE for dry cleaning and spot cleaning, including for the use listed in paragraph (a)(3)(ii) of this section.

(10) After December 19, 2034, all persons are prohibited from manufacturing (including import), processing, distribution in commerce, or use of PCE, including any PCE containing products, for industrial or commercial use in an emergency by the National Aeronautics and Space Administration or its contractors as described in § 751.117(b).

§ 751.607 Workplace Chemical Protection Program (WCPP).

(a) *Applicability.* The provisions of this section apply to the following conditions of use of PCE, including manufacturing and processing for export, unless otherwise indicated in this section, except to the extent the conditions of use are prohibited by § 751.605:

(1) Manufacturing (domestic manufacture);

(2) Manufacturing (import);

(3) Processing as a reactant/intermediate;

(4) Processing into formulation, mixture or reaction product;

(5) Repackaging;

(6) Industrial and commercial use as solvent for open-top batch vapor degreasing;

(7) Industrial and commercial use as solvent for closed-loop batch vapor degreasing

(8) Industrial and commercial use in maskant for chemical milling;

(9) Industrial and commercial use in solvent-based adhesives and sealants;

(10) Industrial and commercial use as a processing aid in catalyst regeneration in petrochemical manufacturing;

(11) Industrial and commercial use as a processing aid in sectors other than petrochemical manufacturing;

(12) Industrial and commercial use for cold cleaning of tanker vessels;

(13) Recycling; and

(14) Disposal.

(b) *Existing chemical exposure limit (ECEL).*—(1) *Applicability.* The provisions of this paragraph (b) apply to

any workplace engaged in a condition of use that is listed in paragraph (a)(1) through (12) of this section and not prohibited by § 751.605.

(2) *Eight-hour time-weighted average (TWA) ECEL.* Beginning September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, March 13, 2026 for non-Federal owners and operators, or beginning four months after introduction of PCE into the workplace if PCE use commences after December 15, 2025, the owner or operator must ensure that no person is exposed to an airborne concentration of PCE in excess of the ECEL, consistent with the requirements of paragraph (d)(1)(i) of this section and, if necessary, paragraph (f) of this section.

(3) *Exposure monitoring*—(i) *General.*

(A) Owners or operators must determine each potentially exposed person's exposure, without regard to respiratory protection, by either:

(1) Taking a personal breathing zone air sample of each potentially exposed person's exposure; or

(2) Taking personal breathing zone air samples that are representative of the 8-hour TWA of each exposure group.

(B) Personal breathing zone air samples are representative of the 8-hour TWA of all potentially exposed persons in an exposure group if the samples are of at least one person's full-shift exposure who represents the highest potential PCE exposures in that exposure group. Personal breathing zone air samples taken during one work shift may be used to represent potentially exposed person exposures on other work shifts where the owner or operator can document that the tasks performed and conditions in the workplace are similar across shifts.

(C) Exposure samples must be analyzed using an appropriate analytical method by a laboratory that complies with the Good Laboratory Practice (GLP) Standards in 40 CFR part 792 or a laboratory accredited by the American Industrial Hygiene Association (AIHA) or another industry-recognized program.

(D) Owners or operators must ensure that methods used to perform exposure monitoring produce results that are accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of PCE.

(E) Owners and operators must re-monitor within 15 working days after receipt of any exposure monitoring when results indicate non-detect, unless an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist reviews the

monitoring results and determines re-monitoring is not necessary.

(ii) *Initial monitoring.* By June 21, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, by December 15, 2025 for non-Federal owners and operators, or within 30 days of introduction of PCE into the workplace,

whichever is later, each owner or operator covered by this section must perform initial monitoring of potentially exposed persons. Where the owner or operator has monitoring results from monitoring conducted within five years prior to February 18, 2025 and the monitoring satisfies all other requirements of this section, the owner

or operator may rely on such earlier monitoring results to satisfy the requirements of this paragraph.

(iii) *Periodic monitoring.* The owner or operator must establish an exposure monitoring program for periodic monitoring of exposure to PCE in accordance with table 1.

TABLE 1 TO § 751.607(b)(3)(iii)—PERIODIC MONITORING REQUIREMENTS

Air concentration condition	Periodic monitoring requirement
If initial exposure monitoring is below ECEL action level (<0.10 ppm 8-hour TWA).	Periodic exposure monitoring is required at least once every five years.
If the most recent exposure monitoring indicates that airborne exposure is above the ECEL (>0.14 ppm 8-hour TWA).	Periodic exposure monitoring is required within three months of the most recent exposure monitoring.
If the most recent exposure monitoring indicates that airborne exposure is at or above the ECEL action level but at or below the ECEL (≥0.10 ppm 8-hour TWA, ≤0.14 ppm 8-hour TWA).	Periodic exposure monitoring is required within six months of the most recent exposure monitoring.
If the two most recent (non-initial) exposure monitoring measurements, taken at least seven days apart within a 6 month period, indicate exposure is below the ECEL action level (<0.10 ppm 8-hour TWA).	Periodic exposure monitoring is required within five years of the most recent exposure monitoring.
If the owner or operator engages in a condition of use for which WCPP ECEL is required but does not manufacture, process, use, or dispose of PCE in that condition of use over the entirety of time since the last required monitoring event.	The owner or operator may forgo the next periodic monitoring event. However, documentation of cessation of use of PCE is required; and periodic monitoring is required when the owner or operator resumes the condition of use.

(iv) *Additional monitoring.* (A) The owner or operator must conduct the exposure monitoring required by paragraph (b)(3)(ii) of this section within 30 days after there has been a change in the production, process, control equipment, personnel or work practices that may reasonably be expected to result in new or additional exposures above the ECEL action level or when the owner or operator has any reason to believe that new or additional exposures above the ECEL action level have occurred. Prior monitoring data cannot be used to meet this requirement.

(B) Whenever start-ups or shutdowns, or spills, leaks, ruptures or other breakdowns or unexpected releases occur that may lead to exposure to potentially exposed persons, the owner or operator must conduct the exposure monitoring required by paragraph (b)(3)(ii) of this section within 30 days after the conclusion of the start-up or shutdown and/or the cleanup of the spill or repair of the leak, rupture or other breakdown. Prior monitoring data cannot be used to meet this requirement.

(v) *Observation of monitoring.* (A) Owners and operators must provide potentially exposed persons or their designated representatives an opportunity to observe any monitoring of occupational exposure to PCE that is conducted under this section and designed to characterize their exposure.

(B) When monitoring observation requires entry into a regulated area, the

owner or operator must provide the observers with the required PPE.

(C) Only persons who are authorized to have access to facilities classified in the interest of national security must be permitted to observe exposure monitoring conducted in such facilities.

(vi) *Notification of monitoring results.* (A) The owner or operator must inform each person whose exposures are monitored or who is part of a monitored exposure group and their designated representatives of any monitoring results within 15 working days of receipt of those monitoring results.

(B) This notification must include the following:

(1) Exposure monitoring results;
(2) Identification and explanation of the ECEL and ECEL action level;
(3) Statement of whether the monitored airborne concentration of PCE exceeds the ECEL action level or ECEL;

(4) If the ECEL is exceeded, descriptions of any exposure controls implemented by the owner or operator to reduce exposures to or below the ECEL, as required by paragraph (d)(1) of this section;

(5) Explanation of any respiratory protection provided in accordance with paragraphs (b)(4)(iv), (d)(1)(i), and (f) of this section;

(6) Quantity of PCE in use at the time of monitoring;

(7) Location of PCE use at the time of monitoring;

(8) Manner of PCE use at the time of monitoring; and

(9) Identified releases of PCE.

(C) Notice must be written in plain language and either provided to each potentially exposed person and their designated representatives individually in a language that the person understands, or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(4) *Regulated areas*—(i) *Establishment.* By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government and by March 13, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, the owner or operator must establish and maintain a regulated area wherever airborne concentrations of PCE exceed or can reasonably be expected to exceed, the ECEL.

(ii) *Access.* The owner or operator must limit access to regulated areas to authorized persons.

(iii) *Demarcation.* The owner or operator must demarcate regulated areas from the rest of the workplace in a manner that adequately establishes and alerts persons to the boundaries of the area and minimizes the number of authorized persons exposed to PCE within the regulated area.

(iv) *Provisions of respirators.* (A) The owner or operator must ensure that each

person who enters a regulated area is supplied with a respirator selected in accordance with paragraph (f) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever PCE exposures may exceed the ECEL.

(B) An owner or operator who has implemented all feasible controls as required in paragraph (d)(1)(i) of this section, and who has established a regulated area as required by paragraph (b)(4)(i) of this section where PCE exposure can be reliably predicted to exceed the ECEL only on certain days (for example, because of work or process schedule) must have persons use respirators in that regulated area on those days.

(v) *Prohibited activities.* (A) The owner or operator must ensure that, within a regulated area, persons do not engage in non-work activities which may increase PCE exposure.

(B) The owner or operator must ensure that while persons are wearing respirators in the regulated area, they do not engage in activities which interfere with respirator performance.

(c) *DDCC.* Beginning September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government and beginning March 13, 2026 for non-Federal owners and operators, owners or operators must ensure that all persons are separated, distanced, physically removed, or isolated from direct dermal contact with PCE consistent with the requirements of paragraph (d)(1)(ii) of this section and, if necessary, paragraph (f) of this section.

(d) *Exposure control procedures and plan—(1) Methods of compliance—(i) ECEL.* (A) By December 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by June 7, 2027 for non-Federal owners and operators, the owner or operator must institute one or a combination of elimination, substitution, engineering controls, or administrative controls to reduce exposure to or below the ECEL except to the extent that the owner or operator can demonstrate that such controls are not feasible, in accordance with the hierarchy of controls.

(B) If the feasible controls required under paragraph (d)(1)(i)(A) of this section that can be instituted do not reduce exposures for potentially exposed persons to or below the ECEL, then the owner or operator must use such controls to reduce exposure to the lowest levels achievable by these controls and must supplement those controls with the use of respiratory protection that complies with the

requirements of paragraph (f) of this section.

(C) Where an owner or operator cannot demonstrate exposure to PCE has been reduced to or below the ECEL through the use of controls required under paragraphs (d)(1)(i)(A) and (B) of this section, and has not demonstrated that it has appropriately supplemented with respiratory protection that complies with the requirements of paragraph (f) of this section, this will constitute a failure to comply with the ECEL.

(ii) *DDCC requirements.* (A) By December 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by June 7, 2027 for non-Federal owners and operators, the owner or operator must institute one or a combination of elimination, substitution, engineering controls, or administrative controls to prevent all persons from direct dermal contact with PCE except to the extent that the owner or operator can demonstrate that such controls are not feasible.

(B) If the feasible controls required under paragraph (d)(1)(ii)(A) of this section that can be instituted do not prevent direct dermal contact, then the owner or operator must use such controls to reduce direct dermal contact to the extent achievable by these controls and must supplement those controls with the use of dermal protection that complies with the requirements of paragraph (f) of this section.

(C) Where an owner or operator cannot demonstrate direct dermal contact to PCE is prevented through the use of controls required under paragraphs (d)(1)(ii)(A) and (B) of this section, and has not demonstrated that it has appropriately supplemented with dermal protection that complies with the requirements of paragraph (f) of this section, this will constitute a failure to comply with the direct dermal contact control requirements.

(2) *Exposure control plan.* By December 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by June 7, 2027 for non-Federal owners and operators, each owner and operator must establish and implement an exposure control plan.

(i) *Exposure control plan contents.* The exposure control plan must include documentation of the following:

(A) Identification of exposure controls that were considered, including those that were used or not used to meet the requirements of paragraphs (d)(1)(i)(A) and (d)(1)(ii)(A) of this section, in the following sequence: elimination,

substitution, engineering controls and administrative controls;

(B) For each exposure control considered, a rationale for why the exposure control was selected or not selected based on feasibility, effectiveness, and other relevant considerations;

(C) A description of actions the owner or operator must take to implement exposure controls selected, including proper installation, regular inspections, maintenance, training or other actions;

(D) A description of regulated areas, how they are demarcated, and persons authorized to enter the regulated areas;

(E) Description of activities conducted by the owner or operator to review and update the exposure control plan to ensure effectiveness of the exposure controls, identify any necessary updates to the exposure controls, and confirm that all persons are properly implementing the exposure controls; and

(F) An explanation of the procedures for responding to any change that may reasonably be expected to introduce additional sources of exposure to PCE, or otherwise result in increased exposure to PCE, including procedures for implementing corrective actions to mitigate exposure to PCE.

(ii) *Exposure control plan requirements.* (A) The owner or operator must not implement a schedule of personnel rotation as a means of compliance with the ECEL.

(B) The owner or operator must maintain the effectiveness of any controls instituted under this paragraph (d).

(C) The exposure control plan must be reviewed and updated as necessary, but at least every 5 years, to reflect any significant changes in the status of the owner or operator's approach to compliance with paragraphs (b) through (d) of this section.

(iii) *Availability of exposure control plan.* (A) Owners or operators must make the exposure control plan and associated records, including ECEL exposure monitoring records, ECEL compliance records, DDCC compliance records, and workplace participation records described in § 751.615(b), available to potentially exposed persons and their designated representatives.

(B) Owners or operators must notify potentially exposed persons and their designated representatives of the availability of the exposure control plan and associated records within 30 days of the date that the exposure control plan is completed and at least annually thereafter.

(C) Notice of the availability of the exposure control plan and associated

records must be provided in plain language writing to each potentially exposed person in a language that the person understands or posted in an appropriate and accessible location outside the regulated area with an English-language version and a non-English language version representing the language of the largest group of workers who do not read English.

(D) Upon request by the potentially exposed person or their designated representative(s), the owner or operator must provide the specified records at a reasonable time, place, and manner. If the owner or operator is unable to provide the requested records within 15 working days, the owner or operator must, within those 15 working days, inform the potentially exposed person or designated representative(s) requesting the record(s) of the reason for the delay and the earliest date when the record will be made available.

(e) *Workplace information and training.* (1) By March 13, 2026, the owner or operator must institute a training program and ensure that persons potentially exposed to PCE participate in the program according to the requirements of this paragraph (e).

(2) The owner or operator must ensure that each potentially exposed person is trained prior to or at the time of a potential exposure to PCE.

(3) The owner or operator must ensure that information and training is presented in a manner that is understandable to each person required to be trained.

(4) The following information and training must be provided to all persons potentially exposed to PCE:

(i) The requirements of this section, as well as how to access or obtain a copy of these requirements in the workplace;

(ii) The quantity, location, manner of use, release, and storage of PCE and the specific operations in the workplace that could result in exposure to PCE, particularly noting where each regulated area is located;

(iii) Methods and observations that may be used to detect the presence or release of PCE in the workplace (such as monitoring conducted by the owner or operator, continuous monitoring devices, visual appearance or odor of PCE when being released);

(iv) The acute and chronic health hazards of PCE as detailed on relevant Safety Data Sheets; and

(v) The principles of safe use and handling of PCE and measures potentially exposed persons can take to protect themselves from PCE, including specific procedures the owner or operator has implemented to protect potentially exposed persons from

exposure to PCE, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

(5) The owner or operator must retrain each potentially exposed person annually to ensure that each such person maintains the requisite understanding of the principles of safe use and handling of PCE in the workplace.

(6) Whenever there are workplace changes, such as modifications of tasks or procedures or the institution of new tasks or procedures, that increase exposure, and where such exposure exceeds or can reasonably be expected to exceed the ECEL action level or increase potential for direct dermal contact, the owner or operator must update the training and ensure that each potentially exposed person is re-trained.

(f) *Personal protective equipment (PPE)*—(1) *Protection.* The provisions of paragraph (f) apply to any owner or operator that is required to provide respiratory protection pursuant to paragraphs (b)(4)(iv) or (d)(1)(i)(B) of this section or § 751.611(b), or dermal protection pursuant to paragraphs (c) or (d)(1)(ii)(B) of this section, § 751.609(b)(2), or § 751.611(b).

(2) *Respiratory protection.* (i) By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, by March 13, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, if an owner or operator is required to provide respiratory protection pursuant to paragraph (f)(1) of this section, the owner or operator must ensure that each potentially exposed person is provided with a respirator according to the requirements of this section.

(ii) For purposes of this paragraph (f)(2), cross-referenced provisions in 29 CFR 1910.134 applying to an “employee” apply equally to potentially exposed persons and cross-referenced provisions applying to an “employer” also apply equally to owners or operators. Other terms in cross-referenced provisions in 29 CFR 1910.134 that are defined in 29 CFR 1910.134(b) have the meaning assigned to them in that paragraph.

(iii) By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by March 13, 2026 for non-Federal owners and operators, or within three months after receipt of any exposure monitoring that indicates exposures exceeding the ECEL, if an owner or operator is

required to provide respiratory protection pursuant to paragraph (f)(1) of this section, the owner or operator must develop and administer a written respiratory protection program consistent with the requirements of 29 CFR 1910.134(c)(1), (c)(3) and (c)(4).

(iv) Owners and operators must select respiratory protection required by paragraph (f)(2)(i) of this section based on a medical evaluation consistent with the requirements of 29 CFR 1910.134(e). If a potentially exposed person cannot use a negative-pressure respirator that would otherwise be required by paragraph (f)(1) of this section, then the owner or operator must provide that person with an alternative respirator. The alternative respirator must have less breathing resistance than the negative-pressure respirator and provide equivalent or greater protection. If the person is unable to use an alternative respirator, then the person must not be permitted to enter the regulated area.

(v) Owners and operators must select respiratory protection that properly fits each affected person and communicate respirator selections to each affected person consistent with the requirements of 29 CFR 1910.134(f), 1910.134 App. A.

(vi) Owners and operators must provide, ensure use of, and maintain (in a sanitary, reliable, and undamaged condition) respiratory protection that is of safe design and construction for the applicable condition of use consistent with the requirements of 29 CFR 1910.134(g) through (j), 1910.134 App. B–1 to B–2.

(vii) Prior to or at the time of initial assignment to a job involving potential exposure to PCE, owners and operators must provide training to all persons required to use respiratory protection consistent with 29 CFR 1910.134(k), 1910.134 App. D.

(viii) Owners and operators must retrain all persons required to use PPE at least annually, or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use PPE, or when changes in the workplace or in PPE to be used render the previous training obsolete.

(ix) Owners or operators must select and provide to persons appropriate respirators as indicated by the most recent monitoring results as follows:

(A) If the measured exposure concentration is at or below 0.14 ppm: no respiratory protection is required.

(B) If the measured exposure concentration is above 0.14 ppm and less than or equal to 1.4 ppm (10 times ECEL): Any National Institute for Occupational Safety and Health

(NIOSH) Approved® air-purifying half mask respirator equipped with organic vapor cartridges or canisters; or any NIOSH Approved® Supplied-Air Respirator (SAR) or Airline Respirator operated in demand mode equipped with a half mask; or any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in a demand mode equipped with a half mask [APF 10].

(C) If the measured exposure concentration is above 1.4 ppm and less than or equal to 3.5 ppm (25 times ECEL): Any NIOSH Approved® Powered Air-Purifying Respirator (PAPR) equipped with a loose-fitting facepiece or hood/helmet equipped with organic vapor cartridges or canisters; or any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with a loose-fitting facepiece or helmet/hood [APF 25].

(D) If the measured exposure concentration is above 3.5 ppm and less than or equal to 7.0 ppm (50 times ECEL): Any NIOSH Approved® air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved® PAPR with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved® SAR or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved® SAR or Airline Respirator operated in a pressure-demand or other positive-pressure mode with a half mask; or any NIOSH Approved® SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50].

(E) If the measured exposure concentration is above 7.0 ppm and less than or equal to 140 ppm (1,000 times ECEL): Any NIOSH Approved® PAPR equipped with a full facepiece equipped with organic vapor cartridges or canisters; any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with full facepiece; any NIOSH Approved® SAR or Airline Respirator in pressure-demand or other positive-pressure mode equipped with a full facepiece and an auxiliary self-contained air supply; or any NIOSH Approved® SAR or Airline Respirator in a continuous-flow mode equipped with a helmet or hood and that has been tested to demonstrated performance at a level of a protection of APF 1,000 or greater [APF 1000].

(F) If the measured exposure concentration is greater than 140 ppm (1,000+ times ECEL): Any NIOSH Approved® Self-Contained Breathing Apparatus (SCBA) in a pressure-demand or other positive-pressure mode equipped with a full facepiece or helmet/hood [APF 10,000].

(G) If the exposure concentration is unknown: Any NIOSH Approved® combination supplied air respirator equipped with a full facepiece and operated in pressure demand or other positive pressure mode with an auxiliary self-contained air supply; or any NIOSH Approved® SCBA operated in pressure demand or other positive pressure mode and equipped with a full facepiece or hood/helmet [APF 1000+].

(x) Owners and operators must select and provide respirators as required in paragraph (f)(2) of this section consistent with the requirements of 29 CFR 1910.134(d)(1)(iv), and with consideration of workplace and user factors that affect respirator performance and reliability.

(xi) Owners and operators who select air-purifying respirators must either:

(A) Select respirators that have an end-of-service-life indicator (ESLI) that is NIOSH Approved® for PCE; or

(B) Implement a change schedule for canisters and cartridges based on objective information or data that ensures that canisters and cartridges are changed before the end of their service life. The written respiratory protection program required by paragraph (f)(2)(iii) of this section must include a description of the information and data relied upon, the basis for reliance on the information and data, and the basis for the canister and cartridge change schedule.

(xii) Owners and operators must ensure that respirators are used in compliance with the terms of the respirator's NIOSH certification.

(xiii) Owners and operators must conduct regular evaluations of the workplace, including consultations with potentially exposed persons using respiratory protection, consistent with the requirements of 29 CFR 1910.134(l), to ensure that the provisions of the written respiratory protection program required under paragraph (f)(2)(iii) of this section are being effectively implemented.

(xiv) The respiratory protection requirements in this paragraph (f)(2) represent the minimum respiratory protection requirements, such that any respirator affording a higher degree of protection than the required respirator may be used.

(3) *Dermal protection.* (i) By September 20, 2027 for Federal agencies and Federal contractors acting for or on behalf of the Federal government, or by March 13, 2026 for non-Federal owners and operators, if an owner or operator is required to provide dermal protection pursuant to paragraph (f)(1) of this section, the owner or operators must ensure that each potentially exposed

person is provided with dermal PPE according to the requirements of this section.

(ii) Owners or operators must supply and require the donning of dermal PPE that separates and provides a barrier to prevent direct dermal contact with PCE in the specific work area where it is selected for use, selected in accordance with this paragraph (f)(3) and provided in accordance with 29 CFR 1910.132(h), to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact with PCE. For the purposes of this paragraph (f)(3)(ii), provisions in 29 CFR 1910.132(h) applying to an "employee" also apply equally to potentially exposed persons, and provisions applying to an "employer" also apply equally to owners or operators.

(iii) Owners or operators must select and provide dermal PPE in accordance with 29 CFR 1910.133(b) and additionally as specified in this paragraph (f)(3) to each person who is reasonably likely to be dermally exposed in the work area through direct dermal contact with PCE. For the purposes of this paragraph (f)(3)(iii), provisions in 29 CFR 1910.133(b) applying to an "employer" also apply equally to owners or operators.

(iv) Owners or operators must select and provide to persons appropriate dermal PPE based on an evaluation of the performance characteristics of the PPE relative to the task(s) to be performed, conditions present, and the duration of use. Replacement PPE must be provided immediately if any person is dermally exposed to PCE longer than the breakthrough time period for which testing has demonstrated that the PPE will be impermeable or if there is a chemical permeation or breakage of the PPE. Dermal PPE must include, but is not limited to, the following items:

(A) Impervious gloves selected based on specifications from the manufacturer or supplier or by individually prepared third-party testing.

(B) Impervious clothing covering the exposed areas of the body (e.g., long pants, long sleeved shirt).

(v) Owners or operators must demonstrate that each item of gloves and other clothing selected provides an impervious barrier to prevent direct dermal contact with PCE during normal and expected duration and conditions of exposure within the work area by evaluating the specifications from the manufacturer or supplier or individually prepared third-party testing of the dermal PPE or of the material used in construction of the dermal PPE, to establish that the dermal PPE will be impervious to PCE alone

and in likely combination with other chemical substances in the work area.

(vi) Dermal PPE that is of safe design and construction for the work to be performed must be provided, used, and maintained in a sanitary, reliable, and undamaged condition. Owners and operators must select PPE that properly fits each affected person and communicate PPE selections to each affected person.

(vii) Owners or operators must provide training in accordance with 29 CFR 1910.132(f) to all persons required to use dermal protection prior to or at the time of initial assignment to a job involving exposure to PCE. For the purposes of this paragraph (f)(3)(vii), provisions in 29 CFR 1910.132(f) applying to an “employee” also apply equally to potentially exposed persons, and provisions applying to an “employer” also apply equally to owners or operators.

(viii) Owners and operators must retrain each person required to use dermal protection at least annually or whenever the owner or operator has reason to believe that a previously trained person does not have the required understanding and skill to properly use dermal protection, or when changes in the workplace or in dermal protection to be used render the previous training obsolete.

§ 751.609 Workplace requirements for laboratory use

(a) *Applicability.* The provisions of this section apply to the industrial and commercial use of PCE as a laboratory chemical.

(b) *Laboratory use requirements.* (1) After December 15, 2025, owners or operators must ensure laboratory ventilation devices such as fume hoods or glove boxes are in use and functioning properly and that specific measures are taken to ensure proper and adequate performance of such equipment to minimize exposures to potentially exposed persons in the area when PCE is used in a laboratory setting.

(2) After December 15, 2025, owners or operators must ensure that all persons reasonably likely to be exposed from direct dermal contact to PCE in a laboratory setting are provided with dermal personal protective equipment and training on proper use of PPE in a manner consistent with § 751.607(f)(3), except that the date listed in paragraph (f)(3)(i) does not apply.

§ 751.611 Workplace requirements for energized electrical cleaner.

(a) *Applicability.* The provisions of this section apply as indicated in

paragraphs (b) through (d) of this section to:

(1) All manufacturing (including importing), processing, and distribution in commerce of PCE for industrial and commercial use as energized electrical cleaner, and

(2) Industrial and commercial use of PCE as energized electrical cleaner.

(b) *Energized electrical cleaner requirements.* The provisions of this paragraph (b) apply to any workplace engaged in the condition of use listed in paragraph (a)(2).

(1) *PPE.* (i) The provisions of this paragraph (b)(1) apply after March 13, 2026.

(ii) Owners or operators must ensure that all potentially exposed persons using PCE, including any PCE containing products, are provided with dermal PPE and training on proper use of PPE in accordance with § 751.607(f)(3).

(iii) If any of the criteria in paragraphs (b)(1)(iii)(A) or (B) are met, then owners or operators must ensure that all persons using PCE, including any PCE containing products, are provided with respiratory PPE and training on proper use of PPE in accordance with § 751.607(f)(2), except that instead of selecting appropriate respirators based on monitoring results pursuant to paragraph (f)(2)(ix), owners or operators must select from and provide the following types of respirators: any NIOSH Approved® air-purifying full facepiece respirator equipped with organic vapor cartridges or canisters; any NIOSH Approved® PAPR with a half mask equipped with organic vapor cartridges or canisters; any NIOSH Approved® SAR or Airline Respirator in a continuous flow mode equipped with a half mask; any NIOSH Approved® SAR or Airline Respirator operated in a pressure-demand or other positive-pressure mode with a half mask; any NIOSH Approved® SCBA in demand-mode equipped with a full facepiece or helmet/hood [APF 50]; or any respirator affording a higher degree of protection.

(A) The potentially exposed person is in a confined space, as defined in 29 CFR 1910.146(b), or in an enclosed space, as described in 29 CFR 1910.269(e); or

(B) The potentially exposed person approaches the exposed energized equipment closer than the employer's established minimum approach distance required under 29 CFR 1910.269(l)(3) or when there is no established minimum approach distance.

(2) *Alternative to PPE requirements.*

(i) As an alternative to the requirements in paragraph (b)(1) of this section, the

owner or operator may choose to follow the WCPP provisions in § 751.607.

(ii) Owners or operators who choose to follow the WCPP as an alternative to the requirements in paragraph (b)(1) of this section must:

(A) Document and maintain a statement that they are electing to comply with the WCPP.

(B) Comply with the WCPP provisions in § 751.607 and document compliance in accordance with § 751.615(b).

(c) *Label.* After March 13, 2026, all manufacturers (including importers), processors and distributors in commerce of PCE or PCE-containing products for industrial and commercial use as energized electrical cleaner must provide a label securely attached to each product. Label information must be prominently displayed and in an easily readable font size, with the sentences:

“This product contains perchloroethylene (PCE) (CASRN 127–18–4), a chemical determined by the Environmental Protection Agency to present unreasonable risk of injury to health under the Toxic Substances Control Act (TSCA), based on neurotoxicity and other adverse health effects. The use of PCE is restricted under 40 CFR part 751, subpart G. This product is for Energized Equipment use only. Not to be used for motorized vehicle maintenance, or their parts.”

(d) *Self-certification.* After March 13, 2026, the owner or operator of the business entity purchasing and using PCE, including any PCE containing products, for the industrial and commercial use as energized electrical cleaner must self-certify that use is in compliance with requirements of paragraph (b) of this section with the following written statement.

(1) The self-certification must include the following written statement:

I certify each of the following statements under penalty of law. This document was prepared under my direction and supervision. This energized electrical cleaner will be used for energized equipment use only. This business entity has implemented and complies with the EPA requirements for the use of energized electrical cleaner that contains perchloroethylene under 40 CFR 751.611 and only trained and qualified persons will handle the energized electrical cleaner. Based on my inquiry of the person or persons who manages this business entity and/or those persons directly responsible for implementing the EPA requirements for energized electrical cleaner that contains perchloroethylene, and to the best of my knowledge and belief, this business entity is in compliance with the EPA requirements for energized electrical cleaner. I am aware that there are significant penalties, including the possibility of civil penalties for failing to comply with these requirements and criminal fines and imprisonment, for knowingly

failing to comply with these requirements. I understand that this certification shall serve as a certification that this business entity will properly implement and comply with the EPA requirements for energized electrical cleaner consistent with the applicable regulatory timelines.

(2) The self-certification must also include the following:

(i) Printed name and signature, job classification, title, email address, and phone number of the owner or operator who is self-certifying.

(ii) Date of self-certification.

(iii) Name and address of the business entity.

(iv) Indication of whether this is the business entity's first purchase of PCE, including PCE containing products, after publication of the final rule.

(3) Owners or operators or persons specifically authorized by the owner or operator to purchase energized electrical cleaner must provide a copy of the self-certification statement for each business entity to the distributor from whom PCE, including PCE containing products, is being purchased, for every purchase.

(4) Distributors of PCE, including PCE containing products, must review the self-certification statement to ensure it is appropriately completed to include the owner or operator's and the business entity's information required by this section.

(5) Distributors of PCE, including PCE containing products, must have a complete and valid self-certification statement in accordance with this section for each sale of PCE, including PCE containing products, for use in energized electrical cleaning.

§ 751.613 Downstream notification.

(a) Beginning on February 18, 2025, each person who manufactures (including imports) PCE for any use must, prior to or concurrent with the shipment, notify companies to whom PCE is shipped, in writing, of the restrictions described in this Subpart in accordance with paragraph (c) of this section.

(b) Beginning on June 16, 2025, each person who processes or distributes in commerce PCE or any PCE-containing products for any use must, prior to or concurrent with the shipment, notify companies to whom PCE is shipped, in writing, of the restrictions described in this Subpart in accordance with paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section must occur by inserting the following text in Section 1(c) and 15 of the Safety Data Sheet (SDS) provided with the PCE or with any PCE-containing product:

After December 8, 2026 this chemical substance (as defined in TSCA section 3(2))/product cannot be distributed in commerce to retailers for any use. After March 8, 2027, this chemical substance (as defined in TSCA section 3(2))/product is and can only be distributed in commerce or processed with a concentration of PCE equal to or greater than 0.1% by weight for the following purposes: (1) Processing as a reactant/intermediate; (2) Processing into formulation, mixture or reaction product; (3) Processing by repackaging; (4) Recycling; (5) Industrial and commercial use as solvent in open-top batch vapor degreasing; (6) Industrial and commercial use as solvent in closed-loop batch vapor degreasing; (7) Industrial and commercial use in maskant for chemical milling; (8) Industrial and commercial use as a processing aid in catalyst regeneration in petrochemical manufacturing; (9) Industrial and commercial use as a processing aid in sectors other than petrochemical manufacturing; (10) Industrial and commercial use as solvent for cold cleaning of tanker vessels; (11) Industrial and commercial use as energized electrical cleaner; (12) Industrial and commercial use in laboratory chemicals; (13) Industrial and commercial use in solvent-based adhesives and sealants; (14) Industrial and commercial use in dry cleaning in 3rd generation machines until December 20, 2027; (15) Industrial and commercial use in all dry cleaning and related spot cleaning until December 19, 2034; (16) Export; and (17) Disposal.

§ 751.615 Recordkeeping requirements.

(a) *General records.* After February 18, 2025, all persons who manufacture (including import), process, distribute in commerce, or engage in industrial or commercial use of PCE or PCE-containing products must maintain ordinary business records, such as downstream notifications, invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of this subpart G.

(b) *WCPP compliance—(1) ECEL exposure monitoring.* For each monitoring event, owners or operators subject to the ECEL described in § 751.607(b) must document and retain records of the following:

(i) Dates, duration, and results of each sample taken;

(ii) The quantity, location(s) and manner of PCE use at the time of each monitoring event;

(iii) All measurements that may be necessary to determine the conditions that may affect the monitoring results;

(iv) Name, workplace address, work shift, job classification, work area, and type of respiratory protection (if any) by each monitored person;

(v) Identification of all potentially exposed persons that a monitored person is intended to represent if using a representative sample, consistent with § 751.607(b)(3)(i)(A) and (B);

(vi) Sampling and analytical methods used as described in

§ 751.607(b)(3)(i)(D);

(vii) Compliance with the GLP Standards in 40 CFR part 792, or use of a laboratory accredited by the AIHA or another industry-recognized program, as required by § 751.607(b)(3)(i)(C); and

(viii) Information regarding air monitoring equipment, including: Type, maintenance, calibrations, performance tests, limits of detection, and any malfunctions;

(ix) Re-monitoring determinations conducted by an Environmental Professional as defined at 40 CFR 312.10 or a Certified Industrial Hygienist, if results indicated non-detect; and

(x) Notification of exposure monitoring results in accordance with § 751.607(b)(3)(v).

(2) *ECEL compliance.* Owners or operators subject to the ECEL described in § 751.607(b) must retain records of:

(i) Exposure control plan as described in § 751.607(d)(2);

(ii) Implementation of the exposure control plan as described in § 751.607(d)(2), including:

(A) Any regular inspections, evaluations, and updating of the exposure controls to maintain effectiveness;

(B) Confirmation that all persons are implementing the exposure controls; and

(C) Each occurrence and duration of any start-up, shutdown, or malfunction of the facility that causes an exceedance of the ECEL and any subsequent corrective actions taken by the owner or operator during the start-up, shutdown, or malfunctions to mitigate exposures to PCE.

(iii) Respiratory protection used by each potentially exposed person and PPE program implementation as described in § 751.607(f)(2) including:

(A) The name, workplace address, work shift, job classification, work area of each potentially exposed person, and the type of respiratory protection provided to each potentially exposed person;

(B) The basis for the specific respiratory protection selection in accordance with § 751.607(f)(2); and

(C) Fit testing and training in accordance with § 751.607(f)(2).

(iv) Information and training provided as required in § 751.607(e).

(3) *DDCC compliance.* Owners or operators subject to DDCC requirements described in § 751.607(c) must retain records of:

(i) Exposure control plan as described in § 751.607(d)(2);

(ii) Dermal protection used by each potentially exposed person and PPE

program implementation as described in § 751.607(f)(3), including:

(A) The name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle PCE or handle equipment or materials on which PCE may be present and the type of PPE selected to be worn by each of these persons;

(B) The basis for specific PPE selection (e.g., demonstration based on permeation testing or manufacturer specifications that each item of PPE selected provides an impervious barrier to prevent exposure during expected duration and conditions of exposure, including the likely combinations of chemical substances to which the PPE may be exposed in the work area);

(C) Appropriately sized PPE and training on proper application, wear, and removal of PPE, and proper care/disposal of PPE;

(D) Occurrence and duration of any direct dermal contact with PCE that occurs during any activity or malfunction at the workplace that causes direct dermal exposures to occur and/or glove breakthrough, and corrective actions to be taken during and immediately following that activity or malfunction to prevent direct dermal contact to PCE; and

(E) Training in accordance with § 751.607(f)(3).

(iii) Information and training provided as required in § 751.607(e).

(4) *Workplace participation.* Owners or operators must document the notice to and ability of any potentially exposed person that may reasonably be affected by PCE inhalation exposure or direct dermal contact and their designated representatives to readily access the exposure control plans, facility exposure monitoring records, PPE program implementation records, or any other information relevant to PCE exposure in the workplace.

(c) *Workplace requirements for laboratory use compliance.* Owners and operators subject to the laboratory chemical requirements described in § 751.609 must retain records of:

(1) Dermal protection used by each potentially exposed person and PPE program implementation, as described in § 751.615(b)(3)(ii);

(2) Documentation identifying: Criteria that the owner or operator will use to determine and implement control measures to reduce potentially exposed persons' exposure to PCE including laboratory ventilation devices;

(3) Documentation identifying: Implementation of properly functioning laboratory ventilation devices using manufacturer's instructions for

installation, use, and maintenance of the devices including inspections, tests, development of maintenance procedures, the establishment of criteria for acceptable test results, and documentation of test and inspection results; and

(d) *Workplace requirements for energized electrical cleaner.* (1) Owners and operators subject to the energized electrical cleaner requirements described in § 751.611 must retain records of:

(i) Statement regarding whether the owner or operator is complying with the prescriptive PPE requirements described in § 751.611(b)(1) or with the WCPP described in § 751.611(b)(2).

(ii) Dermal and respiratory protection used by each potentially exposed person and program implementation as described in § 751.611(b)(1) or WCPP records described in § 751.615(b).

(iii) Labels used as described in § 751.611(c).

(iv) Self-certification statements provided as described in § 751.611(d)(1)–(3).

(2) Distributors of PCE, including PCE containing products, for use in energized electrical cleaning must retain sale records, including:

(i) Name of purchaser;

(ii) Date of sale;

(iii) Quantity of PCE or PCE containing products sold;

(iv) Self-certification statement for each purchase of PCE; and

(v) Copies of labels required in § 751.611(c).

(e) *Records related to exemptions.* To maintain eligibility for an exemption described in § 751.617, the records maintained by the owners or operators must demonstrate compliance with the specific conditions of the exemption.

(f) *Retention.* Owners or operators must retain the records required under this section for a period of 5 years from the date that such records were generated.

§ 751.617 Exemptions.

(a) *General applicability.* (1) Time-limited exemptions described in this section are established in accordance with 15 U.S.C. 2605(g)(1).

(2) To be eligible for the exemptions established in this section, regulated parties must comply with all conditions promulgated in this section for such exemptions in accordance with 15 U.S.C. 2605(g)(4).

(b) *Time-limited exemption for emergency use by the National Aeronautics and Space Administration.* Under 15 U.S.C. 2605(g)(1)(A), use of PCE or PCE containing products for the conditions of use identified in

paragraph (b)(1) of this section in an emergency by the National Aeronautics and Space Administration (NASA) and its contractors operating within the scope of their contracted work is exempt from the requirements of § 751.605 until December 19, 2034.

(1) *Applicability.* This exemption shall apply to the following specific conditions of use:

(i) Industrial and commercial use as solvent for cold cleaning; and

(ii) Industrial and commercial use in wipe cleaning.

(2) *Emergency use.* (i) An emergency is a serious and sudden situation requiring immediate action, within 15 days or less, necessary to protect:

(A) Safety of NASA's or their

contractors' personnel;

(B) NASA's missions;

(C) Human health, safety, or property, including that of adjacent communities; or

(D) The environment.

(ii) Each emergency is a separate situation; if use of PCE exceeds 15 days, then justification must be documented.

(3) *Eligibility.* To be eligible for the exemption, NASA and its contractors must:

(i) Select PCE because there are no technically and economically feasible safer alternatives available during the emergency.

(ii) Perform the emergency use of PCE at locations controlled by NASA or its contractors.

(iii) Comply with the following conditions:

(A) Within 15 working days of the emergency use by NASA or its contractors, NASA and its contractors must provide notice to the EPA Assistant Administrators of both the Office of Enforcement and Compliance Assurance and the Office of Chemical Safety and Pollution Prevention that includes the following:

(1) Identification of the conditions of use detailed in paragraph (b)(1) of this section that the emergency use fell under;

(2) An explanation for why the emergency use met the definition of emergency in paragraph (b)(2)(i) of this section; and

(3) An explanation of why PCE was selected, including why there were no technically and economically feasible safer alternatives available in the particular emergency.

(iv) The owner or operator must comply with and document such compliance efforts under the WCPP provisions in § 751.607, to the extent technically feasible in light of the particular emergency.

(v) The owner or operator of the location where the use takes place must

comply with the recordkeeping requirements in § 751.615.

[FR Doc. 2024–30117 Filed 12–17–24; 8:45 am]

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Vol. 89, No. 243

Wednesday, December 18, 2024

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Presidential Documents

Executive orders and proclamations **741-6000**

The United States Government Manual **741-6000**

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FEDERAL REGISTER PAGES AND DATE, DECEMBER

95077-95716.....	2
95717-96088.....	3
96089-96512.....	4
96513-96854.....	5
96855-97458.....	6
97459-99058.....	9
99059-99688.....	10
99689-100288.....	11
100289-100716.....	12
100717-101462.....	13
101463-101836.....	16
101837-102672.....	17
102673-103616.....	18

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Title 2.....	101463
Ch. XIX.....	99695
5801.....	101837

3 CFR

Proclamations:

10864.....	95077
10865.....	96087
10866.....	96513
10867.....	96515
10868.....	96855
10869.....	99689
10870.....	100289
10871.....	100299
10872.....	102673

Administrative Orders:

Memorandums:

Memorandum of November 15, 2024.....	99691

Memorandum of November 20, 2024.....	99693

Memorandum of December 11, 2024.....	101835

Memorandum of December 12, 2024.....	102665

Memorandum of December 12, 2024.....	102669

Notices:

Notice of December 11, 2024.....	100717

Notice of December 11, 2024.....	100719

5 CFR

302.....	102675
532.....	100721
630.....	102256
731.....	102675
752.....	102256
950.....	102696

Proposed Rules:

1605.....	102840

7 CFR

271.....	102342
273.....	96517, 102342
331.....	101837
1240.....	99059
1942.....	96857
3201.....	97459
3202.....	97459
3550.....	95079
3560.....	96857, 96860
3570.....	96857
4270.....	97459
5001.....	96857, 97477

Proposed Rules:

273.....	95724
985.....	96126
1000.....	95466
1001.....	95466
1005.....	95466
1006.....	95466
1007.....	95466
1030.....	95466
1032.....	95466
1033.....	95466
1051.....	95466
1124.....	95466
1126.....	95466
1131.....	95466
1170.....	95466
1240.....	99149
1944.....	96130

8 CFR

208.....	103370
214.....	95626, 103054, 103202
274a.....	95626, 101208, 103202

9 CFR

121.....	101837

10 CFR

420.....	100301
429.....	100302
430.....	100722
1008.....	101846, 101850

Proposed Rules:

50.....	100921
52.....	100921

12 CFR

1026.....	95080
1090.....	99582

Proposed Rules:

Ch. I.....	99751
Ch. II.....	99751
Ch. III.....	99751
1022.....	100922, 101402
1102.....	96912

13 CFR

120.....	102697
121.....	102448
124.....	96089, 102448
125.....	102448
126.....	96089, 102448
127.....	96089, 102448
128.....	96089, 102448
134.....	96089, 102448

14 CFR

25.....	100723, 100727
27.....	100730
33.....	101854
39.....	95086, 95088, 95090,
	95092, 95095, 95098, 95717,
	96517, 96863, 97477, 97480,

97482, 97484, 97492, 97494,	522.....95101
97497, 97499, 97502, 97505,	524.....95101
97507, 99696, 100734	558.....95101
71 95100, 95719, 96520,	Proposed Rules:
96521, 96522, 96866, 96868,	179.....100404
96870, 96871, 97510, 99064,	
99700, 100302, 100737,	22 CFR
100738	42.....99076
95.....97512	122.....99081
97 99065, 99067, 101463,	129.....99081
101464	518.....99695
120.....103416	
129.....101870	24 CFR
382.....102398	5.....96898, 101880
Proposed Rules:	200.....100739
39 95139, 96618, 97562,	203.....99705
97564, 99169, 100923,	206.....99705
100926, 102016, 102019	247.....101270
71 95141, 96619, 97567,	291.....99705
97569, 97572, 97574, 99172,	880.....101270
99173, 101545	883.....96096
183.....96621	884.....101270
Ch. II.....99706	886.....101270
	891.....101270
	966.....101270

15 CFR

3.....102701
29.....102703
732.....96095, 96790
734.....96095, 96790
736.....96095, 96790
740.....96095, 96790
742.....96095, 96790
744 96095, 96790, 96830,
99702
746.....96095, 96790
748.....96095, 96830
758.....96095, 96790
762.....96095, 96790
772.....96095, 96790
774.....96095, 96790
791.....96872
922.....95101
1400.....101466

16 CFR

310.....99069

17 CFR

40.....96897
200.....101467
275.....96095

Proposed Rules:

Ch. II.....99175

18 CFR

4.....96524
5.....96524
6.....96524
7.....96524
35.....97174
284.....97518

19 CFR

Ch. 1.....96898
351.....101694
356.....100303

20 CFR

402.....102704
655.....95626
726.....100304

21 CFR

510.....95101
520.....95101

522.....95101
524.....95101
558.....95101

Proposed Rules:

179.....100404

22 CFR

42.....99076
122.....99081
129.....99081
518.....99695

24 CFR

5.....96898, 101880
200.....100739
203.....99705
206.....99705
247.....101270
291.....99705
880.....101270
883.....96096
884.....101270
886.....101270
891.....101270
966.....101270

25 CFR

1000.....100228

26 CFR

1 95108, 99782, 100598,
101881, 102721

Proposed Rules:

1 95362, 95727, 96143,
100138, 102841
301.....96622

27 CFR

5.....102726
26.....96901
31.....96901

Proposed Rules:

9.....96623

28 CFR

50.....97525
543.....101881, 101882
Proposed Rules:
25.....100404, 100424
545.....102022

29 CFR

531.....101884
1926.....100321
4902.....96531

Proposed Rules:

525.....96466

30 CFR

18.....99085
74.....99085

31 CFR

1.....101887
323.....102735
587.....102742
588.....96901

33 CFR

100 96098, 96902, 97538,
100743, 101468
110.....96099, 101469
165 95720, 96101, 96533,
97539, 97541, 100346,
100743, 101471, 101473,

101475, 101889, 101892
181.....97356

34 CFR

Proposed Rules:

Ch. III.....102841

36 CFR

1.....96535
14.....96535

Proposed Rules:

73.....96144

37 CFR

201.....100348
380.....96904

Proposed Rules:

1.....96152
201.....100439

38 CFR

Proposed Rules:

17.....102031
9.....96627
71.....97404

39 CFR

111.....100745

Proposed Rules:

3041.....100440

40 CFR

9.....100361
52 95117, 95121, 95126,
96103, 96554, 96905, 97543,
99105, 100377, 101475,
101477, 101479, 101894,
101896, 102744
62.....100092, 101481
63.....96106
68.....102773
75.....99105
78.....99105
81 97545, 101483, 101896,
101901, 101910
82.....99720
84.....100381
97.....99105
123.....103454
124.....103454
131.....101914
174 100746, 100749, 101938
180.....95131, 96566
232.....103454
233.....103454
261.....99727
262.....99727
266.....99727
282.....97550
300.....100751
372.....102773
703.....102773
716.....100756
720.....102773
721.....100361, 102773
723.....102773
725.....102773
745.....101489
751 102568, 103512, 103560
761.....102773
Proposed Rules:
52 96152, 99177, 99180,
99790, 102034
60.....101306
62.....102847

80.....100442
81.....99790
122.....100929
180.....97577, 99184
282.....97578
721.....95688, 102046
1515.....99799
1516.....99799

42 CFR

11.....97558
52i.....96119
73.....101941
93.....95136
401.....97710
405.....97710
410.....97710
411.....97710
414.....97710
423.....97710
424.....97710
425.....97710
427.....97710
428.....97710
491.....97710
512.....96280

Proposed Rules:

417.....99340
422.....99340
423.....99340
460.....99340
1000.....95143
1001.....95143

45 CFR

46.....95136
73.....95136
162.....100763
170.....101772
171.....101772, 102512
172.....101772
302.....100789
303.....100789
304.....100789
309.....100789
1355.....96569

Proposed Rules:

2550.....100456
2551.....100456
2552.....100456
2553.....100456

46 CFR

1.....102298
10.....102298
11.....102298
12.....102298
13.....102298
14.....102298
15.....102298
16.....102298
25.....97356
28.....97356
67.....101490
108.....97356
117.....97356
133.....97356
141.....97356
160.....97356
169.....97356
180.....97356
199.....97356
401.....100810

47 CFR

1.....95136, 100838

2.....96590, 100856	1.....101821	49 CFR	648 95138, 95723, 96616,
4.....101500	2.....101828	37.....102800	96910, 97560, 99138,
11.....100868	6.....101828	513.....101952	100402, 100919, 102834
14.....100878	9.....101828	563.....102810	600.....102000
25 96124, 96590, 100898	12.....101821	571.....96125, 99732	660.....101514
30.....100856	13.....101831	Proposed Rules:	697.....99147
54.....101358	18.....101828	40.....97579	Proposed Rules:
64.....100878	19.....101828	383.....96176	17 99207, 99809, 100662,
73.....100392, 100868	22.....101821		100934, 101100, 102074
74.....100868	25.....101831	50 CFR	80.....95590
90.....97559, 100838	36.....101831	17 96602, 99129, 99656	216.....102091
95.....100838	47.....101821	29.....99732	224.....100458
97.....100838	49.....101831	216.....100393	300.....96631, 102091
Proposed Rules:	52 101821, 101828, 101831	223.....101993	622.....102100
54.....96166	212.....103338	224.....101993	635.....102091
73.....101547	216.....103366	260.....101501	679.....96186
48 CFR	225.....103338	300.....96906, 100917	
Ch. 1.....101820, 101832	227.....103338	622.....100918	
	252.....103338		

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This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at <https://www.archives.gov/federal-register/laws/current.html>.

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S. 3960/P.L. 118–151

To amend title 35, United States Code, to provide a

good faith exception to the imposition of fines for false assertions and certifications, and for other purposes. (Dec. 17, 2024; 138 Stat. 1685)
Last List December 16, 2024

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